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

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EUROPEAN UNION

Treaties and international agreements

Agreement on EU-US Air Transport

Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 91), annexed to Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community

Charter of Fundamental Rights

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Enabling Council Regulation 1534/91 on insurance


Enabling Council Regulation 19/65 on Vertical Agreements

Council Regulation 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ P 36, 6.3.1965)

Enabling Council Regulation 2821/71/EEC on Standardisation, R&D and Specialisation Agreements


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Regulation 1184/2006/EC on the application of Competition Rules on Agricultural Products

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<table>
<thead>
<tr>
<th>Regulation</th>
<th>Title</th>
<th>Description</th>
</tr>
</thead>
</table>


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- **Article 102 Guidance (2009)**: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45/7, 24.2.2009)
- **Clarifications on Transport Infrastructure Projects (1997)**: Clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (OJ C 298/5, 30.9.1997)
<p>| De minimis Notice (1997) | Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty establishing the European Community (97/C 372/04 09.12.1997) |
| ECN+ Directive Proposal (2017) | Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (SWD(2017) 114 22.3.2017) |</p>
<table>
<thead>
<tr>
<th>Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guidance on restrictions of competition &quot;by object&quot; (2014)</td>
<td>Commission Staff Working Document, Guidance on restrictions of competition &quot;by object&quot; for the purpose of defining which agreements may benefit from the De Minimis Notice Accompanying the document Communication from the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (SWD (2014) 4136 final)</td>
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<td>Description</td>
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</tr>
</tbody>
</table>

459


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Decree 2007-1884 on Motor Vehicles Subsidiaries

Décret n° 2007-1884 du 26 décembre 2007 pris en application de l'article L. 420-4 (II) du code de commerce, concernant un accord relatif aux délais de paiement dans la filière automobile

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Ordinance 2004-1173 adapting French Competition Law to EU Competition Law

Ordonnance n° 2004-1173 du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence

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465
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<table>
<thead>
<tr>
<th>Healthcare Market Regulation Act of 2006</th>
<th>Wet marktordening gezondheidszorg van 7 Juli 2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Healthcare Market Regulation Act of 2010</td>
<td>Wet van 7 juli 2006, houdende regels inzake marktordening, doelmatigheid en beheerste kostenontwikkeling op het gebied van de gezondheidszorg (Wet marktordening gezondheidszorg)</td>
</tr>
<tr>
<td>Industrial Agreements Act of 1935</td>
<td>Ondernemersovereenkomsten van 15 December 1935</td>
</tr>
<tr>
<td>Law Regulating Economic Competition of 1956</td>
<td>Wet economische mededinging van 28 juni 1956</td>
</tr>
<tr>
<td>The Competition (Independent Administrative Authority) Amendment Act of 2015</td>
<td>Wet tot wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan</td>
</tr>
</tbody>
</table>

**Ordinances and decrees**

<table>
<thead>
<tr>
<th>Cartel Ordinance of 1941</th>
<th>Kartelbesluit van 5 November 1941</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dutch Decree Exempting New Shopping Centers (1997)</td>
<td>Besluit van 25 november 1997, houdende vrijstelling van branchebeschermingsovereenkomsten in nieuwe winkelcentra van het verbod van mededingingsafspraken (Besluit vrijstelling branchebeschermingsovereenkomsten)</td>
</tr>
<tr>
<td>Dutch Decree Exempting Cooperation Agreements in Retail Trade (2014)</td>
<td>Besluit van 12 december 1997, houdende enige vrijstellingen voor samenwerkingsovereenkomsten in de detailhandel van het verbod van mededingingsafspraken (Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel), As amended in August 2014</td>
</tr>
<tr>
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</tbody>
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Enterprise Act 2002 c. 40
<table>
<thead>
<tr>
<th>Enactment</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enterprise and Regulatory Reform Act of 2013</td>
<td>Enterprise and Regulatory Reform Act of 2013 c. 24</td>
</tr>
<tr>
<td>Health and Social Care Act of 2012</td>
<td>Health and Social Care Act of 2012 c. 7</td>
</tr>
<tr>
<td>Other Enactments (Amendment) Regulations of 2004</td>
<td>The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 No. 1261</td>
</tr>
<tr>
<td>Resale Price Act of 1964</td>
<td>Resale Prices Act 1964 c. 53</td>
</tr>
<tr>
<td>The Monopolies and Mergers Act of 1965</td>
<td>Monopolies and Mergers Act of 1965 c. 50</td>
</tr>
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**Orders**

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<th>Order</th>
<th>Reference</th>
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**UK NCA documents**

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<thead>
<tr>
<th>Document</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>CMA Prioritisation principles (2014)</td>
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</tr>
<tr>
<td>CMA Roundtable on the Use of Commitments (2015)</td>
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Commission decision no. IV/32368 BBC Brown Bover, of 11 October 1988
Commission decision no. IV/32173 Continental/Michelin, of 11 October 1988
Commission decision no. IV/31498 Delta ChemieDDD, of 13 October 1988
Commission decision no. IV/32358 ServiceMaster, of 14 November 1988
Commission decision no. IV/31697 Charles Jourdan, of 2 December 1988
Commission decision no. IV/27393 and IV/27394 Publishers Association - Net Book Agreements, of 12 December 1988
Commission decision no. IV/31865 PVC, of 21 December 1988
Commission decision no. IV/30979 and IV/31394 Decca Navigator System, of 21 December 1988
Commission decision no. IV/31866 LDPE, of 21 December 1988
Commission decision no. IV/31553 Welded steel mesh, of 2 August 1989
Commission decision no. IV/32265 Concordato Incendio, of 20 December 1989
Commission decision no. IV/33016 Ansac, of 19 December 1990
Commission decision no. IV/32006 Alcatel Espace/ANT Nachrichtentechnik, of 12 January 1990
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Commission decision no. IV/33100 Assurpol, of 14 January 1992
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Commission decision no. IV/32290 Newitt/Dunlop Slazenger International, of 18 March 1992
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Commission decision no. IV/33585 Distribution of railway tickets by travel agents, of 25 November 1992
Commission decision no. IV/33031 Fiat/Hitachi, of 21 December 1992
Commission decision no. IV/33151 and IV/33997 Jahrhundertvertrag VIK-GVSt, of 23 December 1992
Commission decision no. IV/31533 and IV/34072 Langnese –Iglo, of 23 December 1992
Commission decision no. IV/33814 Ford/VW, of 23 December 1992
Commission decision no. IV/32150 EBU/Eurovision System, of 11 June 1993
Commission decision no. IV/33374 Ladbroke, of 29 July 1993
Commission decision no. IV/33941 HOV SVZ/MCN, of 29 March 1994
Commission decision no. IV/34456 Stichting Baksteen, of 29 April 1994
Commission decision no. IV/34518 ACI, of 27 July 1994
Commission decision no. IV/34600 Night Services, of 21 September 1994
Commission letter rejecting a compliant regarding Asia Motor France III, of 13 October 1994
Commission decision no. IV/34410 Olivetti/Digital, of 11 November 1994
Commission decision no. IV/32490 Eurotunnel, of 13 December 1994
Commission decision no. IV/33863 Asahi/Saint-Gobain, of 16 December 1994
Commission decision no. IV/34252 Philips-Osram, of 21 December 1994
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Commission decision no. IV/34607 Banque Nationale de Paris - Dresdner Bank, of 24 June 1996
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Commission decision no. IV/36494 EACEM, of 15 April 1998
Commission decision no. IV/37231 ACEA, of 11 September 1998
Commission decision no. IV/34466 Greek ferries, of 9 December 1998
Commission decision no. IV/36718 CECED, of 24 January 1999
Commission decision no. IV/36147 EPI code of conduct, of 7 April 1999
Commission decision no. IV/36748 REIMS II, of 15 September 1999
Commission decision no. IV/37634 JAMA, of 1 December 1999
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Commission decision no. IV/35860B 39041 Seamless steel tube, of 8 December 1999
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36264 Mercedes-Benz, of 10 October 2001
Commission decision no. COMP/37614 Interbrew and Alken-Maes, of 5 December 2001
Commission decision no. COMP/37800 Luxembourg Brewers, of 5 December 2001
Commission decision no. COMP/37027 Zinc Phosphate, of 11 December 2001
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Commission decision no. COMP/38158 Meca-Medina and Majcen/IOC, of 1 August 2002
Commission decision no. COMP/38014 IFPI 'Simulcasting', of 8 October 2002
Commission decision no. COMP/38279 French beef, of 2 April 2003
Commission decision no. COMP/38369 O2, of 16 July 2003
Commission decision no. COMP/37370 Sorbates, of 1 October 2003
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Commission decision no. COMP/38359 Electrical and mechanical carbon and graphite products, of 3 December 2003
Commission decision no. COMP/38284 Société Air France/Alitalia Linee, of 7 April 2004
Commission decision no. COMP/38549 Barème d'honoraires de l'Ordre des Architectes belges, of 24 June 2004
Commission decision no. COMP/38069 Copper plumbing tubes, of 3 September 2004
Commission decision no. COMP/38238 Raw Tobacco Spain, of 20 October 2004
Commission decision no. COMP/38662 GDF-ENI, of 26 October 2004
Commission decision no. COMP/38662 GDF-ENEL, of 26 October 2004
Commission decision no. COMP/37214 DFB, of 19 January 2005
Commission decision no. COMP/38281 Raw Tobacco Italy, of 10 October 2005
Commission decision no. COMP/38173 The Football Association Premier League Limited, of 22 March 2006
Commission decision no. COMP/38348 Repsol, of 12 April 2006
Commission decision no. COMP/39151 39152 SABAM and BUMA, of 4 October 2006
Commission decision no. COMP/38681 Cannes Agreement, of 4 October 2006
Commission decision no. COMP/39140 DaimlerChrysler, of 14 September 2007
Commission decision no. COMP/37860 Morgan Stanley Dean Witter/Visa, of 2 October 2007
Commission decision no. COMP/38606 Cartes bancaires, of 17 October 2007
Commission decision no. COMP/34579 COMP/36518 and COMP/38580 MasterCard I, of 19 December 2007
Commission decision no. COMP/38698 CISAC Agreement, of 16 July 2008
Commission decision no. COMP/39188 Bananas, of 15 October 2008
Commission decision no. COMP/39401 E.ON/GDF, of 22 July 2009
Commission decision no. COMP/39396 Calcium carbide and magnesium based reagents, of 22 July 2009

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Commission decision no. COMP/39416 Ship Classification, of 14 October 2009
Commission decision no. COMP/38589 Heat stabilisers, of 11 November 2009
Commission decision no. COMP/38866 Animal Feed Phosphates, of 20 July 2010
Commission decision no. COMP/39258 Airfreight, of 9 November 2010
Commission decision no. COMP/39510 Ordre National des Pharmaciens, of 8 December 2010
Commission decision no. COMP/39673 Virtual Print Fee agreements, of 4 March 2011
Commission decision no. COMP/39482 Exotic fruit (Bananas), of 12 October 2011
Commission decision no. COMP/39847 Ebooks, of 12 December 2012
Commission decision no. COMP/39230 Rio Tinto Alcan, of 21 December 2012
Commission decision no. COMP/39839 Telefonica and Portugal Telecom, of 23 January 2013
Commission decision no. COMP/39595 Continental/United/Lufthansa/Air Canada, of 23 May 2013
Commission decision no. COMP/39226 Lundbeck, of 19 June 2013
Commission decision no. COMP/39633 Shrimps, of 27 November 2013
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Commission decision no. COMP/39921 Refusal to provide payment services, of July 2014
Commission decision no. COMP/39097 Watch Repair, of 29 July 2014
Commission decision no. COMP/40023 Cross-border access to pay-TV, of 26 July 2016
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C-107/84 Commission v Germany, ECLI:EU:C:1985:332
C-108/09 Online distribution of contact lenses, ECLI:EU:C:2010:725
C-119/97P Ufex and Others v Commission, ECLI:EU:C:1999:116
C-121/16 Salumificio, ECLI:EU:C:2016:543
C-123/83 BNIC, ECLI:EU:C:1985:33
C-127/73 SABAM, ECLI:EU:C:1974:6
C-13/61 Bosch, ECLI:EU:C:1962:11
C-13/77 INNO, ECLI:EU:C:1977:185
C-136/12 Consiglio nazionale dei geologi, ECLI:EU:C:2013:489
C-136/86 BINC, ECLI:EU:C:1987:524
C-138/11 Compass-Datenbank, ECLI:EU:C:2012:449
C-14/68 Walt Wilhelm, ECLI:EU:C:1969:4
C-140/94 C-141/94 C-142/94 DIP SpA, ECLI:EU:C:1995:330
C-15/74 Centeafarm, ECLI:EU:C:1974:114
C-159/91 C-160/91 Poucet, ECLI:EU:C:1993:63
C-161/84 Pronuptia, ECLI:EU:C:1986:41
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C-171/05P Laurent Piau v. Commission, EU:C:2006:149
C-172/80 Züchner, ECLI:EU:C:1981:178
C-189/02 Dansk Rørindustri, ECLI:EU:C:2005:408
C-19/77 Miller International Schallplatten GmbH, ECLI:EU:C:1978:19
C-19/92 Yves Saint Laurent Perfumes, ECLI:EU:C:1993:125
C-193/83 Windsurfing surfing Internationa, ECLI:EU:C:1986:75
C-198/01 Consorzio Industrie Fiammiferi (CIF), ECLI:EU:C:2003:430
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C-210/81 REVOX, ECLI:EU:C:1983:277
C-218/00 Cisal di Battistello Venanzio & C. Sas, ECLI:EU:C:2002:36
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C-222/98 Hendrik van der Woude, ECLI:EU:C:2000:475
C-226/11 Expedia, EU:C:2012:795
C-229/83 Leclerc, ECLI:EU:C:1985:1
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C-231/83 Cullet, CLI:EU:C:1985:29
C-234/89 Delimitis ECLI:EU:C:1991:91
C-235/92P Polypropylene, ECLI:EU:C:1999:362
C-238/05 Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios, EU:C:2006:734
C-243/83 Binon, ECLI:EU:C:1985:284
C-245/91 Ohra Schadeverzekeringen, ECLI:EU:C:1993:887
C-248/98P Cartonboard, ECLI:EU:C:2000:625
C-250/03 Giorgio Emanuele Mauri, ECLI:EU:C:2005:96
C-250/92 Göttrup-Klim Grovareforening, ECLI:EU:C:1994:413
C-258/78 Maize seed, ECLI:EU:C:1982:211
C-26/76 Metro, ECLI:EU:C:1977:167
C-264/95P Distribution of railway tickets by travel agents, ECLI:EU:C:1997:143
C-266/96 Corsica Ferries France SA, ECLI:EU:C:1998:306
C-279/95P Langnese-Iglo, ECLI:EU:C:1998:447
C-30/87 Bodson, ECLI:EU:C:1988:225
C-308/04P Graphite electrodes, ECLI:EU:C:2006:433
C-309/99 Wouters, ECLI:EU:C:2002:98
C-31/80 L’Oréal, ECLI:EU:C:1980:289
C-311/85 Vlaamse Reisbureaus, ECLI:EU:C:1987:418
C-312/11 Allianz, ECLI:EU:C:2013:160
C-327/12 Ministero dello Sviluppo economico, ECLI:EU:C:2013:827
C-332/89 Marchandise, ECLI:EU:C:1991:94
C-338/00P VW, ECLI:EU:C:2003:473
C-343/95 Cali, ECLI:EU:C:1997:160
C-344/98 Masterfoods, ECLI:EU:C:2000:689
C-35/99 Manuele Arduino, ECLI:EU:C:2002:97
C-350/07 Kattner Stahlbau, ECLI:EU:C:2009:127
C-375/09 Tele2 Polska, ECLI:EU:C:2011:270
C-38/97 Autotrasporti Librandi Snc di Librandi F. & C., ECLI:EU:C:1998:454
C-382/12P MasterCard Inc., EU:C:2014:2201
C-386/07 Hospital Consulting, ECLI:EU:C:2008:256
C-399/93 H. G. Oude Luttkhuis, ECLI:EU:C:1995:434
C-401/96 P Asia Motor France III, ECLI:EU:C:1998:208
C-41/90 Höfner, ECLI:EU:C:1991:161
C-413/13 FNV Kunsten Informatie en Media, ECLI:EU:C:2014:2411
C-42/84 Nutricia-de Rooij and Nutricia-Zuid-Hollandse Conservenfabriek, ECLI:EU:C:1985:327
C-437/09 AG2R Prévoyance, ECLI:EU:C:2011:112
C-439/09 Pierre Fabre, ECLI:EU:C:2011:649
C-439/11 P Ziegler, ECLI:EU:C:2013:513
C-441/07 Alrosa, ECLI:EU:C:2010:377
C-450/98 IECC, ECLI:EU:C:2001:276
C-461/03 Gaston, ECLI:EU:C:2005:742
C-47/76 De Norre, ECLI:EU:C:1977:11
C-475/99 Ambulanz Glöckner, ECLI:EU:C:2001:577
C-5/69 Völkk, ECLI:EU:C:1969:35
C-5/79 Buys, ECLI:EU:C:1979:238
C-515/15 P Prestressing steel, ECLI:EU:C:2016:298
C-519/04 P Prestressing steel, ECLI:EU:C:2006:492
C-52/09 TelisaSona, ECLI:EU:C:2011:83
C-523/15 P Prestressing steel, ECLI:EU:C:2016:541
C-547/16 Gasorgia, ECLI:EU:C:2017:891
C-56/65 Société Technique Minière, ECLI:EU:C:1966:38
C-580/12 P Guardian, ECLI:EU:C:2014:2363
C-63/75 Fonderies, ECLI:EU:C:1976:15
C-66/86 Flugreisen, ECLI:EU:C:1989:140
C-67/13 P Cartes bancaires, ECLI:EU:C:2014:2204
C-67/86 Van Eycke, ECLI:EU:C:1986:187
C-67/96 Albany, ECLI:EU:C:1999:430
C-67/15 Endive, ECLI:EU:C:2017:860
C-70/93 BMW, ECLI:EU:C:1995:344
C-71/74 Frubo, ECLI:EU:C:1975:61
C-8/08 T-mobile Netherlands and others, ECLI:EU:C:2009:343
C-94/74 IGAV, ECLI:EU:C:1975:81
C-96/94 Centro Servizi Spediporto Srl, ECLI:EU:C:1995:308
C-364/92 SAT Fluggesellschaft, ECLI:EU:C:1994:7
Joined Cases C-100/80 C-101/80 C-102/80 C-103/80 Pioneer Hi-fi equipment, ECLI:EU:C:1983:158
Joined Cases C-115/97 C-116/97 C-117/97 Brentjens’ Handelsonderneming BV, ECLI:EU:C:1999:434
Joined Cases C-177/82 C-178/82 Van De Haar, ECLI:EU:C:1984:144
Joined Cases C-184/12 C-185/13 C-186/13 C-187/13 C-194/13 C-195/13 C-208/13 API, ECLI:EU:C:2013:663
Joined Cases C-186/02P and C-188/02P Ramondin, ECLI:EU:C:2004:702
Joined Cases C-209/84 C-210/84 C-211/84 C-212/84 C-213/84 Asjes, ECLI:EU:C:1986:188
Joined Cases C-253/78 C-3/79 Procureur de la République, ECLI:EU:C:1980:188
Joined Cases C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband, ECLI:EU:C:2004:150
Joined Cases C-359/95P C-379/95P Ladbroke, ECLI:EU:C:1997:531
Joined Cases C-40/73 C-41/73 to C-48/73 C-50/73 C-54/73 to C-56/73 C-111/73 C-113/73 C-114/73 European sugar industry, ECLI:EU:C:1975:174
Joined Cases C-403/08 C-429/08 Football Association Premier League Ltd, ECLI:EU:C:2011:631
Joined Cases C-427/16 C-428/16 CHEZ, ECLI:EU:C:2017:890
Joined Cases C-43/82 and C-63/82 VBVB/VBBB, ECLI:EU:C:1984:9
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Joined Cases C-89/85 C-104/85 C-114/85 C-115/85 C-125/85 C-129/85 and C-125/85 to C-129/85 Woodpulp, ECLI:EU:C:1993:120
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Joined Cases T-185/00 T-216/00 T-299/00 T-300/00 Eurovision, ECLI:EU:T:2002:242
Joined Cases T-217/03 T-245/03 French beef, ECLI:EU:T:2006:391
Joined Cases T-231/01 and T-214/01 Österreichische Postsparkasse, ECLI:EU:T:2006:151
Joined Cases T-49/02 T-50/02 T-51/02 Brasserie, ECLI:EU:T:2005:298
Joined Cases T-71/03 T-74/03 T-87/03 T-91/03 Speciality Graphite, ECLI:EU:T:2005:220
Joined Cases T-79/95 80/95 Eurotunnel, ECLI:EU:T:1996:155
T-106/95 FFSA, ECLI:EU:T:1997:23
T-114/92 BEMIM, ECLI:EU:T:1995:11
T-14/89 Polypropylene, ECLI:EU:T:1992:36
T-14/93 Distribution of railway tickets by travel agents, ECLI:EU:T:1995:96
T-144/99 EPI code of conduct, ECLI:EU:T:2001:105
T-148/89 Welded steel mesh, ECLI:EU:T:1995:68
T-168/01 GlaxoSmithKline, ECLI:EU:T:2006:2969
T-17/02 Fred Olsen, ECLI:EU:T:2005:218
T-17/93 Ford/Volkswagen, ECLI:EU:T:1994:89
T-185/00 Eurovision, ECLI:EU:T:2002:242
T-19/91 Vichy, ECLI:EU:T:1992:28
T-17/93 Ford/Volkswagen, ECLI:EU:T:1994:89
T-185/00 Eurovision, ECLI:EU:T:2002:242
ECLI:EU:T:1992:447
T-193/02 Laurent Piau, ECLI:EU:T:2005:22
T-208/13 Telefónica/Portugal Telecom, ECLI:EU:T:2016:368
T-213/00 Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA), ECLI:EU:T:2003:76
T-216/13 Telefónica-Portugal Telecom, ECLI:EU:T:2016:369
T-219/99 British Airways, ECLI:EU:T:2003:343
T-23/99 Pre-Insulated Pipe Cartel, ECLI:EU:T:2002:75
T-24/90 Automec II, ECLI:EU:T:1992:97
T-271/03 Deutsche Telekom, ECLI:EU:T:2008:101
T-274/06 REPSOL, ECLI:EU:T:2007:323
T-313/02 Meca-Medina and Majcen/IOC, ECLI:EU:T:2004:282
T-325/01 Mercedes-Benz, ECLI:EU:T:2005:322
T-328/03 O2, ECLI:EU:T:2006:116
T-352/09 Calcium carbide and magnesium based reagents for the steel, ECLI:EU:T:2012:673
T-355/13 EasyJet, ECLI:EU:T:2015:36
T-357/06 Bitumen, ECLI:EU:T:2012:488
T-360/09 E.ON/GDF, ECLI:EU:T:2012:332
T-370/09 GDF Suez SA, ECLI:EU:T:2012:333
T-387/94 Asia Motor France III, ECLI:EU:T:1996:120
T-393/10 Prestressing steel, CLI:EU:T:2015:515
T-395/94 Trans-Atlantic Agreement, ECLI:EU:T:2002:49
T-406/09 Calcium carbide and magnesium based reagents for the steel and gas industries, ECLI:EU:T:2014:254
T-419/03 Altstoff Recycling Austria AG, EU:T:2010:975
T-427/08 Watch Repair (2010), ECLI:EU:T:2010:517
T-44/00 Seamless steel tubes, ECLI:EU:T:2004:218
T-447/12 Visa MIF, ECLI:EU:T:2014:247
T-451/08 CISAC, CLI:EU:T:2013:189
T-456/10 Animal feed phosphates, ECLI:EU:T:2015:296
T-460/13 Lundbeck, ECLI:EU:T:2016:453
T-461/07 Visa, ECLI:EU:T:2011:181
T-467/13 Lundbeck, ECLI:EU:T:2016:450
T-469/13 Lundbeck, ECLI:EU:T:2016:454
T-470/13 Lundbeck, ECLI:EU:T:2016:452
T-471/13 Lundbeck, ECLI:EU:T:2016:460
T-472/13 Lundbeck, ECLI:EU:T:2016:449
T-48/00 Corus, ECLI:EU:T:2004:219
T-491/07 Cartes bancaires, EU:T:2012:633
T-50/00 Seamless steel tubes, ECLI:EU:T:2004:220
T-51/89 Tetra Pak, ECLI:EU:T:1990:41
T-587/08 Bananas, ECLI:EU:T:2013:129
T-59/99 Greek Ferries, ECLI:EU:T:2003:334
T-65/99 Greek Ferries, ECLI:EU:T:2003:336
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Autorité de la concurrence decision no. 09-D-18 Marseille transportation, 2 June 2009
Autorité de la concurrence decision no. 09-D-25 Work on railway tracks, 29 July 2009
Autorité de la concurrence decision no. 09-D-31 Football rights, 1 October 2009
Autorité de la concurrence decision no. 10-D-13 Le Havre Port, 15 April 2010
Autorité de la concurrence decision no. 10-D-28 Exchanges Check-Image Fee, 20 September 2010
Autorité de la concurrence decision no. 10-D-35 Welding electrodes, 15 December 2010
Autorité de la concurrence decision no. 11-D-01 Cargo handling in La Réunion, 18 January 2011
Autorité de la concurrence decision no. 11-D-02 Restoration of historical monuments, of 26 January 2011
Autorité de la concurrence decision no. 11-D-17 Laundry detergents, of 8 December 2011
Autorité de la concurrence decision no. 12-D-08 Endives, of 6 March 2012
Autorité de la concurrence decision no. 12-D-19 Tooth whitening, of 26 September 2012
Autorité de la concurrence decision no. 12-D-26 Fire extinguishers, of 20 December 2012
Autorité de la concurrence decision no. 13-D-02 Towing light vehicles, of 4 February 2013
Autorité de la concurrence decision no. 14-D-20 Wallpaper, of 22 December 2014
Autorité de la concurrence decision no. 15-D-19 Standard and express delivery, 15 December 2015
Autorité de la concurrence informal opinion no. 09-A-48 Dairy, of 2 October 2009
Autorité de la concurrence informal opinion no. 09-A-50 Cinema code, of 8 October 2009
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Autorité de la concurrence informal opinion no. 10-A-10 Chartered accountants, of 27 May 2010
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Autorité de la concurrence informal opinion no. 15-A-02 Regulated professions, of 9 January 2015
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Conseil de la concurrence decision no. 05-D-48 Taximeters, of 28 July 2005
Conseil de la concurrence decision no. 05-D-60 Transport to Saint Honorat, of 9 November 2005
Conseil de la concurrence decision no. 06-D-03 Heating, ceramic sanitary and plumbing equipment, of 6 March 2006
Conseil de la concurrence decision no. 06-D-11 Turbo Europe, of 16 May 2006
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Conseil de la concurrence decision no. 07-D-04 Jeff de Bruges chocolates, of 24 January 2007
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Conseil de la concurrence decision no. 08-D-32 Steel trading, of 16 December 2008
Conseil de la concurrence decision no. 08-D-34 funeral services in Marseille, of 22 December 2008
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Paris Court of Appeal
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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 rechtzeker 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 discretiemarge 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-moderniseringstijdperk:

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-medededingingsrecht mogelijks een succes was in het algemeen, het een contraproductief effect heeft gehad op de afweging van niet-medededingingsbelangen onder Artikel 101.
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