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Member States' Interest in the Enforcement of EU Competition Law: a Case Study of Article 101 TFEU

Member States' interest in the enforcement of EU competition law: a case study of Article 101 TFEU

M Varju (ed), Between Compliance and Particularism: Member State Interests and European Union Law (Springer, Forthcoming).

Or Brook and Katalin J. Cseres¹²

1 Introduction

Even though competition law has always formed a core pillar of the European integration process, for several decades EU and national competition laws have developed along each other with little interaction. EU competition law functioned as a supranational policy in the EU with the European Commission as the central body of public enforcement. This has fundamentally changed when Regulation 1/2003 (hereinafter, Regulation) entered into force in May 2004.³ The Regulation has decentralised the public enforcement of Articles 101 and 102 TFEU by delegating enforcement powers to national competition authorities (NCAs) and national courts. The new Regulation paved the way for a greater role of Member States' courts and NCAs in the enforcement of Articles 101 and 102. Regulation 1/2003 has also introduced various mechanisms of cooperation between the Commission and the national enforcers, in particular the European Competition Network (ECN) (see Gauer et al. 2004). The Regulation and the Commission repeatedly emphasised that the multi-governance enforcement regime should not compromise the creation of a single corpus of rules to be developed and applied in the same manner throughout the EU.⁴

Nevertheless, this chapter will show that the decentralised enforcement system has also opened up new ways for NCAs to implement their national competition policies. Whereas the combination of Regulation 1/2003 and the so-called Modernisation Package⁵ have stimulated an exceptional process

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³ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

⁴ Regulation 1/2003, Article 16 and preambles 1 and 22; European Commission (1999), points 11, 24.

⁵ It consists of Regulation 773/2004 on details of its competition law procedures as well as six Commission Notices aimed at

of Europeanisation, its multi-level governance framework has made the enforcement of EU competition law subject to the involvement of diverse national competition enforcers embedded in different political, institutional and procedural settings. This has given the Member States the opportunity to implement their own national competition interests within the EU legal and governance framework, while creating a risk of re-nationalising EU competition law and policy.

In this context, we define national interest as expressed in various measures of the Member States, such as laws, regulations, soft laws, judicial and administrative decisions and actions. As elaborated in Sect. 3 below, we will show that national interests can influence the effective scope of Article 101 TFEU by way of the leeway permitted at the national level under the decentralised enforcement system of Regulation 1/2003 in two distinctive ways: first, Member States can adopt national measures that *limit the enforcement of Article 101 TFEU*. Second, NCAs and national courts can *apply* the substantive provisions of the Article in ways that bring the enforcement of the Article in line with their national interest.

Notably, the role of national interest in the enforcement of EU competition law has so far only received attention in the fields of merger control and State aid rules (see Jones and Davies 2015; Reader 2016), which are still enforced in a centralised manner by the Commission. This chapter provides the first critical assessment of the way in which Member States incorporated national interests in the enforcement of Article 101 TFEU. The chapter aims to identify and analyse the manifestation of Member States' national interest in EU competition law by scrutinising the decisional practices of five NCAs: those in France, Germany, Hungary, the Netherlands and the UK.⁶

Accordingly, this chapter is structured as follows. Sect. 2 examines the transformation of EU competition law enforcement following Regulation 1/2003 and the Commission's effort to combat the risks of re-nationalisation of EU competition enforcement. Sect. 3 analyses the Commission's efforts to guarantee uniform enforcement of Article 101 and presents illustrative examples of the two distinctive ways the Member States use to incorporate their interests in the local enforcement of

providing guidance on a range of aspects that were of particular significance in the decentralised enforcement system. With the aid of these soft law instruments, the Commission explained the application of the Treaty articles and provided guidance to assist undertakings and national competition enforcers in assessing the compatibility of a specific practice with EU competition law. Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18; Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C101/43; Commission Notice on cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (Guidance Letters), [2004] OJ C101/78; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101/65; Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] OJ C101/81; Guidelines on the application of Article 81(3) of the Treaty ("Article 101(3) Guidelines"), [2004] OJ C101/97.

⁶ The analysis of the national practices of the five NCAs is based on the empirical database developed by Brook, Brook (forthcoming).

Article 101 TFEU. Finally, Sect. 4 concludes by suggesting that the national practices analysed are an expression of the tension between Member States' obligation of compliance and the particularism of national economic policies.

2 The Transformation of EU Competition Law Enforcement and its Impact on the Uniform Enforcement of Article 101 TFEU

2.1 The Centralised Enforcement System of Regulation 17/62

Competition law has been a fundamental area of EU law ever since the establishment of the Treaty of Rome in 1957. Before its modernisation in May 2004, the Commission had a central role in the enforcement of EU competition law. This centralised enforcement system was an important exception to the generally decentralised enforcement framework of other fields of EU law. Its introduction was justified by the fact that many Member States lacked a proper competition law and enforcement regime until the 1980s, or in some cases the late 1990s. Until this period, competition law has not been regarded as an economic policy tool of primary importance in most of the EU Member States (Gerber 1998, 398).

The centralised nature of the enforcement system was reflected in the Commission's monopoly over the application of Article 101(3) under the centralised enforcement framework of Regulation 17/62.⁷ The Commission enjoyed a considerable margin of discretion in applying the conditions laid down in Article 101(3) in order to guarantee its coherent and uniform application throughout the common market. It was feared that if the NCAs would be given powers to apply Article 101(3) they could incorporate their own national interests into their decisions (European Commission 1999, point 17) (See also Wils 2005, 6–7; Gerber 2008, 1239; Ehlermann 2000, 537–538; Temple Lang 1998, 3; Jones 2010, 787–788; Sauter 2018, 41–42). This position was clearly formulated in a 1993 Commission policy report, noting that “the grant of a derogation from the ban on restrictive agreements requires assessment of complex economic situation and the exercise of considerable discretionary power, particularly where different objectives of the EC Treaty are involved. This task can only be performed by the Commission” (European Commission 1993, point 190).⁸

2.2 The Decentralised Enforcement System of Regulation 1/2003

Regulation 1/2003 has fundamentally changed the enforcement system in order to relieve the Commission of its increasing administrative burden and make the overall enforcement more

⁷ Council Regulation 17/62 (EEC) First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ L13/204.

⁸ This position was widely shared by members of the competition epistemic community. For example, Claus-Dieter Ehlermann, former Director-General of DG COMP until 1995, described the Commission's monopoly as “almost a religious belief”, and noted that “Not to adhere to it was considered heresy, and could lead to excommunication”, Ehlermann (2000), 537–538.

effective. The change was twofold. First, the Regulation shifted the enforcement from a notification to a self-assessment regime. Second, it decentralised the enforcement by entrusting the NCAs and national courts with power to apply Articles 101 and 102 TFEU in parallel to the Commission.

The motive for decentralisation was not purely administrative. Decentralisation also reflected a political objective of bringing “the decision-making process closer to citizens” through allowing consumers to address NCAs and national courts in order to improve the European citizens’ perception of competition policy (European Commission 1999, points 9–10). As such, decentralisation was seen as an important component to provide a stronger and more democratic political support to the EU competition policy (European Commission 1999, points 10, 21).

However, bringing the decision-making process closer to citizens carried an inherent risk that NCAs would incorporate their own economic and political interests into EU competition policy (see Maher 2002, 224; Simonsson 2010, 111). From the very launch of the Modernisation White Paper (European Commission 1999), it was feared that the NCAs’ institutional, personal and financial settings would allow national governments and parliaments to influence the outcome of the enforcement (German Monopolies Commission 2000, paragraph 40; UK Parliament 2000, paragraphs 11, 150; Wils 2013, 295). Particularly, given the vague wording of Article 101 TFEU, there was a clear risk of the enforcement of the Article becoming subject to the discretion of each national enforcer, to its institutional, procedural and political characteristics and competition culture.

Moreover, while the Commission’s decision-making body, DG COMP, is generally seen as free from political interference when proceeding in individual competition infringement cases, not all NCAs have an equally independent status as authorities. Although some NCAs are institutionally, financially and politically independent of their governments, others are considerably less so.⁹ As Riley pointed out in 2003, “[E]ven when institutional and political independence is granted by the state it can find other means of ensuring that a NCA will be directed to protect specific national interests.[...] NCAs when faced with complaints concerning the state provision of services may well be tempted to take a narrow view as to the extent to which competition law can apply” (Riley 2003, 659; see also European Commission 2017).

In addition to the threat to the integrity and effectiveness of EU competition law, the possibility of exposing EU competition enforcement to particular national interests created a risk of uneven application of EU competition rules across the Member States. Industry stakeholders, as well as the European Parliament and the Member States, pointed out that decentralised enforcement should

⁹ A relatively recent and comprehensive study on the issue of the formal independence of NCAs by Guidi revealed extensive variations in independence among the NCAs, Guidi (2014). The study also raised the question of whether an NCA’s *de iure* independence reflects its *de facto* independence. The Commission has recently started to plead for more independence for NCAs in order to enhance further the enforcement of EU competition law, European Commission (2017), 17.

not lead to re-nationalisation of EU competition policy (European Parliament 2016, 16; European Commission 2000, point 6.1; German Monopolies Commission 2000, 37; UK Parliament 2000, paragraphs 11, 150). Rather, the enforcement system must continue to ensure that Article 101 TFEU is applied in a uniform manner throughout the EU, despite differences in national laws and polices (European Parliament 2016, 16).

2.3 Hard and Soft Law Rules to Address the Risk of Re-Nationalisation under Regulation 1/2003

In order to accommodate the above concerns, the Commission introduced hard and soft law rules aiming to shield the application of EU competition law from national interests and fragmentation. As a hard law solution, Regulation 1/2003 contains provisions for ensuring the consistent and uniform application of the EU competition rules. In fact, the original legislative proposal for Regulation 1/2003 stated that national competition laws would not apply to agreements that fall within the scope of Article 101 TFEU.¹⁰ In other words, the Commission advocated that EU and national competition laws should not apply in parallel so that the national influence on the application of EU competition law can be delimited. Nevertheless, the proposal was dropped after it had been severely opposed by a number of Member States. In fact, it proved to be the most contentious point in the Council's deliberations (Wils 2013, 295).

The compromise solution was ultimately found in the form of Article 3 of Regulation 1/2003. Article 3(1) obliges the NCAs and national courts to apply Articles 101 and 102 TFEU *in parallel* to their national competition rules when effect on trade between Member States is at stake.¹¹ Next, Article 3(2) of the Regulation encapsulates a strict *supremacy* rule¹² (European Commission 2009, points 141–2, 152): Member States may not adopt and apply stricter national competition laws which prohibit practices which affect trade between Member States but which do not restrict competition within the meaning of Article 101(1), fulfil the conditions of Article 101(3), or covered by a Block Exemption Regulation. Put differently, Article 3(2) provides that stricter national competition laws are not objectionable as such as long as they are not applied to practices that fall within the scope of

¹⁰ See Recital 8 of Preamble and Article 3 of Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty), COM(2000) 582 final. Article 3 stated that “where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws”. This provision was not reproduced in the Modernisation White Paper.

¹¹ However, in accordance with Articles 3(2) and 3(3), the convergence rule does not apply for unilateral conduct and national merger laws.

¹² Supremacy of EU competition law over national competition law was originally established in Judgment of 13 February 1969, *Walt Wilhelm v Bundeskartellamt*, Case 14/68, EU:C:1969:4, but only for cases where an exemption under Article 101(3) has been granted. See also more recently Judgment of 14 February 2012, *Toshiba*, C-17/10, EU:C:2012:72.

the EU competition rules. It thus works as a *convergence* rule. It seeks to create a level playing field, by providing for a single standard of assessment that allows undertakings to design EU-wide business strategies without having to check all the relevant national sets of competition rules.

Article 3 of Regulation 1/2003 was characterised as one of the major successes of the new enforcement system (European Commission 2009, point 142). It has triggered a notable Europeanisation process, in which most national competition laws were altered or adapted to mirror the *substantive* scope and wording of Article 101 TFEU (see European Commission 2014). This was especially so in the new Member States that joined the EU since May 2004. However, a similar top-down convergence of the NCAs' *administrative procedures* and *institutional design* has not taken place. When NCAs apply Articles 101 and 102 TFEU, they continue to make use of national procedural rules and remedies.

Moreover, the Commission has introduced a second set of soft law rules in order to steer the application of EU competition law by national enforcers. With its 2004 Modernisation Package, the Commission adopted a set of soft law rules that not only clarified the substantive, institutional and procedural scope of 101 TFEU (European Commission 2009, points 3, 9; European Commission 2014, point 6) but also served for the Commission to formulate its new approach on what it regarded as the primary aim of EU competition law. The Commission advocated a more economic approach to Article 101 TFEU, in which the primary aim of EU competition law appeared as the promotion of consumer welfare.¹³

The Commission's soft instruments had a purpose beyond introducing a more economic approach to EU competition law. They can also be understood as providing a safeguard against undue national interference with EU competition policy. In fact, by invoking the more economic approach, the Commission can ensure that the application of Article 101 TFEU was devoid of political considerations (Petit 2009, 6; Van Rompuy 2012, 257; Sufrin 2006, 964; Monti 2002, 1092; Monti 2007, 21; Odudu 2006, 160–174; Wesseling 2000, 77–113; Townley 2009, 80; Cseres 2007, 169; Komninos 2005, 17; van der Woude et al. 2009, 82), and that other interests may only be taken into account to the extent that they meet the four conditions of Article 101(3).¹⁴ Hence, with the promotion of consumer welfare as the ultimate goal of EU competition law and the reframing of Article 101(3) as an "objective" tool facilitating economic assessment, the Commission has limited the possibility for national enforcers to disapply Article 101 TFEU in favour of national policy objectives. It remains a fact, however, that despite the Commission's efforts EU hard and soft law still

¹³ Paragraph 33 of the "Article 101(3) Guidelines" stipulates that "the aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."

¹⁴ Paragraph 42 of the "Article 101(3) Guidelines".

leave leeway for incorporating national interests in the application of EU competition law by the NCAs.

3 Leeway in EU law for Incorporating National Interests in the Enforcement of Article 101 TFEU

This section demonstrates how national interests have played a role in the application of Article 101 TFEU when it was enforced by NCAs following the entry into force of Regulation 1/2003. The consideration of national interests can be traced back to two types of legal sources. First, certain *national procedural or substantive measures* specifically demand taking national interests into account in the application of Article 101 TFEU. Second, the wording of Article 101 TFEU and the case law of EU Courts tolerate a certain degree of divergence in the way the NCAs apply Article 101 and, accordingly, allow NCAs to align their enforcement with their national view on competition policy.

3.1 Leeway for National Interests under National Legal Provisions

3.1.1 Substantive National Laws Limiting the Enforcement of Specific Agreements

Member States can shield an agreement from the prohibition of Article 101 TFEU by adopting substantive laws that explicitly limit EU competition law in favour of the protection of a national interest. This section provides three examples to illustrate this: the UK Competition Act's public policy defense clause, and the case of specific Hungarian and German laws limiting the application of Article 101 TFEU.

The UK public policy defense clause entrusts a member of the government to exclude the application of Article 101 TFEU from a specific agreement. The UK Competition Act holds that the Secretary of State may declare the cartel prohibition inapplicable for "exceptional and compelling reasons of public policy".¹⁵ Ministers have so far made careful use of this power, issuing only four such orders.¹⁶ The practice followed suggests that the Secretary of State interprets its powers narrowly and has

¹⁵ Article 7(1) of Schedule 3 provides: "If the Secretary of State is satisfied that there are exceptional and compelling reasons of public policy why the Chapter I prohibition ought not to apply to— (a) a particular agreement, or (b) any agreement of a particular description, he may by order exclude the agreement, or agreements of that description, from the Chapter I prohibition."

¹⁶ Three orders concerned the defense industry: The Competition Act 1998 (Public Policy Exclusion) Order 2006 (2006 No. 605), which excluded any agreement aimed to enable the parties to provide or receive maintenance and repair services for surface warships; The Competition Act 1998 (Public Policy Exclusion) Order 2007 (2007 No. 1896), which excluded agreements between members of Team Complex Weapons relating to complex weapons or supporting technology; The Competition Act 1998 (Public Policy Exclusion) Order 2008 (2006 No. 1820), which excluded agreements relating to nuclear submarines developed or manufactured for the Secretary of State. The fourth defence policy order has been repealed (The Competition Act 1998 (Public Policy Exclusion) (Revocation) Order 2011 (2011 No.2886) with respect to Team Complex Weapons). Another order concerned arrangements for the supply of oil and petroleum products in the event of significant disruption to normal supply (The Competition Act 1998 (Public Policy Exclusion) Order 2012 (2012 No. 710)).

limited the scope of cases to security policy.¹⁷ This means, in practice, that other public policy reasons beyond security are unlikely to justify an exception, at least not when the agreement affects trade between Member States.

The Hungarian example concerns the adoption of a line of legislations in which the national parliament limited the application of Article 101 TFEU to agreements in certain economic sectors. In the *Watermelon* case,¹⁸ the Hungarian NCA examined an agreement between large retail supermarkets with the participation of the association of watermelon farmers. The agreement had fixed the price of watermelons produced in Hungary and adopted collective measures hindering the distribution of imported watermelons. Despite its clear anti-competitive nature, the Hungarian Minister for Agriculture and Rural Development decided to support the agreement, noting that it aimed to secure a fair standard of income for farmers and a “fair deal for producers and consumers” (Tóth 2013, 7).

After the Hungarian NCA commenced an investigation, the Hungarian Parliament adopted an amendment to the Act on Inter-branch Organisations.¹⁹ This amendment stated that subject to the approval of the Minister for Agriculture and Rural Development an otherwise restrictive agreement in the agricultural sector could be exempted from the prohibition of anti-competitive agreements under Hungarian competition law. The Minister must ensure that the restrictive agreement guarantees a fair income for the producers and that all market actors are equally allowed to join it.²⁰ Moreover, the amendment stated where the agreement affects trade between Member States no fine could be imposed by the NCA for the infringement of Article 101 TFEU.

The new provision also provided for a special procedure for agricultural products that were not granted an exemption.²¹ Before establishing an infringement of EU or national competition law with respect to conduct involving such products, the NCA must first, by setting a deadline, call the undertakings to bring their conduct in conformity with the law. Only if the undertaking fails to cease the infringement after the deadline’s expiry, can a fine be imposed.

¹⁷ This is confirmed by the justification given in the Explanatory Memorandums of the orders. The Secretary of State explained that the orders are not incompatible with Article 101 TFEU given the provisions of Article 346 TFEU (1)(b) which hold that provisions of the Treaty shall not preclude the application of the rule that “any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material”.

¹⁸ Case Vj-62/2012 (watermelon).

¹⁹ Act No.CLXXVI of 2012 on inter-branch organisations and on certain issues of the regulation of agricultural markets adopted on November 19, which amended Act CXXVIII of 2012.

²⁰ The new Section 18/A(1) provides that: “The infringement of Section 11 of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to Section 11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Article 101 TFEU was not applied.” English translation from Tóth (2013).

²¹ Section 18/A(4).

The adoption of the amendment had far-reaching consequences. In the *Watermelon* case, the Hungarian NCA terminated its proceedings after the Minister had found that the conditions for the exception were met.²² The NCA also closed its investigation in the *Sugar cartel* case in which it suspected that sugar producers had regularly coordinated their market behaviour with respect to prices, divided their industrial and retail purchasers and shared information related to the quantities sold.²³ There is some evidence that the amendment might have deterred the Hungarian NCA from opening future investigations in the agriculture sector. While prior to the amendment, the competition law prohibitions had been actively enforced in the agriculture sector,²⁴ after the NCA refrained from starting new investigations in the sectors, at least investigations which resulted in a published notice (see Brook).

The amendment to the Act on Inter-branched Organisations was heavily criticised by commentators (see Csépai 2015, 404–405; Tóth 2013, 3–4; Szilágyi 2013, 6–8; Pina 2014, 16), including the NCA itself. The NCA warned that that amendment “leads to a situation in which the public interest that the legislator wishes to protect is no longer clear,”²⁵ and gives rise to serious concerns as it causes legal uncertainty in the evaluation of cartel activities concerning agricultural products (GVH 2009). The Commission too voiced its concerns; yet it has not questioned the exception itself. It challenged only the explicit provision which excluded the Hungarian NCA from imposing fines where the agreement affected trade between Member States (Csépai 2015, 404).²⁶

Despite the evident issues with constraining the application of Article 101 TFEU in the national territory by adopting specific legislation, the Hungarian legislator introduced further measures covering specific economic sectors and specific types of agreements.²⁷

²² Vj-62/2012 (watermelon), paragraphs 13–15, 42–46 and 56–57.

²³ Vj-50/2009 (sugar cartel), paragraph 132. The new rule was also retroactively applied to Vj-69/2008 (wheat mill products I). Prior to the adoption of the amendment, the NCA imposed a fine with respect to a bilateral and multilateral agreement on the allocation of the Hungarian flour and other wheat mill product market and on the application of minimum prices and on (the extent and timing of) intended price rises. In judicial review, decided after the introduction of the new measure, the NCA was instructed to its decision under the new legal circumstances (2.K.31.793/2011/90 (wheat mill products I) and 2.Kf.649.964/2013/20 (wheat mill products I)).

²⁴ E.g., Vj-199/2005 (egg cartel), upheld in judicial review in 7.K.30.838/2007/33; Vj-89-2003/58 (hunting cartel), upheld in judicial review in 3.K.33.949/2010/17; Vj-132/2003/37 (Council for Wild Animals Products and Services), upheld in judicial review in 3.K.31.984/2005/30.

²⁵ Vj-62/2012 (watermelon), paragraph 70–72.

²⁶ When threatened by an infringement procedure for inserting the exemption into the Hungarian competition act, the law clarified that the NCA may impose sanctions, including fines, when the agreement infringes EU competition law. Article 39/A of the Hungarian competition act provides that the special exception for agriculture “shall only apply to a case, if the necessity of the application of Article 101 of the TFEU does not arise. The necessity of the application of Article 101 of the TFEU shall be established by the Hungarian Competition Authority in its competition supervision proceeding pursuant to Article 3(1) of Council Regulation (EC) No 1/2003, before making the final resolution.”

²⁷ In Vj-67/2014/59 (waste materials), the NCA examined the conduct of the group of Hungarian undertakings that won the bid for the operation of the newly established national waste management scheme. The NCA closed its investigation after the Hungarian parliament adopted Act XCIX of 2014 on the financial grounding of the central budget, which established retrospectively that no infringement of the national prohibition on cartels could be established in respect of actions carried out in the execution of public procurement procedures published in 2012–2013 for the implementation of the National

Similarly to Hungary, a specific national law limiting the application of Article 101 TFEU was also adopted by the German legislator. In *Round timber in Baden-Württemberg case*, the German NCA examined the conduct of the federal state of Baden-Württemberg, which sold and invoiced wood on behalf of other forest owners and carried out several services related to the marketing of round timber via its company Forst BW. In July 2015, the German NCA held that because the agreements between the federal state and other forest owners fixed prices and restricted sales, they amounted to by-object restrictions of competition.²⁸ In early 2017, *after* the federal state of Baden-Württemberg had appealed this decision, the German legislator amended the national Federal Forests Act. The amendment excluded these types of agreements from the scope of national competition law, and effectively also from the scope of EU competition law by setting a presumption that they are justified under Article 101(3) TFEU.²⁹

The full force of the amendment was not accepted by the Düsseldorf Higher Regional Court. The Court confirmed the NCA's decision, noting that the amendment could only entail that the federal state's activity does no longer violated German competition law. According to the Court, the German legislator did not have the regulatory competence to limit the full application of Article 101 TFEU.³⁰ Nevertheless, in the end, the conduct of the federal state of Baden-Württemberg was not prohibited. In June 2018 the Federal Court of Justice had overturned the NCA's decision to take on the case, without discussing the compatibility of the amendment.³¹

3.1.2 Procedural Provisions – National *de minimis* Rules

Finally, also national procedural rules can limit the application of EU competition law in favour of promoting national interests. The so-called *de minimis* rules in national laws are a good example of how Member States can protect, among others, SMEs from the general application of EU and national competition laws.

The EU's own *de minimis* rule excludes from the scope of prohibition of Article 101(1) TFEU agreements between undertakings with low market share, or agreements having a small impact which are unlikely to have an appreciable effect on competition.³² This doctrine was introduced by the Court of Justice in *Völk*³³ (see also von Papp 2015, 2–3) and was later codified by a Commission

Waste Plan. The NCA closed the investigation noting that there was no public interest in continuing the case in light of the new law. Also see Varju and Papp (2016), 1661.

²⁸ B1-72/12 *Round timber in Baden-Württemberg* (2015)

²⁹ Gesetz zur Erhaltung des Waldes und zur Förderung der Forstwirtschaft (Bundeswaldgesetz), Section 46(2)

³⁰ Kart 10/15 (V) *Round timber in Baden-Württemberg* (2017), para 349-369

³¹ According to the press release from 12 June 2018, the decision was based on the finding that the German NCA should have not re-opened its investigation after it has accepted commitments on this matter in 2008. While the NCA claimed that the reopening of the proceedings was justified by new information obtained after the commitment decision was adopted, the Court disagreed

³² On the doctrine, see Goyder (2009), 104–107; Bailey and Whish (2015), 148–152; von Papp (2015).

³³ Judgment of 9 July 1969, *Völk v Vervaecke*, Case 5/69, EU:C:1969:35.

notice. It grants safe harbour to agreements between undertakings having a market share lower than a certain quantitative threshold.³⁴

Notably, the EU *de minimis* rule did not only cover agreements having an insignificant effect on competition. In the past, it had also afforded a special protection for SMEs. In fact, until 1997 the Commission's *de minimis* notice applied the exception only to SMEs.³⁵ The Commission justified this special regime with reference to the importance of SMEs as a source of employment in crisis times. Yet, in 1997 the Commission noted that this justification was no longer valid.³⁶ Accordingly, from the late 1990s, the basis for the application of the *de minimis* rule changed from the size of the relevant undertaking to its market power.

The Commission's *de minimis* notice, however, only binds the Commission (von Papp 2015, 1). Cases taking place in front of NCAs are subject to national *de minimis* rules. These are national procedural rules that determine the NCAs' jurisdiction to apply Article 101 TFEU and its national equivalent. Since *de minimis* rules are not harmonised throughout the EU, they can differ substantially. As a result, NCAs might not have the jurisdiction to examine agreements that are subject to the Commission's jurisdiction and *vice versa*.³⁷

In particular, some Member States use their national *de minimis* rules to afford a special protection for SMEs similarly to the Commission's old notice. In other words, the Member States made use of their procedural rules to shield local SMEs from competition law. The degree of protection of SMEs and its specific terms vary according to the national preferences. This is illustrated by Table 1, which summarises the variety of the EU and national *de minimis* rules in the five investigated Member States.

³⁴ Commission Notice of 2 June 1970 concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community, [1970] OJ C64/1. The notice was revised over the years. See Commission Notice of 19 December 1977 concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community, [1977] OJ C313/3; Commission Notice on agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community, [1986] OJ C231/2; Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85 (1) of the Treaty establishing the European Community, [1997] OJ C372/04; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), [2001] OJ C368/07; 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 (*de minimis* notice), [2014] OJ C291/01.

³⁵ In addition to a low market share, the exception had set a limit on the turnover of the undertakings.

³⁶ Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85 (1) of the Treaty establishing the European Community, [1997] OJ C372/04. Yet, the notices still refer to SMEs and hold that the exception is based on the assumption that agreements between SMEs are rarely capable of significantly affecting competition within the common market. Consequently, as a general rule, they are not caught by the prohibition of Article 101(1). See 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 (*de minimis* notice), [2014] OJ C291/01, footnote 5; Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85 (1) of the Treaty establishing the European Community, [1997] OJ C372/04, paragraph 19.

³⁷ See the Appeal Court of Paris in 2009/05544 (online travel sales), 10–11.

Table 1: *De minimis* rules in the EU and in five Member States

| | Criteria | Special protection of SMEs? |
|-----------------------|---|------------------------------|
| Commission until 1997 | Quantitative: 10 per cent horizontal; 15 per cent vertical | Exception is limited to SMEs |
| Commission since 1997 | Quantitative: 10 per cent horizontal; 15 per cent vertical | No |
| FR ³⁸ | Quantitative: 10 per cent horizontal; 15 per cent vertical | Excluding “micro practices” |
| GR ³⁹ | Qualitative: rationalise economic activities of SMEs. A quantitative presumption: 10 per cent horizontal; 15 per cent vertical | Exception is limited to SMEs |
| HU ⁴⁰ | Quantitative: 10% horizontal; 15% vertical (until 2018, 10% for both) | No ⁴¹ |
| NL ⁴² | Quantitative: conduct of no more than 8 undertakings that have a low turnover and market-share | Exception is limited to SMEs |
| UK ⁴³ | Quantitative: 10 per cent horizontal; 15 per cent vertical | No |

This table shows that most Member States opted for a *de minimis* rule that is based on quantitative criteria, identical (France, UK, a presumption in Germany) or similar (Hungary) to those in the Commission’s notices. The national *de minimis* rules of the Netherlands, France, Hungary and Germany explicitly protect SMEs. The particularities and degrees of such protection, however, differ across the Member States.

In the Netherlands, the national *de minimis* rule applies only to an agreement of no more than 8 undertakings having a low turnover and market-share.⁴⁴ The Dutch Parliament revised the *de minimis* rule in 2010 in order to provide SMEs more leeway to join forces against buying power (Dutch Parliament 2007). The revised rule increased the market share threshold from 5 per cent to 10 per cent. However, the Commission objected to this change and noted that the revised rule could have removed hard-core restrictions that affect trade between Member States from the scope of Article 101 TFEU (Dutch Parliament 2010). Therefore, the amendment was revised and limited the higher

³⁸ Articles L464-6-1 and L464-6-2 of the French Commercial Code. Also see Vogel (2012), 171.

³⁹ Section 3 of the GWB.

⁴⁰ Hungarian Competition Act Article 13.

⁴¹ Yet, as mentioned below, Article 78(8) of the Hungarian Competition Act allows to issue a warning instead of a fine to first time infringements by SMEs

⁴² Section 7 of the Competition Act.

⁴³ The *de minimis* rule is not expressly mentioned in the UK Competition Act. It applies pursuant to Section 60 which brings into play EU case law on this issue. The *de minimis* doctrine is mentioned in an OFT guidance, OFT (2004), paragraphs 2.15–2.21.

⁴⁴ If the undertakings are not potential or actual competitors, the turnover of these undertakings is not more than EUR 5.5 million where the core activity is the supply of goods, or EUR 1.1 million in all other cases. If the undertakings are potential or actual competitors, their combined market share shall not exceed 5 per cent, and their combined turnover is not higher than EUR 40 million.

threshold to purely national cases (De Brauw Blackstone Westbroek 2011; De Brauw Blackstone Westbroek 2013, 203).

In Hungary, a 2015 amendment to the national competition act introduced a mechanism which replaced the fine imposed on SMEs for a first-time infringement of the national cartel prohibition with a warning.⁴⁵ Similarly to the revised Dutch rule, this provision does not apply to agreements that have having an effect on trade between Member States. The French *de minimis* rule sets a separate appreciability threshold for less serious cases in local markets, for the so-called “micro-practices”.⁴⁶ Such practices fall outside the competence of the French NCA and can only be assessed by the Minister of the Economy. This jurisdictional rule transfers the application of competition rules from the French NCA to a member of a national government.

Since the NCAs have a wide margin of discretion to decide if an agreement affects trade between Member States (Botta et al. 2015, 1249 and 1271), the above national *de minimis* rules may apply in practice to cases that could have been investigated as Article 101 TFEU infringements. To this extent, the national procedural rules directly affect the application of both EU and national competition laws.

In other cases, national rules can also influence the application of Article 101 TFEU. For example, while most *de minimis* rules are based on objective quantitative criteria, the German rule requires a case-by-case assessment of its applicability. It follows qualitative criteria and requires examining whether an agreement has the effect of rationalising economic activities and serves to improve the competitiveness of SMEs.⁴⁷

The above examples showed how Member States implement the national interest related to the protection of SMEs in a manner which deviates from the Commission’s approach and which is not uniform across the EU. This section demonstrated how Member States’ laws can limit the application of Article 101 TFEU in favour of promoting local interests by means of substantive and procedural legal measures. The next section will analyse cases in which the application of Article 101 TFEU by NCAs has achieved a similar effect.

⁴⁵ Section 78(8) of the Hungarian competition act.

⁴⁶ Article L-464-9 of the Commercial Code provides that where the anticompetitive practice affects a market that is regional in dimension and is not likely to affect trade between Member States, the individual turnover of the undertakings does not exceed EUR 50 million and the cumulative turnover is less than EUR 100 million, the Minister of the Economy can order the undertakings in question to cease the infringing behavior and impose on them a fine of an amount not exceeding EUR 75,000 or 5 per cent of the last known turnover for France, whichever is smaller. Also see Vogel (2012), 171.

⁴⁷ Article 3(1) of the Act provides: “Agreements between competing undertakings and decisions by associations of undertakings, whose subject matter is the rationalisation of economic activities through cooperation among enterprises, fulfill the conditions of Section 2(1) if: a) competition on the market is not significantly affected thereby, and 2) the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.” Also see Klees (2006), 403. This was applied in decisions B1-25/04 Verta/Danzer (2004); B3-06/05 OTC medicines – Land pharmacist associations (2007); B2-90/01-4 Timber (2008); B2-90/01-2 Timber (2009); B2-90/01-3 Timber (2009); B2-90/01-1 Timber (2009).

3.2 Leeway for National Interests Through National Application of Article 101 TFEU

A second avenue available for NCAs to incorporate national interests within the application of Article 101 TFEU is the possibility provided by EU law to adopt national application of that provision which deviate from the Commission's approach. Certainly, the Commission has retained a leading role in the enforcement of EU competition law following modernisation. It is independent from the Member States and has a wide margin of discretion concerning the development and enforcement of EU competition law. Nevertheless, the Commission's guidelines and policy papers on the application of Article 101 only bind the Commission and are not binding on the Member States. The Court of Justice has held in *Expedia* that national authorities are not bound to apply EU soft law instruments and NCAs have complete discretion to adopt different approaches in the matters that are addressed by those instruments.⁴⁸ Accordingly, NCAs may, in principle, apply Article 101 in a ways that bring the enforcement of the Article more in line with their own national view on competition policy.

This section analyses the way NCAs have adopted diverging application of Articles 101(1) and (3) TFEU that allowed them to incorporate their national interests within the enforcement of EU competition law.

3.2.1 Application of Article 101(1) TFEU

The Commission has mostly applied Article 101(1) TFEU as a jurisdictional provision which is confined to determining whether EU or national competition law should be applied (i.e., whether an agreement affects trade between Member States) (Odudu 2006, 101; Goyder 2009, 110–114). This approach was particularly significant prior to the modernisation of EU competition law. Under the old enforcement regime of Regulation 17/62, the fact that an agreement fell within the scope of Article 101(1) did not only mean that EU law applied, but also that only the Commission could grant exemptions under Article 101(3) TFEU. As a result, the Commission practically barred national competition enforcers from analysing any kind of justification under Article 101(3). Following this application of Article 101(1), the Commission could catch as many agreements as possible and thus ensure the effective enforcement and uniform application of Article 101 throughout the EU (Komninos 2005, 2–3; Venit 2003, 577).⁴⁹

Applying Article 101(1) TFEU as a jurisdictional provision entailed that the prohibition of the Treaty provision applied without distinction to almost any restriction imposed on the undertakings' freedom of commercial action. An anti-competitive agreement could then only be justified by the Commission

⁴⁸ Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 29.

⁴⁹ Restrictions of the commercial freedom of undertakings were not only seen as harmful to competition, but also to market integration. A broad interpretation of Article 101(1) allowed the Commission also to control agreements that hinder market integration, irrespective of the actual impact on competition interest. See Odudu (2006), 89–99.

under Article 101(3).⁵⁰ Nevertheless, over the years the Commission and the EU Courts introduced certain exceptions to Article 101(1). In particular, they held that some forms of restriction of rivalry fell outside of its material scope if they were necessary for the attainment of a commercial or public interest. Several of those exceptions enabled the NCAs to accept certain agreements from the prohibition of Article 101 TFEU, *inter alia*, on the basis of promotion of the relevant national interests. These exceptions were used to review agreements that were designed to realise social or other national goals as well as agreements that are the expression of State sovereignty.

One example of this type of exception under Article 101(1) is the so-called “State action defense” or *effet utile* doctrine (see Gyselen 1989; Castillo de la Torre 2005; Cruz 2007; Blomme 2007; Gerard 2010). Its use is based on the premise that the conduct of a State, just like the conduct of private entities, may distort competition on the market. For instance, a national law can sacrifice competition in favor of protecting employment conditions or the environment. A State may also delegate its powers to undertakings, which in turn can limit competition. This posed the question whether an agreement that is the direct result of a State measure (such as a law, regulation or administrative use of public powers) or which substitutes a task that was previously performed by a State is also prohibited by Article 101 TFEU.

Throughout the years, the Court of Justice established in its relevant jurisprudence a balance between Member States powers and EU competition law. While the principle of supremacy of EU law prohibits the Member States from introducing or maintaining in force legislative or regulatory measures that may render Article 101 TFEU ineffective, in certain cases the Court has approved national measures that limited the full application of that provision. In particular, in a line of cases starting with *Van Eycke*, the Court stipulated that the *effet utile* of Article 101 TFEU could be compromised *only* where a Member State either: (i) required or favor the adoption of an anti-competitive agreement or (ii) reinforced the effects thereof, or (iii) deprived its own regulation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.⁵¹ Other types of State measures, therefore, were not found to infringe Article 101(1).

⁵⁰ As early as *Grundig-Consten*, it explained that “the *decisive criterion* for the coming into force of the prohibition mentioned in Article 85(1) (...) consists of the finding that the agreement *interferes with the freedom of action* of the parties or with the position of third parties on the market”. In particular, the prohibition “applies *virtually automatically* to (...) agreements which establish absolute territorial protection for exclusive distributors. This point is *central to Commission policy*.” Emphasis added. The Commission’s position was presented in the Report for the Hearing in appeal in Judgment of 13 July 1966, *Grundig-Consten*, 56 and 58/64, EU:C:1966:41. As well-known, using Article 101(1) as a jurisdictional provision meant that all agreements had to be notified to the Commission, even when the undertakings had no significant market power or when the agreement had an insignificant effect on competition and this created a serious administrative backlog. See, for example, Van Bael (1986), 62–63; Temple Lang (1998), 3; Ehlermann (2000), 541; Riley (2003), 614; Wils (2013), 5; Sufrin (2006), 917; Jones (2010), 789; Goyder (2009), 52 and 613–615; Temple Lang (2014), 3.

⁵¹ Judgment of 21 September 1988, *Van Eycke*, Case 267/86, EU:C:1988:427, paragraphs 15–16.

Another exception under Article 101(1) TFEU that reflects a balance between competition interests and national interests is the concept of “inherent restrictions”. In the landmark case of *Wouters*, the Court of Justice reviewed a rule of the Dutch Bar association prohibiting a partnership between members of the Bar and other professions. The rule was adopted pursuant to a Dutch law that entrusted the Bar with the responsibility to adopt professional rules designed to ensure the proper practice of the legal profession.⁵² The Court observed that not every agreement which restricts the freedom of action of undertakings necessarily falls within the prohibition of Article 101(1). Instead, the overall context of such agreement has to be examined. In particular, “account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience”.⁵³

The Court explained that the exception of inherent restrictions is based on a three-step examination: first, whether the potentially anti-competitive measure pursued a legitimate aim; second, whether the restriction of competition was inherent to the pursuit of this aim; and third, whether the restriction was proportionate. In other words, the Court left room for national laws that restrict competition in case the restriction pursues a legitimate national interest and is proportionate.

The leeway for NCAs to incorporate national interests under Article 101(1) TFEU exceptions is especially significant since the Court of Justice has not developed a specific framework that could guide the assessment of these exceptions. Instead, the Court created *ad hoc*, sector-specific or restriction-specific rules that were developed on a case-by-case basis. Lacking definitive criteria, these exceptions, in principle, leave an exceptionally large margin of discretion to the national competition enforcers.

The NCAs, accordingly, can apply these exceptions in a way that reflects the interests of the relevant Member State. They can decide what type of national interests can justify an exception and determine the applicable balance between competition and other national interests. Moreover, the Member States can autonomously shape the legal tests applicable to the grant of such exceptions. For instance, the five NCAs investigated in this chapter have taken mixed views on the question whether the inherent restriction exception must be part of a State measure to justify a restrictive practice of professional associations. While the UK NCA tied the exception to the existence of regulatory powers,⁵⁴ the French NCA applied the exception also to cases where the professional

⁵² The Law on the Bar of 23 June 1952, adopted pursuant to Article 134 of the Constitution of the Kingdom of the Netherlands.

⁵³ Judgment of 19 February 2002, *Wouters*, C-309/99, EU:C:2002:98, paragraph 97.

⁵⁴ CP/0090/00/S MasterCard (2005), paragraphs 426–430.

association was not vested with regulatory powers.⁵⁵ Unsurprisingly, the NCAs discussed and accepted Article 101(1) TFEU exceptions considerably more frequently than the Commission (see Brook). By invoking such exceptions, the NCAs exhibited varying degrees of willingness to account for their respective national interests when applying the EU competition provisions.

3.2.2 Applying Article 101(3) TFEU

Similarly to Article 101(1) TFEU exceptions, the manner in which the NCAs apply Article 101(3) TFEU has an impact on the leeway available under EU competition law for giving effect to the national interests of the Member States. In the past, the Commission had allowed for a broad consideration of local interests under the frame of Article 101(3). For example, the Commission exempted serious restrictions contained in the International Energy Program concluded between 20 countries, including some of the EU Member States, to meet national oil supply emergencies.⁵⁶ Similarly, the Commission allowed a German waste collection program on the ground that it was necessary for meeting national environmental policy goals.⁵⁷

Yet, in the course of the modernisation the Commission became concerned about the incorporation of national political considerations in the application of Article 101(3) TFEU. In order to avoid such national interferences with the delivery of EU competition policy, the Commission decided to re-interpret this provision and identified it as an objective economics-based tool. Accordingly, the Modernisation White Paper explained that Article 101(3) is intended “to provide a legal framework for the *economic assessment* of restrictive practices and *not to allow* application of the competition rules to be set aside *because of political considerations*” (European Commission 1999, points 57 and 72).⁵⁸ In the same vein, the “Article 101(3) Guidelines” declare that the Article relates to “objective economic efficiencies”.⁵⁹ The guidelines have also introduced the notion of *consumer welfare* as the primary aim of EU competition policy, in general, and of Article 101(3), in particular, by stating that “the aim of the Community competition rules is to protect competition on the market as a *means of enhancing consumer welfare* and of ensuring an efficient allocation of resources.”⁶⁰

Even though the Commission’s new approach was often attributed to the overall policy shift towards a more economic approach, it has also been explained as prompted by the fear that the decentralisation of enforcement would lead to national enforcers tolerating anti-competitive agreements on national public policy grounds (Petit 2009, 227–233; Van Rompuy 2012, 257; Sufrin

⁵⁵ 08-D-06 (specialist physicians overcharging fees), paragraphs 94–96; 10-A-10 (chartered accountants), paragraphs 110–111; 15-A-02 (regulated professions).

⁵⁶ 30525 International Energy Agency (1983).

⁵⁷ 34493 37366 37299 37288 37287 37526 37254 37252 37250 37246 37245 37244 37243 37242 37267 DSD (2001).

⁵⁸ Emphasis added.

⁵⁹ Paragraphs 50, 59.

⁶⁰ Paragraph 33. Emphasis added. In parallel, they discarded market integration as a goal of EU competition policy.

2006, 964; Semmelmann 2008, 39). In this context, limiting the scope of Article 101(3) was seen as a safeguard against national protectionism. As Sufrin put it, “this exclusion of public interest considerations from Article 81(3) is partly a matter of principle but largely a matter of pragmatism” (Sufrin 2006, 964; see also Cseres 2007, 169). By transforming Article 101(3) into a pure economic efficiency norm, the Commission substantially reduced the room for promoting national interests in competition policy.

Despite the Commission’s efforts, the five NCAs investigated in this chapter have adopted considerably different approaches as to the type of benefits that can be taken into account under Article 103(3) TFEU and the underlying standard guiding the application of that provision. As summarised in Table 2, the NCAs’ approaches to Article 101(3) can be roughly divided to three groups: (i) NCAs which generally accepted the Commission’s approach and limited the leeway available for the promotion of national interests; (ii) NCAs that allowed for moderate leeway for national interests; and (iii) NCAs that endorsed a broad consideration of local interests, similar to the Commission’s approach prior modernisation.

Table 2: The leeway allowed for the promotion of national interests under Article 101(3) TFEU

| Leeway for national interest under Article 101(3) | Member States following this approach |
|---|--|
| Limited | Commission; France; Hungary ⁶¹ ; the UK ⁶² |
| Moderate | Germany ⁶³ |
| Broad | France; ⁶⁴ the Netherlands ⁶⁵ |

The first group of NCAs applied Article 101(3) TFEU in a manner that does not leave room for consideration of national interests. Similar to the Commission’s approach following modernisation, they argued that the application of the Treaty provision is limited to taking into account economic efficiencies relating to the specific product or service and market.

The second group of NCAs allowed for the consideration of a limited number of national interests under Article 101(3) TFEU. For example, the German NCA had rejected the use of a consumer welfare standard as a basis for applying that provision. Instead, Article 101(3) is seen as a mechanism for

⁶¹ See Vj-47/2004 (Hungarian Association of Book Publishers and Book Retailers), paragraphs 103, 109, 111; Vj-96/2009-178 (book market), paragraphs 321–332; Vj-26/2006 (navigation tools), paragraph 295.
⁶² CE/2596-03 Tobacco (2010), paragraph 7.58. Short-form Opinion of the Office of Fair Trading, Rural broadband wayleave rates (2012), paragraph 8.12. The narrow role for consumer welfare in the enforcement of Article 101 TFEU was confirmed by UK NCA’s officials (in their private capacity) as well by academics, see Townley (2010), 311 and the references there.
⁶³ Heitzer (2008), 3.
⁶⁴ ICN (2011), 11, 28, 32; Lasserre (2009), 16–17.
⁶⁵ ICN (2011), 33; ACM (2014), paragraph 2.6; Claassen and Gerbrandy (2016), 3.

accepting restrictive agreements that have a positive impact on the competitive structure and process (Heitzer 2008, 4; ICN 2011, 19). Accordingly, in addition to economic efficiencies, the NCA was willing to consider national industrial policy considerations related to security of supply, bargaining power, functioning of online platforms, and the elimination of “white spots” in internet access.⁶⁶ Moreover, the NCA has also cleared under Article 101(3) an agreement that formed an inherent part of the implementation of a national law.⁶⁷

Finally, the third group of NCAs applied Article 101(3) TFEU as leaving ample room for the promotion of national interests. The Dutch NCA’s approach to sustainability agreements provides an illustrative example of how national application of Article 101(3) can secure a leeway for local interests (ACM 2014, paragraph 2.6; see also Claassen and Gerbrandy (2016), 3). The role of sustainability in applying Article 101(3) was subject to a lengthy political discussion in the Netherlands.⁶⁸ In early 2013, the Dutch House of Representatives requested the Minister of Economic Affairs to instruct the NCA, by means of a policy rule, on the assessment of such agreements (Dutch Parliament 2013).⁶⁹ Following those requests, the NCA adopted its Vision Document on Competition & Sustainability in May 2014 (ACM 2014).⁷⁰ Referring to both Dutch and EU competition law, this policy paper maintains that sustainability considerations can play an important role in enforcement of Article 101 TFEU. On the basis of the Vision Document, when applying Article 101(3) the Dutch NCA took account of local interests relating to coordinated closure of coal plants to reduce omissions,⁷¹ cooperation between four construction companies and six public-housing corporations to transform housing into energy-neutral buildings,⁷² and the limitation on the sale of chicken failing to meet certain environmental and animal welfare minimum standards.⁷³

⁶⁶ B8-113/03-1 long-term gas supply (2006), paragraphs 24–26; B7-22/07 basic encryption of TV programmes – commitments (2012), paragraph 41; B7-1/13-35 Sennheiser (2013), paragraphs 1–2; B3-137/12 Adidas (2014), paragraphs 6–7; B2-98/11 Asics (2015), paragraphs 613–622; B6-81/11 ARD/ZDF online platform “Germany’s Gold” (2013); B7-46/13 Telekom and Telefónica (2014), paragraphs 88–89.

⁶⁷ B4-152/07 coordination of tenders for sales packaging waste collection services by compliance schemes (2010), paragraph 6.

⁶⁸ In November 2011, the Dutch Minister of Agriculture submitted a letter to the Dutch House of Representatives demanding the consideration of animal welfare and environmental interests in NCA’s proceedings relating to agreements in the agricultural and nutrition sectors, Dutch Minister of Agriculture (2011).

⁶⁹ According to Article 5 of the Dutch Competition Act, the Minister of Economic Affairs can lay down policy rules, in particular, to instruct the NCA on how to take into account general interests other than economic interests in its assessment of restrictive agreements.

⁷⁰ The document deliberately left the term “sustainability” undefined. It provides that the term could include a wide range of policies, including environmental protection, public health, fair trade production, and animal welfare, ACM (2014), paragraph 6. The Vision Document also served as the basis of a shorter policy instrument of the Minister of Economic Affairs published on the same day see Dutch Government Gazette, Decision of the Minister of Economic Affairs of May 6, 2014, No. WJZ/14052830, Containing the Policy Rule Regarding the Application by the Netherlands Authority for Consumers and Markets of Section 6, Paragraph 3 of the Dutch Competition Act in Anticompetitive Arrangements that have been made for the Purpose of Sustainability (8 May 2014).

⁷¹ ACM opinion: Coal power plants (2013).

⁷² ACM/DM/2013/205913 De troomversnelling (2013).

⁷³ ACM/DM/2014/206028 Chicken for tomorrow (2015), paragraphs 5–6.

The above overview demonstrates that national application of Article 101(3) TFEU allow for different opportunities for incorporating national interests under competition rules. The degree and method in which national interests are taken into account when applying Article 101(3) depend on the applicable national competition policy, which considerably varies between the Member States.

4 Conclusions

This chapter analysed how Member States interests' may manifest in the enforcement of EU competition law. Having regard to the overall analytical frame of the book, namely how national interests are internalised and addressed by the law of the European Union and where these interests lie between *compliance and particularism* with EU legal obligations, the chapter comes to the following conclusions.

Regulation 1/2003 introduced a decentralised enforcement system for Articles 101 and 102 TFEU. The aim of decentralisation was to ensure effective enforcement on the one hand, and to simplify administration to the greatest possible extent, on the other. The current enforcement system is based on the premise that the NCAs must comply with and supplement the Commission's enforcement efforts, rather than advancing the relevant economic and political agendas in their Member States. Consequently, various hard and soft laws have been adopted at EU level to guarantee uniform and consistent application of Articles 101 and 102 TFEU. The multi-governance enforcement system created is generally seen as a major success of the European integration project. The enforcement of EU rules seems to work smoothly, and it has increased the Europeanisation of competition rules across the Member States. It has fostered a commonly shared sense of competition policy and culture among the Member States.

However, this chapter demonstrated that the decentralised enforcement system of EU competition law also provides significant opportunities for the Member States to push their particular national interests. They have used two distinct ways to limit the application of EU competition law in favour of promoting local interests. First, Member States adopted national measures that exclude or limit the enforcement of Article 101 TFEU. They have applied procedural (i.e., *de minimis*) and substantive (issue or sector specific) measures that demand taking national interests into account in the application of Article 101 TFEU in the national territory. Second, some of the NCAs applied Article 101 so as to bring its enforcement in line with their national view on competition policy. The chapter illustrated that the vague wording of Article 101 TFEU and the case law left the Member States considerable leeway to incorporate national interests in their locally framed applications of the EU law provisions.

The unique national measures and applications can be seen, on the one hand, as instruments ensuring the internalisation of EU policies in the Member States. They link EU interests to national interests within the regulatory space created by EU rules and, in this way, they may foster further harmonisation and support the EU's integration efforts. On the other hand, these measures and enforcement practices can point to strong forms of economic particularism and a "raw expression of political will" by national governments.⁷⁴ This chapter has confirmed that the national rules have led to far-reaching outcomes. Incorporating national interests to the enforcement of EU competition law has altered the effective scope of the law as applied in practice and led to fragmentation among the Member States.

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⁷⁴ See Varju and Czina in Chapt. 1 of this volume.

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