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STRUGGLING WITH ARTICLE 101(3) TFEU: DIVERGING APPROACHES OF THE COMMISSION, EU COURTS, AND FIVE COMPETITION AUTHORITIES

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Abstract

The decentralized enforcement regime of EU competition law is based on the assumption that the obligation to apply the same Treaty provisions is sufficient to ensure a uniform administration of the law. This paper questions this assumption. Based on a systematic analysis of a large database of cases, it presents empirical evidence indicating that the Commission, EU courts and five national competition authorities have followed very different interpretations of the law when applying Article 101(3) TFEU. The paper uses the debate over the types of benefit that can be examined under Article 101(3) TFEU as an illustrative example of the struggle between the different competition authorities in shaping the future of EU competition policy.

1. Introduction

"Competition policy is not something neutral", former European Commissioner for Competition, Karel van Miert famously declared: "it is politics".[1] Because the content and scope of competition policy reflect political choices, he maintained that competition policy cannot be understood without reference to the broader legal, economic, and social context in which it is applied.[2]

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1. Van Miert, "Confirmation hearing before the European Parliament" (6 Jan. 1995), as cited by Basedow, "The modernization of European competition law: A story of unfinished concepts", 42 *Texas International Law Journal* (2007), 429–440, at 431.

2. Van Miert, "Competition policy in the 1990s", speech at the Royal Institute of International Affairs (Chatham House, London, 11 May 1993), as cited by Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press, 1997), p. 120. Also see Frazer, "Competition policy after 1992: The next step", 53 *The Modern Law Review* (1990), 609–623,

This observation is particularly intriguing in the context of the decentralized enforcement of EU competition law. Since May 2004, the EU competition provisions are applied in a multi-level governance enforcement system by the Commission and the network of national competition authorities (NCAs) in parallel.[3] In fact, almost 90 percent of the investigations of infringements of Articles 101 and 102 TFEU are now carried out by NCAs.[4] As such, decentralized enforcement has transformed the NCAs into the mediators of the economic and political forces shaping EU competition law.[5]

The NCAs' new role, however, poses an inherent risk to the uniformity and legal certainty of the enforcement. Especially since the application of the EU competition provisions merits a wide margin of discretion, the NCAs' national, economic, and political traditions are prone to lead to a fragmented application.[6]

As elaborated below, from the very inception of the decentralization initiative the Commission and Council were wary of this risk. The Commission attempted to scale down the influence of the national settings by adopting a set of notices and guidelines. This so-called *modernization*

at 623; Maher, "Networking competition authorities in the European Union: Diversity and change", 2002 *European Competition Law Annual* (2002), 223–236, at 224; Townley, *Article 81 EC and Public Policy* (Hart, 2009), pp. 11, 46; Simonsson, *Legitimacy in EU cartel control* (Hart, 2010), p. 431.

3. Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2003, L 1/1., Arts. 3–5.

4. This calculation is based on the data available on the ECN website. See <ec.europa.eu/competition/ecn/ statistics.html> (last visited 17 Apr. 2018).

5. Maher, op. cit. *supra* note 2, p. 224; Cseres and Mendes, "Consumers' access to EU competition law procedures: Outer and inner limits", 51 CML Rev. (2014), 483–521, at 485.

6. Office of Fair Trading, Article 101(3) – A Discussion of Narrow versus Broad Definition of Benefits (2010). Available at <webarchive.nationalarchives.gov.uk/20140402172423/ http://oft.gov.uk/shared_oft/events/Article101(3)-summary.pdf> (last visited 18 Nov. 2018); Commission, European Commission White Paper, on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty (1999), para 17. Also see Wils, *Principles of European Antitrust Enforcement* (Bloomsbury, 2005), pp. 6–7; Gerber, "Two forms of modernization in European competition law", 31 *Fordham International Law Journal* (2008), 1235–1265, at 1239; Ehlermann, "The modernization of EC antitrust policy a legal and cultural revolution", 37 CML Rev. (2000), 537–590, at 537–538; Temple Lang, *FIDE Congress 1998: General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities* (1998). Available at <ec.europa.eu/competition/speeches/ text/sp1998_027_en.pdf> (last visited 18 Apr. 2018), p. 3; Jones, "The journey toward an effects-based approach under Article 101 TFEU – The case of hardcore restraints", 55 *The Antitrust Bulletin* (2010), 783–818, at 787–788; Sauter, *Coherence in EU Competition Law* (OUP, 2016), pp. 41–42; Maher, op. cit. *supra* note 2, p. 224; Simonsson, op. cit. *supra* note 2, p. 111.

package[7] aims to direct the substantive competition analysis, so as to ensure the uniformity and legal certainty of the enforcement.[8] Yet, those notices and guidelines are merely soft law mechanisms. Although they are an important source of influence over the interpretation of EU competition law, they are self-binding on the Commission alone.[9]

As a consequence, while the decentralization and the modernization package have undoubtedly stimulated an exceptional process of voluntary convergence to the Commission's practices,[10] the EU multi-level governance enforcement system empowers the NCAs to adopt diverse interpretations.[11] Where EU primary and secondary laws or the case law of the ECJ do not prescribe otherwise, the NCAs enjoy a wide margin of discretion to shape their national approaches on the basis of their legal, economic, and social traditions.

Previous studies have already examined how national *procedural and institutional* settings have influenced the application of EU competition law.[12]

7. The modernization package consists of Regulation 773/2004 detailing the competition law procedures, as well as notices and guidelines providing guidance to assist undertakings and NCAs in assessing the compatibility of a specific practice with EU competition law. It includes the Commission Notice on Cooperation within the Network of Competition Authorities (O.J. 2004, C 101/43); Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC (O.J. 2004, C 101/54); 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) (O.J. 2004, C 101/78); Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, (O.J. 2004, C 101/65); Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (O.J. 2004, C 101/81); and Guidelines on the Application of Article 81(3) of the Treaty (O.J. 2004, C 101/97).

8. Modernization White Paper, para 86; Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003 (SEC(2009)574), paras. 3, 9; Communication from the Commission to the European Parliament and Council – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (SWD(2014) 230-SWD(2014) 231), para 6.

9. On the legal effects of soft law mechanisms on the enforcement of EU competition law see Stefan, "European Union soft law: New developments concerning the divide between legally binding force and legal effects", 75 *The Modern Law Review* (2012), 879–893; Georgieva, "The judicial reception of competition soft law in the Netherlands and the UK", 12 *European Competition Journal* (2016), 54–86.

10. Lianos and Geradin, *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013), pp. 578–583; Cseres and Mendes, op. cit. *supra* note 5, p. 486.

11. As confirmed by the ECJ in Case C-226/11 *Expedia Inc.* v. *Autorité de la concurrence and Others,* EU:C:2012:795, para 29.

12. Commission Staff Working Document, Enhancing competition enforcement by the Member States' Competition Authorities: Institutional and procedural issues, SWD(2014) 231/2; Cseres, "Comparing laws in the enforcement of the EU and national competition laws", 3 *European Journal of Legal Studies* (2010), 7–44; Cseres, "Questions of legitimacy in the Europeanization of competition law procedures of the EU Member States", 2 *Amsterdam Centre for European Law and Governance Working Paper* (2013); Guidi, *Competition Policy Enforcement in EU Member States* (Springer, 2016); Lachnit, *Alternative Enforcement of*

Yet, the divergence in the *substantive* interpretation of Articles 101 and 102 has so far remained mostly under-explored by the literature,[13] as well as in the Commission's policy papers evaluating the decentralization process.[14]

This paper aims to fill this gap. It uses the debate over the types of benefit that can be examined under the Article 101(3) to justify an otherwise prohibited anti-competitive agreement as an illustration of the struggle in shaping EU competition policy. Relying on empirical methodology, it draws on a large database of cases to record systematically the differences in the practices of the Commission, EU courts, and five NCAs.

The paper offers two significant contributions to the existing scholarship. First, it is the first comprehensive qualitative and quantitative analysis of Article 101(3) as applied by various competition authorities. The paper thus provides unique information on the frequency and patterns of applying the provision in the multi-level enforcement system in general. Second, the paper sheds light on the largely unexplored divergence in the substantive national interpretations of Article 101(3). The empirical findings uncover substantial weaknesses in the enforcement system, which were overlooked by earlier studies based on traditional legal methodologies and anecdotal evidence. The empirical findings are used to refute the Commission's contention that after a few years of decentralized enforcement a "substantial level of convergence in the application of the [competition] rules has been achieved".[15] This divergence, the paper asserts, poses a serious obstacle to attaining the core aims of the EU competition law enforcement.

Accordingly, section 2 of the paper begins by outlining the empirical methodology and definitions guiding this study. Section 3 then presents the gap in EU primary and secondary law as to the type of benefits that can be considered under Article 101(3), as the source allowing for the adoption of various interpretations. Section 4 introduces the empirical findings on the Commission's practice. It reveals that during the time of centralized enforcement, the Commission had not limited the types of benefit that could be examined under the provision. Yet, following decentralization, the Commission has advocated confining such benefits to narrow economic

Competition Law (Diss. Utrecht University, 2016); Dunne, "Convergence in competition fining practices in the EU", 53 CML Rev. (2016), 453–492.

13. A series of papers by Botta, Svetlicinii and Bernatt provides an interesting exception. See Botta, Svetlicinii, and Bernatt, "The assessment of the effect on trade by the national competition authorities of the "new" Member States: Another legal partition of the internal market?", 52 CML Rev. (2015), 1247–1276; Svetlicinii, Bernatt, and Botta, "The dark matter in EU competition law: Non-infringement decisions in the new EU Member States before and after Tele2 Polska", 43 EL Rev. (2018), 424–446.

14. Commission, Report on the functioning of Regulation 1/2003; Commission, Ten Years of Antitrust Enforcement under Regulation 1/2003.

15. Commission, Ten Years of Antitrust Enforcement under Regulation 1/2003, para 24.

efficiencies. Section 5 demonstrates that not all NCAs have adhered to the Commission's new approach, leading to a fragmented application of Article 101(3) throughout the EU. Section 6 focuses on the practice of the EU courts. It shows that although the courts have not fully endorsed the Commission's new approach they have not taken a clear stand on the matter. Section 7 discusses the implications of the findings, suggesting that they compromise the effectiveness, uniformity and legal certainty of the enforcement. Finally, section 8 concludes.

2. Methodology and definitions

The empirical database for this study was constructed by applying a systematic content analysis[16] on all Article 101 public enforcement proceedings[17] rendered by:

(i) the Commission, since the establishment of the EEC in 1958 until 2017;
(ii) the EU courts since the establishment of the EEC in 1958 until 2017. This includes appeals against the Commission's decisions and ECJ preliminary rulings; and
(iii) the NCAs of five representative Member States (France, Germany, Hungary, the Netherlands, and the UK)[18] since the entry into force of Regulation 1/2003 decentralizing the enforcement in May 2004 and until 2017. The database also includes public enforcement proceedings of the national provisions equivalent to Article 101, but does not include decisions of national courts.

For each case in which Article 101(3) is mentioned, the database specifies the *type of benefits* that were examined, and if such benefits justified an Article

16. On the systematic content analysis methodology, see Hall and Wright, "Systematic content analysis of judicial opinions", 96 *California Law Review* (2008); Kort, "Content analysis of judicial opinions and rules of law" in Schubert and Aubert (Eds.), *Judicial Decision Making* (Free Press, 1963); Tyree, "Fact content analysis of case law: Methods and limitations", 22 *Jurimetrics* (1981), 1–33; Neuendorf, *The Content Analysis Guidebook* (Sage, 2016).

17. This includes all public enforcement actions published in any form (decision, opinion, press release or reference in an annual report); and using any regulatory instrument (decisions on infringements, inapplicability, settlements, formal or informal commitments, decisions not to investigate or to terminate investigations, and formal or informal opinions on conduct of a specific undertaking).

18. The five Member States were chosen (out of the 28 EU Member States) by employing a purposive-heterogeneous selection method. This selection aimed to capture a wide spectrum of legal and economic structures, traditions and approaches to Art. 101(3).

101(3) exception.[19] The classification of types of benefit follows a definition developed by a round table of experts and summarized in an OFT paper, which differentiates between three categories of benefits:[20]

First, *direct economic benefits* are cost and qualitative efficiencies that are enjoyed by users of the product or service covered by the agreement. These benefits either directly affect the price or directly provide additional non-price value for consumers, such as new products, improvement of quality and greater product variety.

Second, *indirect economic benefits* are cost and qualitative efficiencies that do not occur in the market in which the agreement takes place or have direct impact. Such benefits arise, for example, in two-sided markets. An agreement concluded on one side of the market could produce indirect benefits for consumers on the other side of the market.

Finally, *non-economic benefits* are not directly related to the characteristics of the product or service of the agreement in question. These benefits are non-pecuniary and are often more subjective than direct or indirect economic benefits. They include cultural interests, environmental benefits (that are not directly valued by consumers within the relevant market), financial stability, or the promotion of national or international interests.

The differences between the three categories can be illustrated by the example of an agreement between manufacturers of paper used for printing journals, agreeing to combine production means, set a minimum price for the paper sold, and change to greener production methods.[21] Undoubtedly, a reduction in the paper prices due to economies of scale is a benefit that may be considered under Article 101(3) (direct economic benefit). Benefits to the journals' advertisers may also possibly be taken into account. For example, a reduction in the price of paper could lead to a reduction in the price of journals. Subsequently, the number of subscribers may increase, rendering advertisements more effective (indirect economic benefit). Finally, the agreement could also generate indirect environmental benefits for society as a whole. For example, greener production methods could reduce the amount of trees cut down and pollution levels (non-economic health and environmental benefits).

19. Under Regulation 1/2003, Art. 101(3) is a directly applicable *exception*. The term *exemption* is closely related to the old enforcement system of Regulation 17/62, in which undertakings had to notify their agreements to the Commission to benefit from the Article. Therefore, this paper refers to Art. 101(3) *exemptions* with respect to decisions granted under the old notification regime, and *exceptions* for decisions granted following the entry into force of Regulation 1/2003.

20. Office of Fair Trading, op. cit. *supra* note 6, paras. 3.3–3.17.

21. This example is based on the one presented ibid., para 3.13.

The distinction between the different categories of benefits is not dichotomous. It represents a scale that essentially relates to the *degree of remoteness*. Benefits generated to remote beneficiaries are more likely to be characterized as an indirect economic benefit than as a direct economic benefit. Moreover, a high degree of remoteness makes a benefit more intangible, and hence more similar to a non-economic benefit.[22] Therefore, the coding of cases, as presented below, includes sub-categories for borderline cases that may be classified under multiple categories.

The remainder of this paper is dedicated to exploring how the types of relevant benefits have changed over time and between the competition authorities. However, since systematic content analysis is rarely used in legal scholarship on EU competition law, it may be appropriate to dedicate a few words as to its assumptions and limitations.

Systematic content analysis of legal decisions focuses on cases as a representation of law as applied in practice. It demonstrates the factual and analytical richness of questions that come before competition authorities and courts, how undertakings structure their arguments, and how the authorities reason their decisions.[23] At the same time, such a study also has certain limitations. In particular, content analysis is inherently restricted to endogenic information extracted from the proceedings examined, without reference to exogenous data. In other words, the database does not reflect considerations beyond the wording of a case. Moreover, clearly, not all Article 101 investigations result in fully reasoned administrative acts. While the database purports to cover all public enforcement of Article 101, aspiring to encompass all considerations of Article 101(3), it cannot fully code investigations that did not end with a reasoned decision.

Despite the above limitations, content analysis provides a valuable source of information to study the divergence between the various competition authorities. The empirical findings presented below reveal that the competition authorities have often indicated the types of benefit that were considered under Article 101(3), even when such decisions took the form of an informal opinion or press release. This corresponds to the obligation imposed on the Commission to state reasons in order to "allow the Court and all parties concerned to ascertain whether [Article 101(3) has] been applied

22. Ibid., para 3.13.

23. Lawlor, "Fact content analysis of judicial opinions", 8 *Jurimetrics* (1968), 107–130, at 107; Hall and Wright, op. cit. *supra* note 16, pp. 95–97.

correctly".[24] Cases in which such benefits were not fully or clearly indicated, however, are labelled accordingly.[25]

Moreover, the data within the cases, even if limited, is the main source of information guiding undertakings and competition authorities alike. As the next section shows, because EU law tells us little about the particularities in applying Article 101(3), such particularities are formed by a bottom-up approach. This is especially true following the decentralization. Under Regulation 1/2003, undertakings no longer notify their agreements to the Commission prior to their implementation; instead, they must self-assess whether their agreements can be approved under Article 101(3). Given the gap in the law, such an assessment is essentially based on principles enunciate in the EU court's judgments and the Commission's and NCAs' decisions.

3. Background: The gap in the law

From the early days of EU competition law, scholars, regulators and practitioners alluded to the uncertainty surrounding the types of benefit that can justify an Article 101(3) exemption.[26] Article 101(3) TFEU (ex. Art. 81(3) EC and Art. 85(3) EEC) stipulates that the prohibition on anti-competitive agreements may be inapplicable where an agreement contributes *"*to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit".

This vague wording raised two sets of important questions. First, the provision does not clearly define the *nature* of benefits that fall within its scope. From the wording of the provision it seems clear that cost-efficiencies related to production and distribution chains ("improving the production or

24. Joined Cases 8–11/66, *Noordwijks Cement Accoord*, EU:1967:75, pp. 93–94. This duty applies also to informal measures, such as rejection of complaints, see Joined Cases T-231 & 214/01, *Österreichische Postsparkasse* v. *Commission*, EU:T:2006:151, para 114.

25. See category "n/a" in Figures and Tables below.

26. E.g. Ehlermann, op. cit. *supra* note 6, p. 549; Monti, *EC Competition Law* (Cambridge University Press, 2007), pp. 88–123; Odudu, *The boundaries of EC Competition Law: the Scope of Article 81* (OUP, 2006), pp. 160–174; Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?* (Kluwer Law International, 2012), pp. 253–266; Wesseling, *The Modernisation of EC Competition Law* (Hart, 2000), pp. 77–113; Witt, *The More Economic Approach to EU Antitrust Law* (Hart, 2016), pp. 160–174; Sauter, op. cit. *supra* note 6, pp. 64–75; Sufrin, "The evolution of Article 81 (3) of the EC Treaty", 51 *The Antitrust Bulletin* (2006), 915–981, 933–936; Townley, op. cit. *supra* note 2, pp. 141–176; Monti, "Article 81 EC and public policy", 39 CML Rev. (2002), 1057–1099, 1057–1059, 1064–1066; Petit, "The guidelines on the application of Article 81(3) EC: A critical review", 4/1009 *Institut d'études juridiques Européennes Working Paper* (2009), 6–9.

distribution"), development of new technologies and products ("technical progress"), and economic growth ("economic progress") are covered by the provision. Yet, the consideration of less quantifiable benefits is more equivocal. Article 101(3) does not indicate whether industrial (e.g., protection of the national or the common market, development of industries, or stimulating employment) or public policies (e.g., promotion of culture, preservation of traditional forms of trade) may also constitute a relevant benefit.

Second, the provision also does not define the relevant *beneficiaries*. It indicates that "consumers" should receive a fair share of the resulting benefits. Yet, it does not specify, for instance, whether only direct benefits to direct consumers could be considered or if indirect benefits to consumers in other markets or to society as a whole could also play a role. Moreover, it does not stipulate when such benefits should be realized. Can benefits to future generations compensate for the harm caused to competition in the present?[27]

The answers to these questions go to the core of EU competition law. Accepting a broad variety of benefits and beneficiaries limits the application of Article 101 in favour of promoting other public policies, while a stricter interpretation gives precedence to competition policy. Accordingly, the answers to these questions reflect different political theories of markets and societies, which manifest different national preferences towards the balancing of the economic, social and political goals of the EU.[28] Moreover, in the decentralized enforcement regime of Regulation 1/2003, the answers to these questions define the boundaries of EU integration. A broad interpretation of Article 101(3) leaves greater room for the promotion of national interests *vis-à-vis* the EU competition policy.[29]

Despite their importance, these questions were not subject to debate during the lengthy political process preceding the adoption of the Treaty of Rome of 1958.[30] Instead, the wording of Article 101(3) was closely modelled after French law,[31] the only Member State with a fully enacted competition regime

27. Also see Office of Fair Trading, op. cit. *supra* note 6, para 1.6.

28. Townley, op. cit. *supra* note 2, p. 46; Basedow, op. cit. *supra* note 1, p. 431; Frazer, op. cit. *supra* note 2, p. 623.

29. Brook and Cseres, "Member state interest in the enforcement of EU competition law: a case study of Article 101 TFEU", in Varju (Ed.), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, 2019) (forthcoming).

30. Ehlermann, op. cit. *supra* note 6, pp. 538–540; Sufrin, op. cit. *supra* note 2, pp. 919–920; Goyder, *Goyders's EC Competition Law* (OUP, 2009), pp. 30–39; Forrester, "The modernisation of EC antitrust policy: Compatibility, efficiency, legal security", 2001 *European Competition Law Annual* (2002), 75–110, at 89–91.

31. Similarly to its EU counterpart, Art. 59 ter of the French Price Ordinance No. 45-1483 of 30 June 1945 provided an exception for agreements allowing undertakings to "improve and extend the markets for their products or to ensure further economic progress by means of

at the time.[32] Favouring consensus over clarity, the open-texture wording entrusted the enforcers of the provision with a broad discretion to shape the scope of the provision, and in particular, to decide what types of benefit to take into account.

This gap in the law, however, had only limited implications in the past. The old enforcement regime of Regulation 17/62 provided the Commission with the *sole power* to apply Article 101(3) in public enforcement proceedings.[33] In fact, the Commission's monopoly to issue Article 101(3) exemptions was based on the assumption that it was the only institution competent to apply the provision in a coherent and uniform manner. National enforcers, it was feared, would incorporate domestic interests in their decisions.[34]

As a result of the procedural setting of Regulation 17/62, only the Commission had the power to determine what types of benefit could be considered under Article 101(3), subject to the scrutiny of the EU courts. Perhaps unsurprisingly, the next section reveals that the Commission elected not to limit its discretion in this regard. Supported by the EU courts, it adopted a broad reading of Article 101(3), incorporating both economic and non-economic benefits.

4. Article 101(3) in the Commission's practice

Figure 1 describes the categories of benefits that were invoked by undertakings (left graph) and accepted by the Commission (right graph) for

rationalization and specialization". English translation from Graupner, *The rules of competition in the European Economic Community: A study of the substantive law on the comparative law basis with special reference to patent licence agreements and sole distributorship agreements* (Springer Science & Business Media, 2012), pp.170–173.

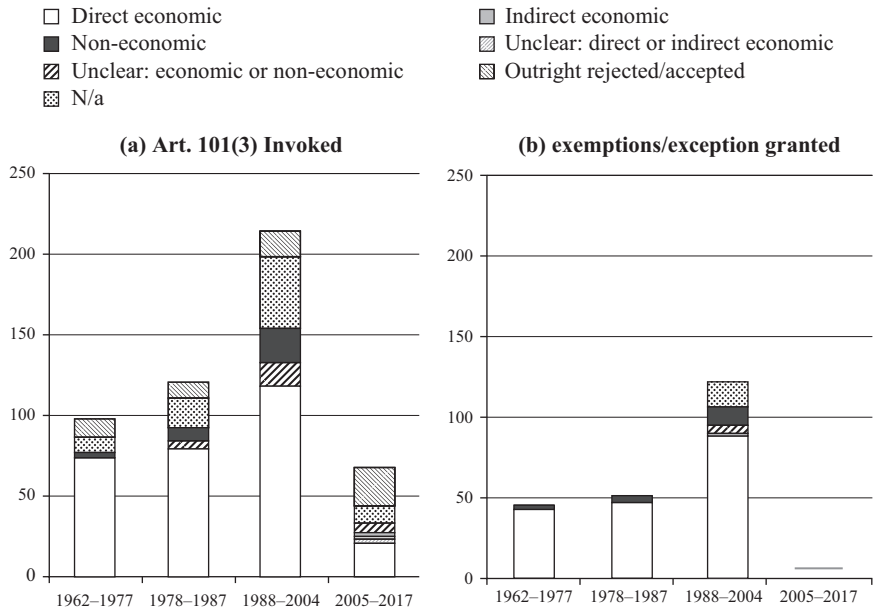
32. In particular, during the negotiations of the Rome Treaty, Germany was busy adopting its own competition law. See Mestmäcker, "The EC Commission's modernization of competition policy: a challenge to the community's constitutional order", 1 EBOR (2000), 223–240, at 223–224; Pace and Seidel, "The drafting and the role of Regulation 17", in Patel and Schweitzer (Eds.), *The Historical Foundations of EU Competition Law* (OUP, 2013), pp. 59–62.

33. Council Regulation 17/62 (EEC), First Regulation implementing Articles 85 and 86 of the Treaty, O.J. 1962, p. 13.

34. This position was summarized in the Commission's Annual report of 1993, para 190, noting: "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." Also see Modernization White Paper, para 17; Wils, op. cit. *supra* note 6, p. 607; Gerber, op. cit. *supra* note 6, 1239; Ehlermann, op. cit. *supra* note 6, pp. 537–538; Temple Lang, op. cit. *supra* note 6, p. 3; Jones, op. cit. *supra* note 6, pp. 787–788.

justifying an Article 101(3) exemption/exception.[35] The empirical findings are also summarized in Table 1, which specifies the number of Article 101 TFEU proceedings in which each type of benefits was invoked and accepted. The brackets indicate the percentage of instances in which the types of benefit were examined, from the total number of instances in which Article 101(3) was invoked/accepted during each period.

Figure 1: Types of benefits under Article 101(3) TFEU – Commission



The figure specifies the number of instances each category of benefits was invoked and accepted. In some proceedings, more than one benefit was examined.

35. The figure distinguishes between four enforcement periods of the Commission's practice, as established by previous scholars: (i) 1958–1977, from the Treaty of Rome to *Metro I* judgment; (ii) 1978–1987, from *Metro I* to signing the Single European Act (SEA); (iii) 1988-Apr. 2004, from SEA to the entry into force of Regulation 1/2003; and (iv) May 2004–2017, the post-decentralization era. See Van Rompuy, op. cit. *supra* note 26, p.122; Wesseling, op. cit. *supra* note 26, p. 9. For a detailed empirical analysis of the development of Art. 101(3) across the four enforcement periods, see Brook, *Coding non-competition interests under Article 101 TFEU: A quantitative and qualitative study* (PhD dissertation, forthcoming).

Table 1: Number of proceedings according to types of benefits under Article 101(3) – Commission									
	Article 101(3) argued/ accepted	Direct economic	Unclear: direct or indirect economic	Indirect economic	Unclear: economic or non-economic	Non-economic	Other	Outright rejected or accepted	n/a
Article 101(3) invoked by undertakings									
1958-1977	78	75 (*77%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	2 (*2%*)	0 (*0%*)	10 (*10%*)	10 (*10%*)
1978-1987	97	80 (*66%*)	0 (*0%*)	0 (*0%*)	4 (*3%*)	8 (*7%*)	0 (*0%*)	10 (*8%*)	19 (*16%*)
1988-Apr. 2004	154	117 (*55%*)	0 (*0%*)	2 (*1%*)	15 (*7%*)	20 (*9%*)	0 (*0%*)	15 (*21%*)	45 (*7%*)
May 2004-2017	45	21 (*31%*)	3 (*4%*)	3 (*4%*)	6 (*9%*)	0 (*0%*)	0 (*0%*)	24 (*35%*)	11 (*16%*)
Article 101(3) exemption/exception granted									
1958-1977	33	42 (*98%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	1 (*2%*)
1978-1987	39	46 (*94%*)	0 (*0%*)	0 (*0%*)	1 (*2%*)	2 (*4%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)
1988-Apr. 2004	90	87 (*72%*)	0 (0%)	2 (*2%*)	5 (*4%*)	10 (*8%*)	0 (*0%*)	1 (*1%*)	16 (*13%*)
May 2004-2017	0	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)

Figure 1 and Table 1 point to a transformation in the invocation and acceptance rates of the different categories of benefits across the enforcement periods. As detailed below, they show that during the period of centralized enforcement, the undertakings invoked – and the Commission accepted – various types of benefit as a justification for an exemption, including non-economic benefits. Yet, following decentralization, Article 101(3) was essentially invoked with reference to economic benefits and was never accepted by the Commission as a justification for concluding an anti-competitive agreement.

4.1. *Centralized enforcement era: no limitation on the relevant types of benefit*

The possibility of relying on indirect and non-economic benefits to justify an Article 101(3) exemption was rarely discussed during the first twenty years of the EU competition law regime. As Figure 1 and Table 1 show, during that period, Article 101(3) almost exclusively pertained to direct economic benefits (77% of the instances in which the provision was invoked, and 98% of the instances in which it was accepted).

The prospect of including broader types of benefit was first formally established by the ECJ landmark judgment in *Metro I* (1977).[36] The case examined the operation of Saba, a manufacturer of electronic consumer goods, which established a selective distribution system in Germany. The Commission exempted the selective distribution system under Article 101(3), given its economic benefits.[37] It accepted Saba's submission that the selective distribution enhanced the quality of its service and facilitated inter-brand

36. Case 26/76, *Metro* v. *Commission*, EU:C:1977:167.

37. *SABA* (IV/847), O.J. 1976, L 28/19, paras. 38–50. The exemption was granted following modifications to the criteria for the appointment of wholesalers.

competition.[38] The Commission's decision was challenged by Metro, a wholesaler who was denied access to Saba's distribution system.

In a groundbreaking judgment, the ECJ agreed with the Commission that the system should be exempted. Yet, the Court followed a different line of reasoning. While the Commission based its exemption on direct economic benefits, the Court resorted to a teleological interpretation of Article 101. The Court held that Article 101, read in conjunction with then Article 3 EEC,[39] entails that the appropriate standard for an exemption is not necessarily one of *perfect* competition. Instead, it introduced the notion of *workable competition*, in which the degree of competition protected under Article 101 is that which is "necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty."[40] The Court maintained that the powers conferred upon the Commission under Article 101(3) show that the requirement of workable competition could be reconciled with "safeguarding of objectives of a different nature", if they comply with the latter two conditions of Article 101(3).[41] Consequently, the Court concluded that non-economic benefits related to stabilizing the provisions of employment justified granting an exemption.[42]

With this somewhat vague statement, the Court opened the door for incorporating non-economic benefits under Article 101(3). The empirical findings summarized in Figure 1 and Table 1 confirm that following *Metro I*, the Commission accepted broad types of benefit as a justification for exemptions. In addition to direct and indirect economic benefits, the Commission justified exemptions on the basis of non-economic benefits, such as environmental benefits, development of sports, and allocation and supply of scarce national resources among States.[43]

The Commission's decision in *CECED* (1999) provides a prominent example. The Commission exempted an agreement between an association of manufacturers of domestic appliances and national trade associations, by

38. Ibid., paras. 38–42; Case 26/76, *Metro* v. *Commission*, at pp. 1884, 1886–1887, 1890.

39. Art. 3 EEC laid down a list of the Community "activities". A comparable article was not included in the Lisbon Treaties.

40. Case 26/76, *Metro* v. *Commission*, para 20.

41. Ibid., paras. 21–22.

42. Ibid., para 43.

43. For example, the Commission exempted agreements contributing to equitable distribution of oil supplies between countries (*International Energy Agency* (IV /30.525), O.J. 1983, L 376/30); environmental and industrial policy considerations (*Ford/Volkswagen* (IV/33.814), O.J. 1993, L 20/14; (*Exxon/Shell* (IV/33.640), O.J. 1994, L 144/20); (*Philips-Osram* (IV/34.252), O.J. 1994, L 378/37); (*EACEM energy saving commitment* (IV/C-3/36.494), O.J 1998, C 12/2); (*ARA, ARGEV and ARO* (COMP D3/35470 and COMP D3/35473), O.J. 2004, L 75/59); and the development of sports (*EBU/Eurovision System* (IV/32.150), O.J. 1993, L 179/23).

which their members agreed not to manufacture or import washing machines that fail to meet a certain energy efficiency criteria.[44] The exemption was justified, *inter alia*, by the *collective non-economic environmental benefits* resulting from a reduction in energy consumption. The Commission pointed to the agreement's significant contribution to the management of energy resources, reduction of CO2-emissions and efforts to combat global warming.[45] Furthermore, the Commission considered *cross-generational benefits*, referring to the agreement's "contribution to the EU's environmental objectives, *for the benefit of present and future generations*".[46]

Notably, the empirical findings reveal that the Commission interpreted the ECJ's judgment in *Metro I* in a broad manner. In *Metro I*, the Court defined the workable competition standard as the degree of competition necessary for the "attainment of the objectives of the Treaty".[47] This wording implies that non-economic interests may justify an Article 101(3) exemption *only* if they are listed as an EU objective.[48] Yet, in practice, the Commission did not reserve the application of the provision to the limited benefits rooted in the Treaties, and applied the provision without distinction also to interests lacking an EU law basis.[49] Hence, the Commission took into account non-economic benefits that are not, or were not at that time of the Commission's decision, listed as objectives of the Treaties. For example, it examined employment considerations even before such interests were included in the Treaties,[50] and assessed national rather than EU interests under the provision.[51]

In addition to the proceedings portrayed by Figure 1 and Table 1, the Commission referred to non-economic benefits to specify or add weight to

44. *CECED* (IV.F.1/36.718), O.J. 2000, L 187/47.

45. Ibid., paras. 52–56.

46. Emphasis added. Commission, Annual report (2000), p. 40.

47. Case 26/76, *Metro* v. *Commission*, para 20.

48. According to the Treaty of Rome, which was in force when *Metro I* was rendered, those objectives included: market integration (Art. 3(a)-(c) and (h) EEC); common policy in the sphere of agriculture and transport (Art. 3(d)-(e) EEC); competition (Art. 3(f) EEC); balanced payment methods (Art. 3(g) EEC); the creation of the European Social Fund and European Investment Bank (Art. 3(i)-(j) EEC); and the association of overseas countries and territories to increase and promote jointly economic and social development (Art. 3(k) EEC).

49. Moreover, the empirical findings reveal that the Commission had not indicated the legal source of the benefit justifying the exemption in the vast majority of its decisions.

50. For instance, in *SSI* (IV/29.525 and IV/30.000), O.J. 1982, L 323/1, para 141, the Commission considered guaranteeing a steady income to tobacco wholesalers and retailers, and in *Grohe's distribution system* ((IV /30.299), O.J. 1985, L 19/17, paras. 25–27 and *Ideal-Standard's distribution system* (IV/30.261), O.J. 1985, L 20/38, pp. 26–27 the survival of the traditional plumbing trade. Also see Hornsby, "Competition policy in the 80s: More policy less competition", 12 EL Rev. (1987), 79–101, at p. 93.

51. *International Energy Agency* (IV /30.525), O.J. 1983, L 376/30; *DSD* (COMP/34493 and others), O.J. 2001, L 319/1.

Article 101(3) exemptions that were mostly based on other grounds. This practice was especially common when considering environmental, employment and industrial policy benefits.[52] In *Synthetic fibres* (1984), for example, the Commission explained that the coordinated closure of plants "will also make it easier to cushion the social effects of the restructuring by making suitable arrangements for the retraining and redeployment of workers made redundant."[53] Similarly, in *Ford/Volkswagen* (1992), it referred to investment, employment and harmonized development of the EU as benefits that were not sufficient to vindicate an exemption but should nevertheless be taken into account.[54] The reference to non-economic benefits in those proceedings was done in a complementary fashion, making it hard to understand what weight was given to them.

In conclusion, the empirical findings show that the Commission did not limit the types of benefit that could be examined under Article 101(3) during the era of centralized enforcement. Rather, it embraced the leeway afforded by the wording of the Treaties to consider generously economic and non-economic benefits within the enforcement of EU competition law.

4.2. *Decentralized enforcement era: narrowing down Article 101(3)*

The old centralized enforcement system, as mentioned, was based on the assumption that only the Commission was able to exercise the considerable discretionary power required to apply Article 101(3) in a coherent and uniform manner. Yet, by the late 1990s the Commission had drastically

52. The Commission took into account environmental benefits as additional justifications in *Bayerische Motoren Werke AG* (IV/14.650), O.J. 1975, L 29/1, para 24; *GEC-Weir Sodium Circulators* (IV/29.428), O.J. 1977, L 327/26, 8; *Carbon Gas Technologie* (IV /29.955), O.J. 1983, L 376/17, 3–4; and *BBC Brown Boveri* (IV/32.368), O.J. 1988, L 301/68, para 23. Employment benefits in: *Synthetic fibres* ((IV I 30.810), O.J. 1984, L 207/17, para 37; *Ford/Volkswagen* (IV/33.814), O.J. 1993 L 20/14, para 36; *Stichting Baksteen* (IV/34.456), O.J. 1994, L 131/15, para 27. Other industrial policies in *P & I CLUBS* (IV/30.373), O.J. 1985, L 376/2, para 56; *Phoenix-GlobalOne* (IV/35.617), O.J. 1996, L 239/57, para 60; *Atlas* (IV/35.337), O.J. 1996, L 239/23, para 51; *IFPI 'Simulcasting'* (COMP/C2/38.014), O.J. 2003, L 107/58, para 91; *UK Network Sharing Agreement* (COMP/ 38.370), O.J. 2003, L 200/59, para 139; MAN/SAVIEM (26612), O.J. 1972, L 31/29, para 29; *Bayerische Motoren Werke AG* (IV/14.650), O.J. 1975, L 29/1, para 24; *United Reprocessors GmbH* (IV/26.940a), O.J. 1976, L 51/7, 6; *Carbon Gas Technologie* (IV /29.955), O.J. 1983, L 376/17, 3–4; *Optical fibres* (IV/30.320), O.J. 1988, L 236/30, para 59; *Computerland* ((IV / 32.034), O.J 1987, L 222/12, para 31; *BBC Brown Boveri* (IV/32.368), O.J. 1988, L 301/68, para 23; *PT-MCI* (IV/34.857), O.J. 1994, L 223/36, paras. 53–54; *Rapid delivery services* (IP-94-850); *CECED* (IV.F.1/36.718), O.J. 2000, L 187/47, para 50.

53. *Synthetic fibres* (IV I 30.810), O.J. 1984, L 207/17, para 37.

54. *Ford/Volkswagen* (IV/33.814), O.J. 1993 L 20/14, para 36.

changed its approach. In its radical, largely unforeseen[55] Modernization White Paper of 1999, the Commission proposed to fully decentralize the application of Article 101. In the context of the enlarged EU with more than twenty Member States, the Commission argued, the NCAs and national courts should apply Article 101(3) in parallel with the Commission.[56] This proposal was largely accepted and implemented by virtue of Regulation 1/2003.

The decentralized enforcement system aspires to uniformity throughout the EU.[57] To that end, it obliges the NCAs to apply the EU competition law provisions where an agreement affects trade between Member States. The Regulation further declares that in such an event, EU competition law enjoys supremacy over conflicting national competition laws.[58] Nevertheless, from the very launch of its initiative, the Commission was concerned that the decentralized enforcement would result in the incorporation of national interests in the application of Article 101(3).[59] To avoid such undue influence, the Commission reframed Article 101(3) in the Modernization White Paper as an "objective" tool restricted to an economic assessment.[60] It 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*."[61]

55. Sufrin, op. cit. *supra* note 2, p. 918; Wils, "Ten years of Regulation 1/2003-A retrospective", 4 JECLAP (2013), 293–301, at 294; Norberg, "Making a virtue out of necessity and at the same time strengthening European competition law enforcement", in Nicholas, Monti, Vesterdorf, Westbrook, Wildhaber (Eds.), *Economic Law and Justice in Times of Globalization* (Nomos, 2007), pp. 527–528.

56. Modernization White Paper, para 46.

57. Regulation 1/2003, Art. 16 and preambles 1, 22; Modernization White Paper, paras. 44, 47.

58. Regulation 1/2003, Art. 3.

59. Commission, Proposal for a Directive of the European Parliament and the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market COM(2017)142, p. 17; Riley, "EC antitrust modernisation: The Commission does very nicely – thank you! Part one: Regulation 1 and the notification burden", 24 ECLR (2003), 657–672, at 659; Temple Lang, op. cit. *supra* note 6; Guidi, op. cit. *supra* note 12, pp. 93–136.

60. Petit, op. cit. *supra* note 26, p. 6; Van Rompuy, op. cit. *supra* note 26, p. 257; Sufrin, op. cit. *supra* note 2, p. 964; Townley, op. cit. *supra* note 2, p. 80; Monti, op. cit. *supra* note 26, (2002) 1092 and (2007) p. 21; Cseres, "Multi-jurisdictional competition law enforcement: The interface between European competition law and the competition laws of the new Member States", 3 *European Competition Journal* (2007), 465–502, at 169; Komninos, "Non-competition concerns: resolution of conflicts in the integrated Article 81 EC", University of Oxford, Working Paper (L) 8.05 (2005), p. 17; Merol, and Waelbroeck (Eds.), *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* (GCLC Annual Conference, 11–12 Jun. 2009. Groupe de Boeck, 2010), p. 82.

61. Emphasis added. Commission Modernization White Paper, para 57. Also see para 72.

Along the same lines, as part of its modernization package of 2004, the Commission introduced its Article 101(3) Guidelines (the "Guidelines"). The Guidelines pronounce the Commission's view on the substantive assessment criteria of the provision, aiming to direct the application by the NCAs.[62] The Guidelines advocate a narrow reading of the provision. They limit the *nature* of relevant benefits, by prescribing that non-economic benefits can only be taken into account if they are "goals pursued by other Treaty provisions".[63] Moreover, they limit the relevant *beneficiaries*, by stating that in principle, only direct economic benefits can be taken into account.[64]

Commentators quickly pointed out that the Commission's new interpretation of the provision is incompatible with the Commission's and court's previous case law, which reserved significant room for indirect and non-economic benefits.[65] Ehlermann, the former Director-General of DG COMP until 1995, suggested a restricted interpretation of the Modernization White Paper, explaining: "[i]t would probably be an exaggeration to assume that, according to the Commission, non-economic considerations are to be totally excluded from the balancing test required by Article [101](3). Such an interpretation *would hardly be compatible with the Treaty, the Court of Justice's case law, and the Commission's own practice*".[66]

It is difficult to evaluate the degree to which the Commission implemented its new approach in practice. As Figure 1 and Table 1 indicate, the Commission did not accept an Article 101(3) defence following entry into force of Regulation 1/2003.[67] Moreover, in around half the proceedings following decentralization, the Commission rejected the applicability of Article 101(3) outright or did not discuss it in details, noting that no benefit

62. Guidelines on the application of Article 81(3), point 4.

63. Ibid., point 42.

64. Ibid., point 43. However, the Guidelines state that the Commission would take into account indirect economic benefits provided that the two markets are related and the groups of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.

65. German Monopolies Commission, Cartel Policy Change in the European Union? On the European Commission's White Paper of 28 April 1999 (2000), para 52; Townley, op. cit. *supra* note 2, pp. 178–181; Gerard, "The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself?" in Bourgeois and Waelbroeck (Eds.), *Ten Years of Effects-Based Approach in EU Competition Law Enforcement* (2012), pp. 36–38; Witt, op. cit. *supra* note 26, pp. 261–295.

66. Emphasis added. Ehlermann, op. cit. *supra* note 6, p. 549; Also see Van Rompuy, op. cit. *supra* note 26, pp. 255–256; Jones, op. cit. *supra* note 6, pp. 791.

67. Although the Commission had not accepted claims for Art. 101(3) individual exceptions, it did hold that certain agreements benefited from the Block Exemption Regulations issued pursuant to this Article.

was identified[68] or sufficiently substantiated[69] (see "outright rejected or accepted" and "n/a" categories in Figure 1 and Table 1). The rest of the proceedings have mostly involved the consideration of direct economic benefits. Consequently, the Commission was not required to address the change in its approach or to clarify whether and how non-economic benefits could justify an exception.

As argued elsewhere, the decline in the invocation rate of Article 101(3) in general, and of non-economic benefits in particular, could be explained by the priority setting powers granted to the competition authorities pursuant to Regulation 1/2003; while under the centralized enforcement system the Commission had to examine all notified agreements, following decentralization the Commission and NCAs have mostly focused on pursuing hard-core restrictions on competition, in which the conditions of Article 101(3) are unlikely to materialize.[70]

The Commission's policy papers, combined with the lack of decisions clarifying the successful application of Article 101(3) in the decentralized era, create great uncertainties as to the relevant types of benefit under the provision. This is especially true since the Commission does not have the legal competence to ignore the EU courts' interpretation of the provision. Clearly, the Commission cannot invoke soft law mechanisms or use its decisional practice to set aside binding principles established by the courts' case law. Moreover, as the next section discloses, not all competition authorities have converged to the Commission's new approach.

5. Divergence in the era of decentralized enforcement

Regulation 1/2003 gave NCAs the task to *apply* Article 101(3) directly. As such, it delegated the decision on what types of benefit to consider under the provision from the exclusive competence of the Commission also to the national level. However, the development of EU competition *policy* still remains the Commission's prerogative.

68. *Souris* (COMP/C-3/37.980), paras. 143–158; *Bitumen Nederland* (COMP/38.456), paras. 162–166*; French beer market* (COMP/C.37.750/B2), para 75; *Shrimps* (AT.39633), para 438; *Ordre National des Pharmaciens en France (*ONP*)* (COMP/39.510), paras. 703–706; *Barême d'honoraires de l'Ordre des Architectes belges* (COMP/38.549), paras. 104–110; *CISAC* (COMP/C2/38.698), paras. 231–237; *Alternators and Starters* (AT.40028), para 68; *Trucks* (AT.39824), para 87; *Thermal Systems* (AT.39960), para 80; *Lighting Systems* (AT.40013), para 53.

69. *Lundbeck* (AT.39226), paras. 1221–1231; *Fentanyl* (AT.39685), paras. 406–439; *Perindopril (Servier)* (AT.39612), paras. 2074–2122.

70. See Brook, "The disappearance of Article 101(3) in the realm of Regulation 1/2003: An empirical coding", 4 *Pázmány Law Review* (2016), 273–290 and Brook, op. cit. *supra* note 35.

Accordingly, the Regulation provides that only the Commission can adopt a *positive decision*, that is to say a binding decision declaring that an agreement is compatible with Article 101.[71] NCAs can only find that there are *no grounds for action* on their part, where on the basis of the information in their possession the conditions for establishing an Article 101 infringement are not met.[72] As confirmed by the ECJ in *Tele2Polska* (2011), an NCA cannot make a binding decision declaring that Article 101 is not breached. It can only explain why an investigation was discontinued – for instance, because it believes that the conditions of Article 101(3) were fulfilled – while the Commission or another NCA may reach a different decision.[73] The limitation of the NCAs' powers was justified by the need to ensure a uniform administration of EU competition law across Member States. Because an NCA can only adopt a non-binding finding of no grounds for action, the Commission may subsequently reach a different conclusion.[74]

The empirical findings disclose that there was no single form for such "no grounds for action" findings. Some were adopted as part of a formal decision (in which the findings of inapplicability are not binding in themselves), while others were included in informal measures or press releases. Some were short and concise, while others provided a full, detailed analysis.[75]

Despite their non-binding, and often informal nature, no grounds for action findings are critical for understanding the national approaches to Article 101(3). As mentioned, they are the main available source of information communicating the NCAs' interpretations. Although they are not binding *de*

71. Regulation 1/2003, Art. 10.

72. Regulation 1/2003, Art. 5.

73. Case C-375/09, *Tele2 Polska,* EU:C:2011:270, paras. 21–30. This case related to Art. 102 TFEU. Nevertheless, the reasoning applies also to Art. 101.

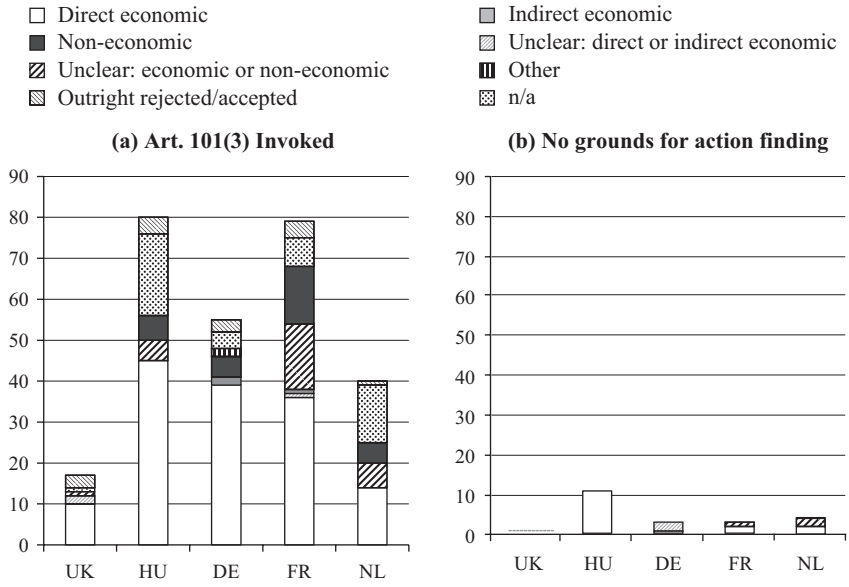
74. Ibid, paras. 27–28.

75. This is reflected by the no grounds for action findings summarized in Figure 2 and Table 2 below. In Hungary, for example, all of the ten inapplicability findings formed part of a formal decision (*Fertilizers* (Vj-169/2003/68); *Card issuance* (Vj–132/2004/26); *Funeral service in Szolnok* (Vj-200/2004/13); *Pont Audio* (Vj-178/2004/5); *Tomb construction activities in Túrkeve* (Vj-128/2004/23); *Rába Group and Integris* (Vj-23/2005); *Rába IT agreement* (Vj-207/2004/51); *British American Tobacco group (BAT)* (Vj-94/2005); *Euronics* (Vj-191/2006/10); *Motor oils and lubricants* (Vj-7/2008/178)). In Germany, the three inapplicability decisions were part of decisions to terminate the proceedings (*Fibre telecommunications networks* (B7- 43/09); *Coordination of tenders for sales packaging waste collection services by compliance schemes* (B4–152/07); *Construction of corvettes* (press release of 19 Jul. 2017)). The two former cases included a detailed reasoning. In France, one of the three inapplicability decisions was taken as part of an informal opinion (*Electricity purchases by intensive industrial users* (05-A-23)), while the other two were part of a formal decision (*Supply of orthotics – UFOP* (07-D-05) and *Exchanges Check-Image Fee* (10-D-28)). In the Netherlands, the four findings of inapplicability were part of highly detailed informal opinions (*Preference policy Medicine* (4713); *MSC Shrimp Fishery* (7011/23.827); *Geldservice Nederland B.V.* (7512); *ATMs in rural areas* (14.1134.15)).

jure, such findings have an important role in guiding the practices of undertakings and competition authorities, thus carrying a *de facto* precedential value.

Against this background, Figure 2 presents the number of instances in which each category of benefits was invoked by undertakings (left graph) and accepted by the five NCAs as a justification for a no grounds for action finding (right graph).

Figure 2: Types of benefits under Article 101(3) TFEU – NCAs (May 2004-2017)



The figure specifies the number of instances in which each category of benefits was invoked or accepted. In some proceedings more than one benefit was mentioned.

The empirical findings are also summarized in Table 2. Similarly to Table 1 above, the brackets indicate the percentage of cases in which each type of benefits was examined out of the total number of instances in which Article 101(3) was invoked and accepted in front of the relevant NCA.

Table 2: Number of proceedings according to types of benefits under Article 101(3) – NCAs (May 2004-2017)									
	Article 101(3) argued or accepted	Direct economic	Unclear: direct or indirect economic	Indirect economic	Unclear: economic or non-economic	Non-economic	Other	Outright rejected or accepted	n/a
Article 101(3) invoked by undertakings									
France	50	36 (*46%*)	1 (*1%*)	1 (*1%*)	16 (*20%*)	14 (*18%*)	0 (*0%*)	4 (*5%*)	7 (*9%*)
Germany	43	39 (*71%*)	0 (*0%*)	2 (*4%*)	0 (*0%*)	5 (*9%*)	2 (*4%*)	3 (*5%*)	4 (*7%*)
Hungary	60	45 (*56%*)	0 (*0%*)	0 (*0%*)	5 (*6%*)	6 (*8%*)	0 (*0%*)	4 (*5%*)	20 (*25%*)
The Netherlands	25	14 (*35%*)	0 (*0%*)	0 (*0%*)	6 (*15%*)	5 (*13%*)	0 (*0%*)	1 (*3%*)	14 (*35%*)
UK	19	10 (*59%*)	2 (*12%*)	0 (*0%*)	1 (*6%*)	0 (*0%*)	0 (*0%*)	3 (*18%*)	1 (*6%*)
Article 101(3) exception granted									
France	3	2 (67%)	0 (*0%*)	0 (*0%*)	1 (*33%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)
Germany	2	1 (*33%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	2 (*67%*)	0 (*0%*)	0 (*0%*)
Hungary	10	11 (*100%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)
The Netherlands	4	2 (*50%*)	0 (*0%*)	0 (*0%*)	2 (*50%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)	0 (*0%*)
UK	0	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)	0 (n/a)

The following sections demonstrate that the NCAs' approaches to Article 101(3) can be roughly divided into three groups: NCAs that followed the Commission's new approach and restricted the provision to direct economic benefits (UK and Hungarian NCAs); those that also took into account indirect and non-economic benefits (French and Dutch NCAs); and those which took an intermediate approach or gave deference to the legal source of the restriction of competition, for instance when an agreement was an inherent part of the implementation of a national scheme (the German NCA).

5.1. *NCAs following the Commission*

The first group of NCAs accepted the Commission's new approach, and restricted Article 101(3) to direct economic benefits. The UK NCA, for example, declared that it would only take into account such benefits by reference to the Commission's Guidelines.[76] Even when the UK NCA examined an agreement that might have generated other types of benefit, it focused on narrow economic benefits. In its informal opinion on *Rural broadband wayleave rates* (2012), for instance, it assessed rate recommendations proposed by the National Farmers' Union and the Country Land and Business Association for wayleaves for broadband in rural areas. The analysis centred on quality improvements and cost savings stemming from the recommended rates; it did not examine potential social benefits

76. *Tobacco* (CE/2596-03), para 7.58. The decision was annulled by the CAT judgment (1160/1/1/10, 1161/1/1/10, 1162/1/1/10, 1163/1/1/10, 1164/1/1/10, 1165/1/1/10); *Short-form opinion of Rural broadband wayleave rates*, para 8.12.

emanating from improving services in rural areas.[77] Similarly, in *Modelling Sector* (2016), in which the UK NCA examined collusion between modelling agencies and their trade association over modelling services prices, it declared that improvements to the working conditions of models could not be examined under Article 101(3), but only benefits that affect consumers, such as price reductions.[78]

By the same token, the Hungarian NCA held that non-economic benefits – such as employment, price stability, diversity of literature, promotion of research and education, fight against unlicensed software and freedom of the press – could *not* be incorporated under Article 101(3).[79] It only accepted Article 101(3) defences with reference to direct economic benefits.[80]

The practices of the UK and Hungarian NCAs illustrate the strong impact of the Commission's soft law mechanisms in directing national administration of EU competition law. Like the Commission, these NCAs have refused to take into account benefits that justified exemptions in the past. Yet, as we see below, not all NCAs have converged to the Commission's new approach.

5.2. *NCAs rejecting the Commission's new approach*

The second group of competition authorities interprets Article 101(3) to account for indirect and non-economic benefits. Similar to the old approach of the Commission and the EU courts, such authorities have taken into account a variety of benefits, including those for society as a whole and for future generations.[81]

The empirical findings presented in Figure 2 and Table 2 affirm that the Dutch NCA followed this approach. The national public debate surrounding the application of competition law to sustainability agreements presents the implications of such policy choice. The possibility of incorporating sustainability concerns under Article 101(3) was confirmed by the Dutch

77. *Short-form opinion of Rural broadband wayleave rates*, paras. 8.12, 8.16–8.17. In comparison, as detailed in the next section, the Dutch NCA had taken into account broader benefits in the comparable case of *ATMs in rural areas* (14.1134.15).

78. *Modelling sector* (CE-9859/14), para. 4.170.

79. *Hungarian Association of Book Publishers and Book Retailers* (Vj-47/2004), paras. 103, 109, 111; *Book market* (Vj-96/2009-178), paras. 321–332; *Navigation tools* (Vj-26/2006), para 295; *Newspaper distribution I* (2.Kf.27.672/2008/7), 18–19.

80. For a list of cases see note 75 *supra*.

81. ICN, *Competition Enforcement and Consumer Welfare: setting the agenda* (2011), p. 33. Available at <www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf> (Last visited 18 Apr. 2018). Claassen and Gerbrandy, "Rethinking European competition law: From a consumer welfare to a capability approach", 12 *Utrecht Law Review* (2016), 1–15, at 3.

NCA in its informal opinion in *MSC Shrimp Fishery* (2011).[82] The NCA held that national producers and the fishing association could set a control system in order to limit overfishing, insofar as it would be indispensable to meet sustainability concerns identified by scientific studies. At the same time, the NCA maintained that more restrictive practices could not be justified.

The NCA's opinion was followed by a heated political discussion. Later that year, the Minister of Agriculture submitted a letter to the Dutch Lower House demanding the consideration of animal welfare and environmental benefits in the NCA's proceedings in the agricultural and nutrition sectors.[83] In early 2013, the Lower House requested that the Minister of Economic Affairs instruct the NCA, by means of a policy rule, on how to assess such agreements.[84]

Following these requests, in May 2014 the NCA adopted its Vision Document on Competition and Sustainability.[85] Interpreting both Dutch and EU competition law, this policy paper maintains that sustainability considerations play an important role in the enforcement of Article 101. According to the Dutch NCA's interpretation, Article 101(3) covers indirect and non-economic benefits resulting from environment-friendly or animal-friendly production methods and efficient allocation of scarce resources.[86] The NCA incorporates short-term and long-term benefits for future generations,[87] and benefits occurring in other markets.[88] The Vision Document further emphasizes that sustainability considerations do not form a special category. Namely, other types of benefit are evaluated by the same analytical framework.[89]

The principles of the Vision Document have guided the Dutch NCA's practice. The NCA has taken into account non-economic benefits related to

82. *MSC Shrimp Fishery* (7011). The NCA found that that population was not in danger at the time of issuing the decision, but that such a measure might be necessary in the future. This opinion can be classified either as based on an economic benefit (efficient allocation of production means in the long term) or on a non-economic benefit (sustainability for future consumers and society as a whole). Therefore, it was classified in Figure 2 and Table 2 as "unclear: economic or non-economic benefit".

83. Letter from Henk Bleker (Minister of Agriculture) to the House of Representatives re sustainability initiatives and competition law (22 Nov. 2011).

84. Dijkgraaf/Geurts motion of 24 Jan. 2013, Parliamentary Documents II, 2012/2013, 33 400 XIII, 99.

85. The Netherlands Authority for Consumers and Markets, Vision Document on Competition and Sustainability. Available at <www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/> (last visited 18 Apr. 2018).

86. ACM, ibid. 85, pp. 7, 14.

87. Ibid., pp. 11–12, 14.

88. Ibid., p. 11.

89. Ibid., p. 6.

the coordinated closure of coal plants to reduce omissions,[90] cooperation between construction companies and public housing corporations to renovate houses into energy-neutral buildings,[91] and limitations on the sale of chickens whose production process failed to meet certain minimum environmental, public health and animal welfare standards.[92] Although the NCA found that on balance the sustainability benefits could *not* justify the harm to competition in those cases, such benefits played an important role in the analysis. Similar considerations were incorporated in the NCA's decision in *ATM in rural areas* (2014), clearing a collaboration among banks and the Dutch Payment Association which was designed to ensure access to cash in areas in which such a service is not economically viable.[93]

Towards the end of 2015, the Dutch Ministry of Economic Affairs had adopted another draft policy rule, aimed to further increase the role of sustainability considerations. In particular, it maintained that long-term benefits for society as a whole should be taken into account when applying Article 101(3).[94] Nevertheless, the Commission opposed this rule after it was published for consultation. According to the Commission, such an interpretation would be incompatible with Article 101(3), which is restricted to direct benefits.[95] Subsequently, the Dutch Ministry abandoned its draft rule. Yet, remarkably, in December 2016 the Dutch NCA stated that it "will not take action against sustainability arrangements that enjoy broad social support if all parties involved such as the government, citizen representatives, and businesses are positive about the arrangements".[96] Consequently, the Dutch NCA will not enforce Article 101 against agreements generating indirect and non-economic sustainability benefits, even when such agreements cannot benefit from Article 101(3) according to the Commission's interpretation. In practice, this policy rule has a similar impact to no grounds for action

90. The Netherlands Authority for Consumers and Markets, *Analysis of the planned agreement on closing down coal power plants from the 1980s*. Available at <www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser energieakkoord.pdf> (last visited 18 Apr. 2018).

91. *De stroomversnelling* (ACM/DM/2013/205913).

92. *Kip van morgen (chicken of tomorrow)* (ACM/DM/2014/206028), 5–6.

93. *ATMs in rural area*s (14.1134.15). Also see Dutch NCA Annual report 2014, p. 61.

94. Policy Instruction of 5 Oct. 2016, *Staatscourant* 2016, 52945.

95. Attachment to the government letter to Parliament regarding competition and sustainability: *Kamerbrief Minister van Economische Zaken aan de Tweede Kamer inzake Mededinging en Duurzaamheid* 23 Jun. 2016, Parliamentary Documents II, 2015/16, 30196, 463.

96. Authority for Consumers and Markets "basic principles for oversight of sustainability agreements", press release of 2 Dec. 2016, available at <www.acm.nl/en/publications/publication/16726/ACM-sets-basic-principles-for-oversight-of-sustainability-arrangements>.

findings. In both cases, the NCA will not enforce Article 101 given the environmental impact of an agreement.

The French NCA followed a similar approach to the Dutch. It maintained that non-economic benefits – such as protection of jobs, living standards, fair trade rules, stabilization of prices, culture and protection of SMEs – are relevant for applying Article 101(3).[97] In *Supply of orthotics* (2007), for example, it found that the conditions for an exception were met with respect to a pricing method set by a trade association. The NCA highlighted the benefits arising from the pricing system not only for patients, but also for the national social security system as a whole.[98] Similarly, in its informal opinion in *Cinema code* (2009), the French NCA declared that the assurance of a wider diffusion of cinematographic works in the general interest could be considered as economic progress in the meaning of Article 101(3).[99]

In 2009, the French NCA seemed to revise its approach. Merely two months after issuing *Cinema code*, it was hesitant to determine that cultural interests could justify a single price system for digital books. In its informal opinion in *Digital books* (2009), the French NCA held that culture is a general interest rather than a true economic justification that can be examined under the provision.[100] Along similar lines, in 2011, it asserted that its mandate is limited to making markets work in the best interest of consumers; promoting other public policies and, if need be, reconciling them with competition policy, is a task which may best be achieved by the government and parliament.[101] This change in the French NCA's approach occurred in parallel to a reform of the national competition law enforcement,[102] which aimed *inter alia* at greater substantive convergence in the interpretation of the competition law provisions across the EU.[103]

Despite the above statements, the empirical findings reveal that the French NCA continued to examine non-economic benefits under Article 101(3) after

97. *Bleach* (05-D-03), paras. 117–121; *Fruit and vegetables in Brittany* (05-D-10), paras. 130–132; *Essential Oils of Lavandin* (05-D-55), paras. 78–85; *Heating, ceramic sanitary and plumbing equipment* (06-D-03), paras. 1254–1261; *Defibrillators* (07-D-49), paras. 323–325; *Fair trade* (06-A-07); *Quality label* (07-A-04). The French NCA also declared that it follows such approach in its answers to the questionnaire of the ICN, cited *supra* note 81, pp. 10, 28, 32.

98. *Supply of orthotics* (07-D-05), paras. 64–65. These findings can be classified either as based on a direct economic benefit (quality improvements to patients) or on non-economic benefit (contribution of the French healthcare system as a whole). Therefore, it was classified in Figure 2 and Table 2 as "unclear: economic or non-economic benefit".

99. *Cinema code* (09-A-50), para 94.

100. *Digital books* (09-A-56), para 128.

101. ICN, questionnaire cited *supra* note 81, p. 25.

102. French Ordinance No. 2008-1161 on Modernization of Competition Regulation.

103. Lasserre, "The new French competition law enforcement regime", 5 *Competition Law International* (2009), 15–20, at 16–17.

2009. It incorporated benefits related to public health, environmental considerations, and the development of rural areas, although they did not justify a finding of inapplicability.[104]

The Dutch and French interpretations of Article 101(3) are incompatible with the approach of the first group of competition authorities discussed above. Unlike the Commission's new approach, the Dutch and French NCAs were willing to limit the application of the EU competition rules in favour of promoting other economic, social and political aims. While, admittedly, those NCAs accepted an Article 101(3) defence in only a handful of cases (see Figure 2 and Table 2 above), their interpretations clearly deviated from the first group of competition authorities.

5.3. *Intermediate approach*

The German NCA's approach to Article 101(3) has mostly reflected an intermediate approach, somewhere between the other two groups of competition authorities. Similarly to the first group, the German NCA limited the *nature* of the benefits. It declared that it bases its decisions only on market-based criteria, noting that "it is undisputed that there are other important economic and socio-political goals than ensuring competition. However, it is not the Bundeskartellamt's responsibility to realize these".[105] The German NCA maintained that other types of benefit, such as avoiding risky investments, combating a decrease in healthcare providers, or indirectly improving R&D efforts, are not relevant under this provision.[106] By the same token, in *Round timber in Baden-Württemberg* (2017), the Dusseldorf Higher Regional Court refused to consider environmental benefits, holding that sustainability concerns related to the management of forests, climate, water balance or clean air could not be taken into account within Article 101(3).[107] This clearly clashes with the Dutch and French approaches described above, as well as the Commission's and ECJ's approaches prior to decentralization.

At the same time, the German NCA has not restricted the type of *beneficiaries* under Article 101(3). Departing from the Commission's revised

104. The French NCA held that those non-economic benefits are relevant under Art. 101(3). Exceptions were not granted because the other conditions of the Article were not fulfilled. See *Relay masts* (11-A-20), paras. 9–33; *Network sharing and roaming* (13-A-08), para 65.

105. Emphasis added. Available at <www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/ bundeskartellamt_node.html> (last visited 18 Apr. 2018).

106. *Rental of retail space in factory outlet centres* (B1-62/13), para 323; *Container glass* (B4-1006/06), paras. 181–186; *Ophthalmologists AOK* (B3-11/13), paras. 41–42; *Ophthalmologists AÄGB* (B3-11/13), paras. 61–61.

107. *Round timber in Baden-Württemberg* (VI-Kart 10/15 (V)), paras. 327–328.

approach, it assessed industrial policy considerations that were not directly related to the consumers in the markets in which the infringement had taken place. Similarly to the second group of competition authorities, the German NCA interpreted the provision so as to cover industry-wide benefits related to the security of supply, bargaining power, the functioning of online platforms, and the elimination of "white spots" in internet access.[108] Thus, while the German NCA restricted the *nature* of benefits, it did not limit the relevant *beneficiaries*.

Furthermore, the German NCA invoked Article 101(3) to justify agreements that formed an *inherent part of implementing a national scheme*. In those cases, the NCA gave deference to the legal source of the restriction of competition. For example, in *Coordination of tenders for sales packaging waste collection services by compliance schemes* (2011), it accepted an agreement that was linked to the German Packaging Ordinance. An amendment to the Ordinance obliged compliance schemes for sales packaging waste to coordinate their tenders via a newly-established joint body.[109] Yet, the amendment did not make any stipulations as to the form of the coordination. The NCA affirmed that while the form of coordination chosen by the undertakings restricted competition in the meaning of Article 101(1), it was justified by Article 101(3) since it was a necessary element of the scheme.[110]

More recently, in *Construction of corvettes* (2017), the German NCA decided not to initiate proceedings against the planned participation of a German undertaking in a consortium for the construction and supply of corvette ships that was commissioned by the German armed forces. The Public Procurement Tribunal at the Bundeskartellamt held that the planned award of the tender to the consortium had not complied with public procurement provisions, as the consortium was the only undertaking that was invited to participate in the award procedure.[111] Nevertheless, the NCA found that the tender met the requirements for an exception.[112] Hence, although the German NCA had not declared that Article 101 was inapplicable to situations

108. *Long-term gas supply* (B8-113/03-1), pp. 24–26; *Basic Encryption of TV Programs – Commitments* (B7-22/07), p. 41; *Sennheiser* (B7-1/13-35), pp. 1–2; *Adidas* (B3-137/12), pp. 6–7; *Asics* (B2-98/11), paras. 613–622; *ARD/ZDF online platform "Germany's Gold"* (B6-81/11); *Telekom and Telefónica* (B7-46/13), paras. 88–89.

109. Art. 6(7) of the German Packaging Ordinance.

110. *Coordination of tenders for sales packaging waste collection services by compliance schemes* (B4-152/07), p. 6.

111. See press release from 18 May 2017, available at <www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/18_05_2017_VK%20Korvetten.pdf?__blob=publicationFile&v=2>.

112. *Construction of corvettes* (press release of 19 Jul. 2017). The full reasoning for this case was not revealed on account of the confidentiality requirements in the affected security sector.

of State involvement, it accepted broader types of non-economic benefits, which otherwise could probably not justify an Article 101(3) exception.

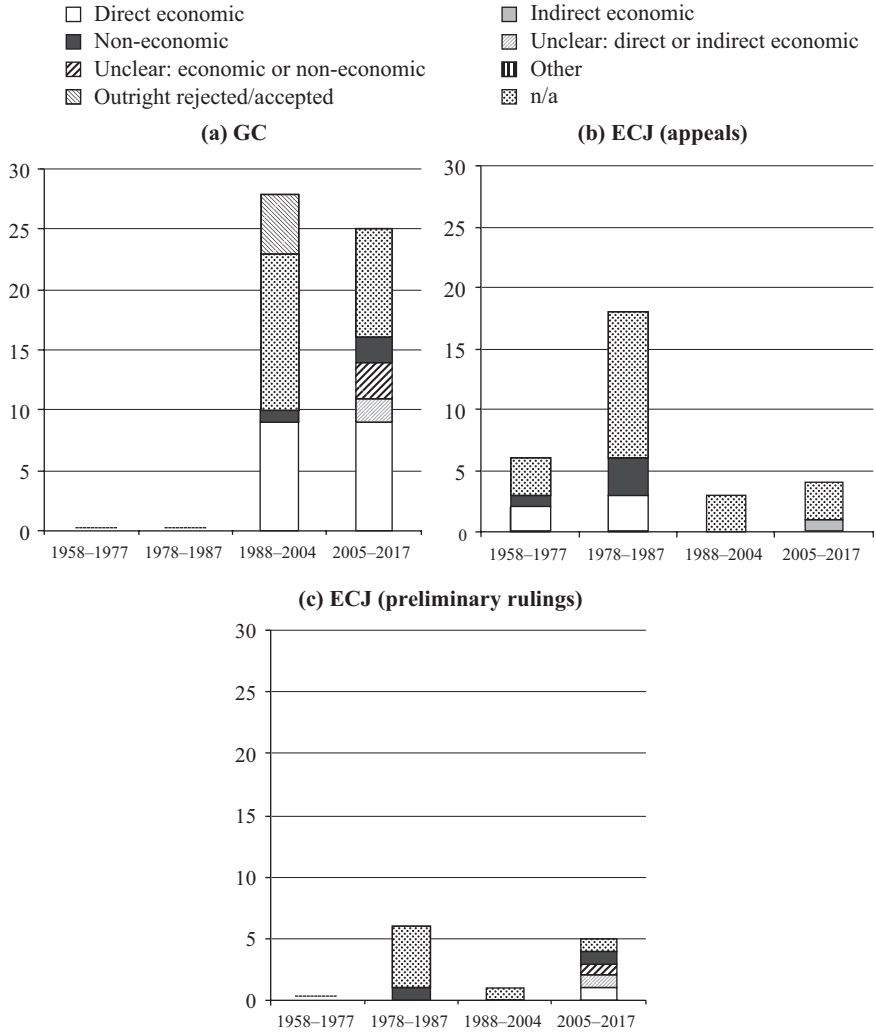
6. The silence of the EU courts

The diverging approaches of the Commission and NCAs prove that the mere obligation to apply Article 101 was insufficient to ensure a uniform administration of the law. EU courts' judgments clarifying and defining the applicable legal regime could have resolved some of this fragmentation, while strengthening the uniformity and legal certainty of the enforcement.[113]

Nevertheless, the empirical findings presented in this section show that although the EU courts have not fully endorsed the Commission's new approach to the relevant types of benefit under Article 101(3), they have not taken a clear stand on the matter following the entry into force of Regulation 1/2003. Before moving on to discuss this in more detail, Figure 3 first presents the number of instances in which each category of benefits was examined by the EU courts when assessing an appeal on a Commission decision or a question referred for a preliminary ruling.

113. The role of the EU courts in ensuring a consistent and uniform application of EU law is specified by Arts. 256 and 267 TFEU.

Figure 3: Types of benefits under Article 101(3) TFEU – EU courts



The figure specifies the number of instances in which each category of benefits was invoked or accepted. In some proceedings more than one benefit was mentioned

The empirical findings are also summarized in Table 3. The brackets indicate the percentage of cases in which each type of benefits was examined from the total number of instances in which Article 101(3) was discussed.

Table 3: Number of proceedings according to types of benefits under Article 101(3) – EU courts									
	Article 101(3) argued/ accepted	Direct economic	Unclear: direct or indirect economic	Indirect economic	Unclear: economic or non-economic	Non-economic	Other	Outright rejected or accepted	n/a
GC									
1958-1977									
1978-1987									
1988-Apr. 2004	28	9 *(32%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	1 *(4%)*	0 *(0%)*	5 *(18%)*	13 *(46%)*
May 2004-2017	25	9 *(36%)*	2 *(8%)*	0 *(0%)*	3 *(12%)*	2 *(8%)*	0 *(0%)*	0 *(0%)*	9 *(36%)*
ECJ (appeals)									
1958-1977	6	2 *(33%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	1 *(17%)*	0 *(0%)*	0 *(0%)*	3 *(50%)*
1978-1987	18	3 *(17%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	3 *(17%)*	0 *(0%)*	0 *(0%)*	12 *(66%)*
1988-Apr. 2004	3	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	3 *(100%)*
May 2004-2017	4	0 *(0%)*	0 *(0%)*	1 *(25%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	3 *(75%)*
ECJ (preliminary rulings)									
1958-1977	0	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*
1978-1987	6	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	1 *(17%)*	0 *(0%)*	0 *(0%)*	5 *(83%)*
1988-Apr. 2004	1	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*	1 *(100%)*
May 2004-2017	5	1 *(20%)*	1 *(20%)*	0 *(0%)*	1 *(20%)*	1 *(20%)*	0 *(0%)*	0 *(0%)*	1 *(20%)*

The empirical findings presented in Figure 3 and Table 3 support a number of interesting observations. In the first place, they reveal the limited number of court judgments on the application of Article 101(3) in general, and on the types of relevant benefits in particular. The limited discussion in preliminary rulings is especially striking. In fact, Figure 3(c) discloses that national courts have rarely referred questions on the interpretation of Article 101(3) to the ECJ. This can perhaps be explained by the Commission's monopoly to grant Article 101(3) exemptions prior to May 2004. National courts, therefore, had only reviewed the application of the provision in a small number of cases.[114] Moreover, scholars have suggested that following decentralization, national courts did not make preliminary references concerning matters which were covered by the Commission's guidelines.[115] According to this explanation, although the guidelines are non-binding soft law, they reduced the ECJ's opportunity to pronounce its approach on the application of the provision.

A closer look at the courts' practice following decentralization reveals that even in the few judgments in which they had the opportunity to examine the application of Article 101(3), they have often used general and ambiguous wording. The ECJ's preliminary rulings have mostly addressed the possibility of exception only briefly, without detailing the application of the conditions of

114. On the competences of national courts when assessing Art. 101(3) prior to decentralization see Commission's notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, O.J. 1993, C 39, paras. 24–32.

115. Blockx, "The Impact of EU Antitrust Procedure on the Role of the EU Courts (1997–2016), 9 JECLAP (2018), 92–103, 99; Colomo, "Three shifts in EU competition policy: Towards standards, decentralization, settlements", 20 MJ (2013), 363–384, at 370.

the provision to the specific case[116] or merely referred to the wording of the provision.[117] The courts' judgments on appeals have often concisely affirmed the Commission's analysis,[118] or focused on procedural grounds.[119] As such, the EU courts have not clarified the scope of the provision or assessed the Commission's new approach.

Nevertheless, there are a number of indications suggesting that the EU courts have not fully endorsed the Commission's new approach limiting Article 101(3) to direct economic benefits.[120] First, the empirical findings summarized in Figure 3 and Table 3 demonstrate that the EU courts have not limited the *nature* of relevant benefits. Accordingly, the ECJ's preliminary rulings still declare that indirect and non-economic benefits – such as those relating to financial services, regulated professions, IPRs, and sport – can justify Article 101(3) exceptions.[121] Similarly, following the entry into force of Regulation 1/2003, the EU courts upheld a number of the Commission's decisions that were adopted prior to the change in its approach. The courts confirmed that the Commission was right to take into account non-economic benefits related to sports, the environment, and financial services.[122] Moreover, they held that fighting free riding and promoting R&D and culture could, in theory, justify an exception.[123]

Second, the pertinence of indirect and non-economic benefits is also supported by the parallel the ECJ has drawn between Article 101(3) and free

116. Cases C403 & 429/08, *Football Association Premier League*, EU:C:2011:631, para 145; Case C439/09, *Pierre Fabre Dermo Cosmétique SAS*, EU:C:2011:649, para 50.

117. Case C-238/05, *AsnefEquifax, Servicios de Información sobre Solvencia y Crédito, SL* v. *Asociación de Usuarios de Servicios Bancarios*, EU:C:2006:734, paras. 65–71; Case C-1/12, *Ordem dos Técnicos Oficiais de Contas*, EU:C:2013:127, paras. 102–103.

118. Case T-193/02, *Laurent Piau*, EU:T:2005:22, paras. 100–104.

119. Case C-171/05 P, *Laurent Piau*, EU:C:2006:149, para 24; Joined Cases T-259-264/02 & T-271/02 *Raiffeisen Zentralbank Österreich AG*, EU:T:2006:396, paras. 213–214.

120. See also Van Rompuy, op. cit. *supra* note 26, p. 208; Townley, op. cit. *supra* note 2, p. 47; Witt, op. cit. *supra* note 26, p. 444; Gerbrandy, "Addressing the legitimacy problem for competition authorities taking into account non-economic values: The position of the Dutch competition authority", (2015) EL Rev., 769–781, at 771.

121. Case C-238/05, *Asnef-Equifax*, para 67; Case C-1/12, *Ordem dos Técnicos Oficiais de Contas* v. *Autoridade da Concorrência*, paras. 100–101; Joined Cases C-403 & 429/08, *Football Association Premier League Ltd*, paras. 145–146.

122. Case T-193/02, *Laurent Piau* v. *Commission*; Case C-171/05 P, *Laurent Piau* v. *Commission*, EU:C:2006:149; Case T-289/01, *Der Grüne Punkt – Duales System Deutschland* v. *Commission*, EU:T:2007:155, para 38; Case T-419/03, *Altstoff Recycling Austria AG* v. *Commission,* EU:T:2010:975, para 23; Joined Cases T-259/02 etc., *Raiffeisen Zentralbank Österreich* v. *Commission*, EU:T:2006:5169.

123. Case T-491/07, *Groupement des cartes bancaires (CB)* v. *Commission*, EU:T:2012:633, paras. 77, 259; Case T-168/01, *GlaxoSmithKline Services* v. *Commission*, EU:T:2006:2969, para 268; Case T-451/08, *Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim)*, EU:T:2013:189, para 103.

movement exceptions, in which such benefits undoubtedly play a role. In *Football Association Premier League* (2011), for example, the Court examined an exclusive broadcasting licence agreement. The ECJ held that the agreement restricted the freedom to provide services, and could not be justified by IPRs or sports-related considerations since it went beyond what is necessary to achieve those aims.[124] The Court later referred to this free movement analysis to explain also why the agreement could not benefit from an Article 101(3) exception.[125]

Third, in a similar vein, the General Court declared that the Treaties' cross-sectional clauses create an obligation to consider non-economic benefits under Article 101(3). In *CISAC* (2013), it noted that when applying Article 101(3), the cross-sectional clause on the protection of culture involves an obligation "to bear in mind the requirements relating to the respect for and promotion of cultural diversity".[126]

Finally, the EU courts did not accept the Commission's position limiting the *beneficiaries* to direct consumers. In *GlaxoSmithKline* (2009), they affirmed that the promotion of innovation in the pharmaceutical industry should be taken into account.[127] In other words, future benefits to society as a whole may justify a restriction of competition. In *MasterCard* (2014), the ECJ seemed to take a more restrictive approach, requiring account to be taken of benefits to direct consumers as well as benefits to indirect consumers in "separate but connected" markets.[128] In any event, the courts clearly did not accept the Commission's reading limiting the provision to direct economic benefits. Similarly to the approaches of the French, Dutch and German NCAs, they also included benefits to other beneficiaries.

Despite the above indications, the lack of explicit and detailed guidance from the EU courts has left the Commission and NCAs additional leeway to shape their own interpretations of Article 101(3). By avoiding taking a clear stand on those matters, the EU courts have ignored the opportunity to harmonize the interpretation of the provision throughout the EU and to increase legal certainty.

124. Joined Cases C-403 & 429/08, *Premier League*, paras. 105–124.

125. Ibid., paras. 145–146.

126. Case T-451/08, *Stim*, para 103.

127. Case T-168/01, *GlaxoSmithKline Services*, para 248. The ECJ accepted the GC's analysis, but did not go into details on this point. See Joined Cases C-501, 513, 515 & 519/06 P, *GlaxoSmithKline*, EU:C:2009:610, para 95.

128. Case C-382/12 P, *MasterCard Inc.*, EU:C:2014:2201, para 240. The ECJ pronounced a similar position in Case C-238/05, *AsnefEquifax*, para 70.

7. Implications

The decentralized enforcement of EU competition law is based on the assumption that the obligation to apply the provisions of Article 101 TFEU will result in a uniform application of the law across the EU. Indeed, during the discussions preceding the decentralization initiative, the Council emphasized that "[t]he abolition of the Commission exemption monopoly is not meant to pave the way for application of multiple national standards which may be different in content or enforcement from the standard of [EU] competition law . . . Such a situation could seriously hamper the proper functioning of the internal market".[129] Such a view was shared by the Commission and the European Parliament.[130]

The empirical findings presented in the previous sections, however, prove that the concerns over a fragmented application of the provision have materialized. They illustrate that the Commission, NCAs and EU courts have adopted conflicting interpretations to one of the core notions of Article 101(3) TFEU, namely the types of benefit that can justify an otherwise anti-competitive agreement.

The empirical findings further reveal that the procedural safeguards introduced by Regulation 1/2003 to ensure a consistent and uniform application of the provision have proven to be insufficient. As part of those safeguards, the Regulation set the bases for the European Competition Network (ECN), a forum for informal contact and consultation between the Commission and NCAs.[131] Article 11 of the Regulation obliges the NCAs to inform the network before commencing a first formal investigative measure, adopting a decision requiring an infringement to be brought to an end, accepting commitments, or withdrawing the benefit of a block exemption

129. Progress report from the Presidency of the Council of the European Union to COREPER, 13563/01, 20 Nov. 2001, para 10.

130. Commission Staff Working Paper, Commission's Proposal for a new Council Regulation Implementing Articles 81 and 82, SEC(2001) 871, 31 May 2001, para 11; European Parliament, Committee on Economic and Monetary Affairs Report on the 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 (COM(2000) 582, C5-0527/2000, 2000/0243(CNS)), p. 22.

131. Regulation 1/2003, Preamble recitals 15–18 and Art. 11; Notice on Cooperation within the Network of Competition Authorities (O.J. 2004, C 101/43), para 3.More generally see Wils, op. cit. *supra* note 6, pp. 62–67; Goyder, op. cit. *supra* note 30, pp. 528–530; Cengiz, "Multi-level governance in competition policy: The European competition network", 35 EL Rev. (2010): 660–77; Monti, "Independence, interdependence and legitimacy: The EU Commission, national competition authorities, and the European competition network", *EUI Working Papers Law* 2014/1; Sauter, op. cit. *supra* note 6, pp. 146–158.

regulation.[132] Subsequent to those notifications, the Commission may initiate its own proceedings while relieving the NCA of its competence to apply Article 101 in the case.[133]

However, because the NCAs' findings of inapplicability are not binding, they are not notified to the ECN or examined by the Commission. Although the Commission had exercised some informal controls (e.g. by its above-mentioned response to the proposed Dutch policy rule on sustainability agreements), the national interpretations of Article 101(3) are not reviewed in a systematic manner. This could be one of the reasons that the Commission and ECN have so far overlooked the existence of this divergence.

Likewise, the empirical findings demonstrate that the fragmentation was not addressed by the judgments of the EU courts. The limited number of judgments discussing Article 101(3), coupled with the courts' vague and general statements on the matter, has facilitated the conflicting interpretations.

The lack of a single standard defining the types of relevant benefits under the provision poses a serious risk to the very aims of the decentralized enforcement system, namely to the effectiveness, uniformity and legal certainty: it hampers the *effectiveness* of the enforcement, because competition is not fully protected across the EU. It allows NCAs to favour other economic, social or political interests. It hinders *uniformity*, because the standard differs according to the Member State in which the agreement is examined. This compromises levelling the EU playing field and attaining full market integration. Finally, the different legal standards impair *legal certainty*. This entails that the legal regime is unclear and is dependent on the authority which decides to pursue it.

Beyond the clear implications for the development of EU competition law and policy, the above findings may also be generalized to include other fields of decentralized application of EU law (e.g., consumer law). Questioning the assumption that the obligation to apply the same Treaty provisions results in a uniform application of the law, these findings invite further research on how the enforcement set-ups inform the substantive interpretation of EU law.

132. This applies only to agreements having an effect on trade between Member States.

133. Regulation 1/2003, Art. 11(6). The Commission shall initiate proceedings where an NCA is already acting on a case following prior consultation with the relevant NCA. According to the Notice on Cooperation within the Network of Competition Authorities (O.J. 2004, C 101/43), para 21, the Commission will do so only in exceptional cases, where NCAs are about to issue conflicting decisions in a single case, where a decision "is obviously in conflict with consolidated case law" or where a decision has "significant divergence" with respect to facts. The Commission may also initiate proceedings where its decision is necessary for the development of the EU competition policy.

8. Conclusion

The application of Article 101(3) in the multi-level governance system of Regulation 1/2003 is generally considered a major success.[134] The Commission emphasized that the "EU competition rules have to a large extent become the 'law of the land' for the whole of the EU".[135] While the Commission admits that a certain level of divergence in the application of the provision persists, this was largely ascribed to differences in the institutional position of NCAs, their national procedures and sanctions.

The empirical findings presented in this paper have refuted this position. They point to the existence of an additional, possibly more significant, divergence in the *substantive* interpretation of Article 101(3). They illustrate that given the lack of detailed binding EU rules, the Commission, NCAs and EU courts have adopted considerably different approaches to the types of benefit that can be examined under the provision.

Those different approaches are not a mere technical matter; they have a fundamental bearing on the nature and limits of EU competition law. A broad interpretation of the relevant types of benefit limits the application of EU competition law in favour of promoting other EU and national objectives, while a narrower interpretation favours competition interests. These choices strike a different balance between economic, social and political goals, and define the limits of EU integration.

The differences in the application of Article 101(3), the paper maintains, are unsurprising. The seeds of this divergent application were planted during the drafting of the Rome and subsequent EU Treaties. The open-textured wording of the EU competition law provisions transferred many of the decisions on the details of their application to the competition authorities. In the realm of decentralized enforcement, gaps in the law can and are being used by NCAs to mould the law to match their national preferences. Although this paper cannot ascertain whether the Commission's concerns that Article 101(3) would be used to incorporate *political* interests materialized,[136] the various authorities have clearly adopted conflicting national approaches to its interpretation.

Perhaps more surprising, however, is the disregard of this issue by the competition authorities, EU courts, and the academic literature. The

134. Commission, Report on the Functioning of Regulation 1/2003, para 7; Commission, Ten Years of Antitrust Enforcement Under Regulation 1/2003, para 6.

135. Commission, Report on the Functioning of Regulation 1/2003, para 23.

136. Other studies, which are based on the same empirical database, show that the Member States have incorporated political interests in the enforcement of Art. 101 by using different legal tools, such as unique issue-specific national rules limiting the full application of the Article. See Brook and Cseres, op. cit. *supra* note 29 and Brook, op. cit. *supra* note 35.

divergence in the substantive interpretation of Article 101(3) poses a serious obstacle to the core aims of EU competition law, namely to an effective, uniform and certain enforcement. Yet, the set-up and evaluation of the decentralized enforcement system have so far focused almost exclusively on institutional and procedural differences. Against this background, the present paper offers a fundamental point of reference for identifying and understanding the significance of diverging national interpretations, and the role they play in the decentralized application of EU competition law.