Lawful cartels

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The prohibition on hard-core cartels unites competition law regimes across the globe. Nevertheless, not every agreement among competitors is unlawful. Rather, a wide array of acceptable cartel or cartel-like agreements are presumed to create efficiencies or promote industrial and social policies.

This chapter illustrates that there is no common framework that guides the assessment of lawfulness. Competition laws differ in the types of agreements they deem as lawful, the justifications invoked, and the assessment strategies (e.g., legal or economic analysis, exclusion rules, or enforcement discretion). In particular, it points to a disconnect between the underlining economic and non-economic benefits invoked to justify certain types of cartels and the strategies guiding their assessments. It calls to rationalise the assessment by aligning the justifications with the assessment strategies, thereby enhancing the effectiveness, transparency, legal certainty, democratic legitimacy, and political accountability of the competition law regimes.

I. INTRODUCTION

The prohibition on hard-core cartels is one of the rare areas of consensus unifying competition law regimes across the globe. Cartels are dubbed as 'the supreme evil of antitrust'[1] and as the 'most egregious violations of competition law'.[2] Nevertheless, not every agreement among competitors is deemed to be unlawful. In fact, for many years, various types of cartels have been perceived as a legitimate business strategy and as an engine for economic growth. Even today, a fine line exists between lawful and unlawful cartels.

This Chapter begins by tracing the historical shift in the international approach towards cartels (Section II). It demonstrates that the prohibition on cartels is not just a question of form, but also one of substance;[3] namely, that even after the emergence of an international scepticism towards cartels from the 1940s and especially following the 1990s, there is a wide array of

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[1] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[2] OECD Council, 'Recommendation Concerning Effective Action Against Hard Core Cartels' (1998) OECD/LEGAL/0294, as repeated by OECD Council, 'Recommendation Concerning Effective Action Against Hard Core Cartels' (2019) C(2019)87.

[3] Niamh Dunne and Imelda Maher 'The "Acceptable" Cartel? Horizontal Agreements Within EU Competition Law: Introduction' (2002) 5.3 The Antitrust Bulletin 335, 335.

acceptable forms of cartel or cartel-like agreements that are presumed to create efficiencies or promote industrial and social policies.[4]

Although some arrangements are accepted by multiple jurisdictions, to date there is no common framework that guides or can explain the assessment of lawfulness (Section III). Competition authorities, courts, governments, and parliaments have often adopted rules incrementally, by responding to case-specific challenges. A notable divergence persists not only in the justifications invoked for lawfulness, but also in the legal, economic, or political tests used to assess similar arrangements.

To structure the discussion, this Chapter distinguishes between two main types of justifications.[5] On the one end of the scale, there are arrangements that are presumed to create *economic benefits*, that is cost and qualitative efficiencies enjoyed by the direct or indirect users of the relevant product or service. These benefits either directly affect prices or provide additional non-price value for consumers, such as new products, better quality, or greater variety.

On the other end of the scale, there are arrangements that are warranted by *non-economic benefits*. Those non-pecuniary benefits are more subjective and are not directly related to the characteristics of the relevant product or service. Accepting cartels on the basis of non-economic benefits entails balancing the harm caused to consumers against benefits created for society as a whole – such as promoting regional, national, or international industrial policies, fostering employment, addressing situations of crisis, or protecting the environment. This balancing exercise is more contentious, often meriting socio-political value judgments and carrying distributional justice effects.

This Chapter uncovers a disconnect between the underlining economic and non-economic benefits invoked to justify cartels and the legal, economic, or political strategies employed to assess their lawfulness (Section IV). It calls to rationalise the assessment of

[4] Jeffrey Fear, 'Cartels' in Geoffrey Jones and Jonathan Zeitlin (eds), *The Oxford Handbook of Business History* (OUP 2008), 273.

[5] This distinction is based on the definitions presented by a group of experts in Office of Fair Trading, 'Article 101(3): A Discussion of Narrow versus Broad Definition of Benefits. Discussion note for OFT Breakfast Roundtable' (2010), paras 3.2-3.17.

lawfulness by shifting the focus away from the types of cartels (e.g., horizontal cooperation, export or crisis cartels) towards ensuring an *alignment* between the economic and non-economic *justifications* invoked and the *assessment strategies*. Such alignment, the Chapter concludes, could enhance the effectiveness, transparency, legal certainty, democratic legitimacy, and political accountability of the competition law regimes (Section V).

II. BRIEF HISTORY OF LAWFUL CARTELS

Although attempts to collude on market prices and outputs are probably as old as markets themselves,[6] the overwhelming opposition to cartels is a relatively recent phenomenon. This Section illustrates that up until the mid-1940s, certain forms of cartels were viewed by members of industries and governments alike as a legitimate business strategy having a positive function on the organisation of markets and generating societal benefits. The shift in the international approach towards cartels was mostly the result of strong American influence following the Second World War, which was later amplified and adjusted by the growing importance of EU competition law from the mid-1990s.

A. From the late-1800s to the First World War: cartels as a social-economic institution

Cartels seeking to directly restrain outputs and sales of specific products have first emerged as a common industrial organisation model in the 1870s. During a time of falling world prices for agricultural and industrial products, most industrialised nations imposed high tariffs to protect their markets against foreign competition. Those tariffs, in turn, induced producers to enter into national cartels to maintain prices at profitable levels and avoid price swings.[7] Banks have too colluded to safeguard credit and local employment, many times receiving the support of state

[6] In the words of Roman Piotrowski, *Cartels and Trusts: Their Origin and Historical Development from the Economic and Legal Aspects* (G. Allen & Unwin 1933).
[7] Charles E. Freedeman 'Cartels and the Law in France before 1914' (1988) 15.3 French Historical Studies 462, 462; Steven B. Webb, 'Tariffs, cartels, technology, and growth in the German steel industry, 1879 to 1914' (1980) 40.2 Journal of Economic History 309, 310.

administration.[8] Gradually, the cartel business model had gained momentum, spreading from Europe and the US and becoming a defining feature of the global economy.[9]

The first blanket opposition to cartels had appeared in the US, where the Sherman Act of 1890 stated that 'every contract, combination, or conspiracy in restraint of trade (…) is declared to be illegal'.[10] Despite this broad wording, prohibiting all restraints to trade, the Supreme Court of Justice interpreted the prohibition as limited to 'unreasonable' restraints. Accordingly, US antitrust law distinguishes between agreements that are *per se* restrictive and are irrebuttable presumed to be unlawful, and other agreements that their legality is determined under the *rule of reason* test.[11] In its early years, the US rule of reason was based on a legal proportionality test, examining whether a restraint was reasonably necessary to attain a legitimate agreement, or whether less restrictive alternatives were permissible. Yet, in 1918, the Supreme Court embraced a cost-benefit approach, by which the legality of an agreement is hinged on its net competitive effect.[12]

The *per se* category has been progressively narrowed, currently extending to naked price-fixing and market division agreements and to limited types of boycotts, concerted refusals to deal, and tying arrangements.[13] Nonetheless, the American approach still represents the *principle of prohibition* in the assessment of cartels, that is to say, a total ban that is subject to only a few exceptions.[14]

In parallel, up until the mid-1940s, most other countries have continued to perceive cartels as generating a host of economic and non-economic benefits.[15] Cartelisation was not only accepted, but was regarded as a legitimate form of a capitalistic economy,[16] carrying

[8] Harm G. Schröter 'Cartelization and Decartelization in Europe, 1870-1995: Rise and Decline of an Economic Institution' (1996) 25.1 Journal of European Economic History 129, 133.
[9] Ibid.
[10] 26 Stat. 209 (1890), sec 1.
[11] Standard Oil Co. v. United States 221 U.S. 502 (1911).
[12] Gabe Feldman, 'The Demise of the Rule of Reason' (2020) 24 Lewis & CLARK L. REV. 951, 954-961.
[13] Herbert Hovenkamp, 'The Rule of Reason' (2018) 70 Fla L Rev 81, 83.
[14] Lorenzo Federico Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-Fought Compromise' in Kiran Klaus Patel and Heike Schweitzer (eds) *The Historical Foundations of EU Competition Law* (OUP 2013), 60-61.
[15] Fear (n 4), 268; Harm Schröter et al. 'Small European States and Cooperative Capitalism, 1920-1960' in Alfred D. Chandler Jr. et al (eds), *Big Business and the Wealth of Nations* (CUP 1997), 189-196.
[16] Schröter (n 8), 131.

stabilising effects on the public interest and economic life.[17] In some European countries, cartels were also linked to national co-operative ethos, positioning them as an adequate response to the threat of class conflict and social disintegration.[18]

This approach was fostered during the First World War, at a time when industrial production was first recognised as a key element of military success.[19] Cartels were endorsed by governments, which preferred to control the production of a limited number of cartels rather than supervising numerous independent firms.[20] They were also encouraged for industrial policy purposes, as a means to promote foreign trade.[21] Even the US, which was guided by the principle of prohibition of cartels, allowed domestic firms to participate in international cartels as long as the affected goods were not sold in the domestic market.[22]

The economic and social merits attributed to cartels during the War are reflected in a report of the British Committee on Commercial and Industrial Policy, warning that manufacturers 'acting independently and usually in acute competition one with another (…) in many cases unable to pay adequate wages or to obtain sufficient capital for necessary improvements or developments'.[23] Consequently, the report recommended that the principle of competition should be 'supplemented or entirely replaced by co-operation and co-ordination of effort in respect of (1) the securing of supplies of materials, (2) production in which we include standardisation and scientific and industrial research, and (3) marketing'.[24]

B. The interwar period: early competition rules

Early ideas advocating the value of competition have begun to spread in Europe during the interwar period. Several European countries prohibited specific forms of competitive restraints

[17] Adrian Kuenzler and Laurent Warlouzet, 'National Traditions of Competition Law: A Belated Europeanization through Convergence?' in Kiran Klaus Patel and Heike Schweitzer (eds) *The Historical Foundations of EU Competition Law* (OUP 2013), 92-93.
[18] David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 1998), 75-76.
[19] Ibid; William Notz, 'Cartels during the War' (1919) 27.1 Journal of Political Economy 1.
[20] Gerber (n 18), 116.
[21] Notz (n 19), 2-6.
[22] See Section IIIC) below.
[23] Committee on Commercial and Industrial Policy after the War, 'Final Report' (1918) [Cd. 9035], para 160.
[24] Ibid, para 161.

as a response to the hyperinflation of the early-1920s, when cartel members shifted the risks associated with currency devaluation to consumers.[25]

The 1923 German Ordinance Against the Misuse of Economic Power, for instance, was introduced as an emergency decree to combat hyperinflation. It did not prohibit cartels as such, but empowered the Minister of Economic Affairs to control abusive practices where a cartel 'endanger the national economy or the public interest'.[26] A 1926 amendment to the French Penal Code had distinguished between 'good' and 'bad' cartels, by which the negative effects emerging from a cartel were balanced against its positive impact on economic development on a case-by-case basis.[27]

Notably, those early rules have not imposed a blanket prohibition on cartels. Rather, they reflected a *principle of abuse*, prohibiting only cartels presuming to have harmful effects.[28] In parallel, governments continued to encourage domestic cartelisation as an instrument of industrial policy to protect their national economies against the economic crisis of 1929-1933.[29] Some governments have further concluded international cartels to shield their markets from expropriation, secure access to raw materials or markets, and influence the host country's domestic policy.[30]

Schröter has recorded the national approaches to cartels during the interwar period by distinguishing between four groups of countries:[31] the first group – including many developed nations, as Austria, Belgium, Czechoslovakia, Finland, France, Germany, the Netherlands, Norway, Sweden, and Switzerland - expressed a strong positive approach towards cartels; the second group, consisting of industrialising countries such as Hungary, Italy, Japan, Poland, and

[25] United Nations Department of Economic Affairs, 'International Cartels: A League of Nations Memorandum' (1947, Lake Success), 10-11; Gerber (n 18), chapter V; Kuenzler and Warlouzet (n 17), 95.
[26] RGBl. 1923 I, 1090. English translation from Robert Liefmann, *Cartels, Concerns and Trusts* (Arno Press 1977), Appendix I. Also see Kuenzler and Warlouzet (n 17), 94.
[27] Articles 419 of the Code Pénal, as added by the 1926 law. Also see Freedeman (n 7), 476-477; Kuenzler and Warlouzet (n 17), 94.
[28] Ibid, 92-94.
[29] United Nations (n 25), v, 5-10; Fear (n 4), 276; Eleanor M. Hadley, *Antitrust in Japan* (Princeton University Press 1970); Schröter (n 8), 134-141.
[30] Harm Schröter, 'Risk and Control in Multinational Enterprise: German Businesses in Scandinavia, 1918-1939' (1988) 62.3 *The Business History Review* 420.
[31] Schröter (n 8). For the EU Member States' approaches, also see United Nations (n 25), 32-36; Kuenzler and Warlouzet (n 17), 103-108.

Spain, had largely demonstrated a positive view towards cartels, yet introduced supervisory agencies; the third group, including Bulgaria, Canada, Denmark, South Africa, and the UK, had taken an ambivalent position; and the fourth group followed the US approach, taking an active stance against cartels, including Argentina, Australia, New Zealand, and Yugoslavia. Against this backdrop, it was estimated that by the advent of the Second World War, about 40 per cent of the worldwide trade was subject to cartelisation.[32]

C. The post-war period: a shift in the *manière de voir*

The modern opposition to cartels has emerged following the Second World War. Driven by strong American influence, cartels were positioned as the enemies of competition and liberalism, and of democracy itself.[33] This has gradually shifted the international *manière de voir,* namely the collective approach of what constitutes a legitimate way of conducting business, the social consensus over the organisation of economic life, and the paradigm of how the question of the lawfulness of cartels should be approached.[34]

For example, cartels were first prohibited in both Japan and Germany in 1947, as part of an American attempt to implement democratic practices and reform their economic structures. Inspired by the principle of prohibition of the Sherman Act, those laws included a strict prohibition on cartels.[35] The American *manière de voir* was further extended to the rest of Europe as the US military government in Germany strongly promoted the inclusions of an anti-cartel provision in the Treaty of Paris of 1951 establishing the European Coal and Steel Community (ECSC). In fact, this provision was a condition for terminating the American control over the German coal and steel industry under the allied de-concentration legislation.[36]

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[32] United Nations (n 25), 2. Also see Fear (n 4), 276, 278.
[33] Fear (n 4), 279; Schröter (n 30), 197; Schröter (n 8), 142.
[34] Ibid, 130-131.
[35] Michiko Ariga and Luvern V. Rieke, 'The Antimonopoly Law of Japan and Its Enforcement' (1964) 39 *Wash. L. Rev.* 437, 437-440; Toshiaki Nakazawa and Leonard W. Weiss, 'The Legal Cartels of Japan' (1989) 34 Antitrust Bull 641, 641-642; Kuenzler and Warlouzet (n 17), 96-98. Such strict prohibitions, nevertheless, were short-lived. Quickly after the American occupation ended, the Japanese and German competition laws were amended to permit various types of lawful cartels.
[36] Articles 65 ECSC. See Ernst-Joachim Mestmäcker, 'Towards a Concept of a Workable European Competition Law' in Kiran Klaus Patel and Heike Schweitzer (eds) *The Historical Foundations of EU Competition Law* (OUP 2013), 192.

Despite the above, the prohibition on anti-competitive agreements that was included in the European Economic Community Treaty of Rome of 1957 (EEC), leaves greater room for lawful cartels in comparison to the Sherman Act. The drafting of Article 101 TFEU (ex. Article 85 EEC) was strongly influenced by the French competition law at force during that time. As mentioned, the French law did not unequivocally prohibit all anti-competitive agreements, but reflected the principle of abuse warranting a case-by-case analysis to determine if positive effects on economic development or on society could counterbalance the agreement's negative effects on competition.

Therefore, while anti-competitive agreements are prohibited by Article 101(1) TFEU, Article 101(3) TFEU accepts agreements that contribute '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', provided they do not impose indispensable restrictions and do not afford firms the possibility of eliminating competition in respect of a substantial part of the relevant market. Furthermore, Article 101(3) TFEU does not directly distinguish between hard-core cartels and other types of restrictive agreements. Unlike the US regime, in which naked cartels are considered as *per se* violations that cannot be justified, all types of anti-competitive agreements can be accepted in the EU.[37]

The nature of cartels that were accepted under Article 101(3) TFEU has changed over the years. During the first decades of EU competition law enforcement, the European Commission ('Commission') was openly inspired by Keynesian economic theories suggesting that free-markets were not the only source for economic development. It called to limit market forces in favour of promoting other industrial and social policies.[38] The Commission's annual report of 1970, for example, stated that

[37] However, as elaborated below, naked cartels are less likely to be justified. For an empirical overview of the application of Article 101(3) TFEU to by-object restrictions, see Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (CUP 2021), Figure 3.7.

[38] Hubert Buch-Hansen and Angela Wigger, 'Revisiting 50 years of Market-making: The Neoliberal Transformation of European Competition Policy' (2010) 17.1 Review of International Political Economy 20, 26-32; Sigfrido M. Ramírez Pérez and Sebastian van de Scheur, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge', in Kiran Klaus Patel and Heike Schweitzer (eds) *The Historical Foundations of EU Competition Law* (OUP 2013), 21.

> 'the trend towards industrial cooperation and concentration became more marked. Accordingly, the Commission's policy necessarily consisted in preserving effective competition in the common market *while at the same time encouraging schemes for cooperation, reorganisation and combination* calculated to render Community enterprises as competitive as possible both inside and outside the Common Market'.[39]

As I explore empirically elsewhere, until the late-1970s, the Commission was willing to accept cartels and other serious restrictions of competition in favour of supporting a host of industrial and social policies, and particularly the EU's market integration imperative.[40] The Commission, moreover, had not focused its enforcement efforts on fighting cartels but rather on vertical restraints that threatened the single market. The few horizontal agreements examined during that period were prohibited only when they impeded market integration in addition to harming competition (e.g., in situations of geographic market-sharing). The Commission exempted cartels pertaining to foster growth, regional cohesion, and employment if they did not impede market integration, by means of accepting voluntary commitments or attaching conditions to the exemptions.[41]

The possibility of exempting restrictive practices under Article 101(3) TFEU was further broadened in 1977, when the ECJ held that EU competition law is guided by the notion of *workable competition* – i.e., the degree of competition 'necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty'.[42] The Court opened the door for accepting cartels and other anti-competitive agreements on the basis of environmental benefits, development of sports, and allocation and supply of scarce national resources among states. No strict test guided this assessment. The Commission enjoyed a wide margin of discretion to take into account almost all types of non-economic benefits.[43]

The tolerance towards cartels had also characterised the national approaches of many of the European Member States.[44] In France, the abovementioned distinction between 'good'

[39] Emphasis added. European Coal and Steel Community, European Economic Community, European Atomic Energy Community, 'Forth General Report on the Activities of the Communities 1970' [1971], para 21.
[40] Brook (n 37), 102-105, 121-123.
[41] Ibid, 123-130.
[42] Case 26/76 *Metro v. Commission* EU:C:1977:167, paras 20-21.
[43] Or Brook, 'Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five Competition Authorities' (2019) 56.1 Common Market Law Review 121, 133.
[44] Schröter (n 8), 142-152; Kuenzler and Warlouzet (n 17), 95-103.

and 'bad' cartels had remained in force even after the Ordinance on Competition and Freedom of Prices of 1986 had established modern French competition policy and was later codified in Book IV of the Commercial Code.[45] Similarly, In the UK, prior to the adoption of The Fair Trading Act of 1973, the prohibition on anti-competitive agreements was subject to a public interest test. There was no presumption that competition was the most effective model, and cartels were accepted if they fostered efficient production and distribution of goods, encouraged new enterprises, or secured efficient regional distribution of employment and resources.[46]

Even the German competition law, which was relatively strict in prohibiting cartels, included various exceptions up until the turn of the millennium. Warranted by a mix of economic, industrial policy, and social considerations, the prohibition did not apply to cartels involving setting standard terms for business, delivery or payments, rebates cartels, crisis cartels, rationalisation cartels, specialisation cartels, cooperation cartels, and export and import cartels (until 1988).[47] The law also shielded a number of industries from the competition rules,[48] and entrusted the Federal Minister of Economics to approve cartels in exceptional cases for reasons concerning the general economy and the common welfare. Corresponding to the above, *Haucap et al*, found that between 1958 and 2004 the German competition authority registered 864 cartels based on those provisions, from which around two-thirds were rationalisation cartels.[49]

[45] French Ordinance 86-1243 of 1986 on Competition and Freedom of Prices, arts. 7 and 10.
[46] David C. Elliott and J. Dennis Gribbin, 'The Abolition of Cartels and Structural Change in the United Kingdom' in Alexis P. Jacquemin and Henry W. De Jong (eds) *Welfare Aspects of Industrial Markets* (Springer 1977), 346-347.
[47] German Act against Restraints of Competition, Sections 2-8.
[48] E.g., transportation and postal, agriculture and forestry, banking and insurance, copyright associations, supply of public utilities including electricity, and gas and water (Sections 99-103).
[49] Justus Haucap et al. 'Legal and Illegal Cartels in Germany between 1958 and 2004' (2010) University of Düsseldorf DICE Discussion paper, available at https://www.econstor.eu/bitstream/10419/41423/1/638076714.pdf, 7-8.

D. The 1990s onwards: modernisation and 'Europeanisation'

The European approach towards cartels had started to shift by the mid-1990s, when the Commission identified the fight against cartels as an enforcement priority,[50] adopted a leniency programme incentivising firms to reveal secret cartels,[51] and declared that cartels are the most harmful agreements to consumers and the European economy in general.[52] This transition was complemented by the substantive modernisation of EU competition law of the early-2000s, when the Commission called to replace the workable competition notion with a short-term narrow consumer welfare standard.[53] According to the Commission's new interpretation, restrictions of competition will only be accepted under Article 101(3) TFEU if they create quantifiable economic benefits enjoyed by direct or indirect consumers.[54] Moreover, the Commission announced that although Article 101(3) TFEU does not *a priori* exclude certain types of agreements, hard-core restrictions are 'unlikely' to fulfil the conditions of the Article.[55] The Commission's new approach has thus considerably limited the type of cartels and other anti-competitive agreements that can be deemed lawful.

The Commission's new approach carried spill-over effects to the European national regimes. As the modernisation decentralised the application of Article 101(3) TFEU – and the decision of what amounts to a lawful cartel – to national competition authorities,[56] it facilitated a process of soft convergence and voluntary harmonisation to the Commission's approach.[57] Although some national divergence still persists,[58] many Member States have adopted a consumer welfare centric approach and a relatively strict opposition to cartels. The Member

[50] Commission, 'Annual Report on Competition Policy 2002', 32. Also see Commission, 'Annual Report on Competition Policy 2003', 5; Commission, 'Annual Report on Competition Policy 2004', 14.
[51] Commission, 'Notice on the Non-imposition or Reduction of Fines in Cartel Cases' OJ [1996] C 207.
[52] Commission, 'Annual Report on Competition Policy 1996', 27; Commission, 'Annual Report on Competition Policy 1999', 31; Commission, 'Annual Report on Competition Policy 2000', 35; Commission, 'Annual Report on Competition Policy 2001', 24, 30.
[53] Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' O.J. 2004, C 101/97 ('Article 101(3) Guidelines'), para 33.
[54] Brook (n 37), 67-73.
[55] Article 101(3) Guidelines (2004), para 46. Also see Commission Staff Working Document, 'Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice', SWD(2014) 198 final, 4.
[56] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, arts 3 and 5.
[57] Brook (n 37), 75-92, 149-185.
[58] Ibid.

States' commitment to fighting hard-core cartels was also pronounced in the ECN+ Directive of 2019, harmonising certain provisions related to the conditions for granting leniency for secret cartels[59] and declaring that commitments decisions are 'in principle' inappropriate to deal with such infringements.[60]

Despite the shift in the Commission's approach, EU competition law still leaves greater room for accepting some cartel arrangements in comparison to the US. This is often explained by the multitude goals pursued by EU competition law. EU competition law is aimed not only at economic efficiency, but also at the promotion of economic freedom and the integration of the common market. Moreover, the competition law provisions form part of the EU Treaties, which pursue various economic and social objectives. Accordingly, the EU Courts have long insisted that the competition rules must be read in the context of those objectives, which ought to be balanced against each other.[61]

The EU approach to lawful and unlawful cartels bears a significant global influence. *Bradford et al* point to the process of 'Europeanisation' of worldwide competition law regimes, by which the majority of jurisdictions with competition law provisions adopt laws that more closely resemble the approach of EU competition law than that of US antitrust. In particular, they attribute some of the popularity of the EU model to its plurality of goals and its tendency to defer less to markets and more to governments' ability to correct market failures.[62]

III. TYPES OF LAWFUL CARTELS: BETWEEN ECONOMIC AND NON-ECONOMIC BENEFITS

Even after the global shift in attitudes towards cartels, it is clear that not all horizontal agreements between competitors are deemed unlawful. Various competition law regimes

[59] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11, arts. 17-23 and preamble 50.
[60] Ibid, preamble 39.
[61] Giorgio Monti 'Article 81 EC and Public Policy' (2002) 39 Common Market Law Review 1057; Niamh Dunne, 'Public Interest and EU Competition Law" (2020) 65.2 The Antitrust Bulletin 65.2, 256, 260-262.
[62] Anu Bradford et al., 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16.4 Journal of Empirical Legal Studies 731, 735.

accept a host of arrangements that are presumed to create economic benefits to consumers or non-economic benefits for the general public.

This section demonstrates that although there are some practices that are accepted by a number of jurisdictions, there is no common framework that guides or can explain the dividing line between lawful and unlawful cartels. In many instances, the assessment of lawfulness differs according to the type of cartel, rather than the degree of harm to competition or the balance of interests. Competition authorities, courts, governments, and parliaments have mostly refrained from adopting a systematic approach, and responded to case-specific challenges emerging from certain types of cartels.

This section, therefore, presents the most common types of lawful cartels, drawing attention to the typical benefits invoked to justify them. While it does not attempt to provide a comprehensive list of all types of lawful cartels, identifying the types of benefits offers a useful analytical tool that can inform the strategies for assessing such practices, which will be discussed in the next section.

A. Horizontal cooperation agreements

Cooperative strategies, by which firms combine complementary activities, skills, or assets are a prevailing and growing business practice.[63] They include agreements on joint research and development, production, purchasing, or commercialisation, and technical or quality standardisation. Prompted by global competition and rapid technological developments, such arrangements are viewed as lawful when they are likely to lead to substantial economic benefits, such as risk-sharing, cost-saving, increase investments, pool know-how, or when they enhance product quality, variety, and innovation. They are subject to special rules and are protected by safe harbours in many jurisdictions, including in the US and EU.[64]

[63] Thomas Hemphill 'Cooperative Strategy, Technology Innovation and Competition Policy in the United States and the European Union' (2003) 15.1 Technology Analysis & Strategic Management, 93, 93-94.
[64] Ibid; Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' OJ C 11/1 (2011), para 2; Federal Trade Commission and the US Department of Justice, 'Antitrust Guidelines for Collaborations Among Competitors' 2000, Preamble.

Although the lawfulness of such horizontal cooperation agreements is mostly explained in economic efficiency terms, at times they were also justified by broader industrial policy considerations. For example, cooperative strategies were seen as a means to protect the survival of SMEs and offsetting structural disadvantages, and a number of jurisdictions exempt or limit SMEs from the prohibitions on anti-competitive agreements even in cases of serious restrictions of competition.[65] Moreover, in the EU, some horizontal cooperation agreements were accepted by noting their function in enhancing the competitiveness of the European industries as an additional justification to the main economic benefits.[66]

B. Crisis cartels and restructuring arrangements

The term 'crisis cartel' has been coined to describe both lawful and unlawful cartels adopted during times of industry-specific downturns or general economic distress.[67] While those agreements are typically highly restrictive and would not be accepted as a rule, they are vindicated by a host of economic and non-economic benefits. In a line of cases during the 1980s, for example, the Commission accepted industrial-restructuring agreements directed at an orderly reduction of excess capacity following the 1970s economic crisis, as long as they did not set prices or quotas. The Commission mostly based its decisions on market-wide pro-competitive benefits and industrial policy justifications, noting that free-market forces have failed to achieve the necessary capacity reductions to re-establish and maintain a long-term, effective, and competitive structure.[68] These conclusions were reinforced by non-economic benefits, observing that the coordinated closure 'helps to mitigate, spread and stagger their impact on employment'.[69]

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[65] OECD Policy Roundtables, 'General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises' OCDE/GD(97)53 (1996), available at https://www.oecd.org/competition/cartels/1920345.pdf, 8, 11-15. Also see Brook (n 37), 296-301.

[66] E.g., *Optical Fibres* (Case IV/30.320) Commission Decision 86/405/EEC [1986] OJ L236/30, para 59; *Olivetti/Canon* (Case IV/32306) Commission Decision 88/88/EEC [1987] L52/60, para 54. Also see Brook (n 37), 113-115, 130-132, 193-194.

[67] OECD Global Forum on Competition, 'Policy Roundtable –Crisis Cartels' (2011) DAF/COMP/GF(2011)11, available at https://www.oecd.org/daf/competition/cartels/48948847.pdf.

[68] *Synthetic Fibres* (Case IV/30.810) Commission Decision 84/380/EEC [1984] OJ L207/17, para 28-52; *BPCL/ICI* (Case IV/30.863) Commission Decision 84/387/EEC [1984] OJ L212/1, para 33-40; *ENI/Montedison* (Case V/31.055) Commission Decision 87/3/EEC [1986] OJ L5/13, para 26-41.

[69] Commission, 'Annual Report on Competition 1982', para 39. Also see Commission, 'Annual Report on Competition 1994, para 85.

The economic value of crisis cartels is more contested in recent years. However, non-economic benefits - such as securing employment, stabilising prices, and protecting domestic firms – still sometimes tilt the balance in favour of accepting such practices.[70] In particular, such public policies have been invoked as a justification for a relaxation of the competition rules as a response to the Coronavirus crisis. The ICN, for example, declared that the unprecedented health, social, and economic challenges emerging from the pandemic 'may trigger the need for competitors to cooperate temporarily in order to ensure the supply and distribution of scarce products and services that protect the health and safety of all consumers'.[71]

C. Export cartels

Export cartels involve the coordination of commercial behaviour of domestic producers in foreign markets.[72] As mentioned, they were prevalent from the late-1800s, and are still a common practice today. The US Webb-Pomerene Act of 1918 and the Export Trading Company Act of 1982, for example, permit exporters to exercise their collective bargaining power in foreign markets as long as such conduct does not lead to a restriction on imports into the US and does not restrict competition on the domestic market.[73] Similar explicit and implicit rules tolerating export cartels are also found in many other jurisdictions, in particular in developing countries.[74]

The lawfulness of export cartels is often explained with reference to economic benefits and industrial policies. They are said to facilitate new market entry, bringing innovation or lower prices and allowing SMEs to counter the economic power of foreign buying cartels.

[70] OECD (n 67), 24.
[71] International Competition Network Steering Group, 'Statement: Competition During and After the Covid-19 Pandemic' (2020), available at https://www.internationalcompetitionnetwork.org/featured/statement-competition-and-covid19/. Also see Okeoghene Odudu, 'Feeding the Nation in Times of Crisis: the Relaxation of Competition Law in the United Kingdom' (2020) 19.2 Competition Law Journal 68.
[72] Frédéric Jenny, 'Export Cartels in Primary Products: The Potash Case in Perspective' [2012] *Trade, Competition, and the Pricing of Commodities* 99.
[73] Webb-Pomerene Act, 15 U.S.C.; Export Trading Company Act, 15 U.S.C. Also see Jenny (n 72), 105.
[74] Margaret C. Levenstein and Valerie Y. Suslow, 'The Changing International Status of Export Cartel Exemptions' (2004) 20 Am. U. Int'l L. Rev. 785, 800-806, 819.

Nevertheless, empirical research challenges such justifications, demonstrating that in practice, large international companies, rather than local SMEs, are taking advantage of such rules.[75]

D. Sustainability agreements

The lawfulness of agreements banning the use of environmental-unfriendly products or production means and setting environmental standards and fair trade labels is subject to much debate in recent years. Whereas many of those agreements could be analysed under the rules applicable to horizontal cooperation agreements or rules of trade and professional associations, they frequently treated as a stand-alone category benefiting from a more relaxed application of the competition rules.[76] A number of competition authorities have adopted dedicated policy papers, setting out their approaches to the assessment of such initiatives.[77]

The lawfulness of such arrangements is not only justified by the economic benefits created to direct and indirect consumers, but also for non-economic benefits for the public and future generations. Given the unprecedented climate emergency and as environmental protection receives a constitutional status in various legal systems, there is a growing acceptance that environmental legislation may not be sufficient to address those concerns alone and that sustainability concerns should be supplemented by private initiatives.[78]

E. State sovereignty

A multitude of cartel and cartel-like agreements are either backed or run by a state. Such agreements may be the direct result of a state measure (e.g., required by law or as part of the administrative use of public power), influenced by a state, or delegate to private firms a task

[75] World Trade Organization, 'Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council' (2003) WT/WGTCP/7, 14.
[76] Monti (n 61), 1073-1075.
[77] E.g., Dutch Authority for Consumers and Markets, 'Draft Guidelines on Sustainability Agreements' (2020), available at https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf; Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law' (2020), available at https://www.epant.gr/en/enimerosi/competition-law-sustainability.html; OECD Competition Committee Discussion Paper, 'Sustainability and Competition' (2020), available at http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.
[78] Suzanne Kingston, 'Competition Law in an Environmental Crisis' (2019) 10.9 Journal of European Competition Law & Practice 517; Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11.3 Journal of European Competition Law & Practice 124; Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8.2 Journal of Antitrust Enforcement 354.

that was previously performed by the state. The legal status of such agreements is highly controversial. On the one hand, they may bear significant anti-competitive effects, akin to private cartels. In fact, cartel members are likely to prefer governmental-backed restraints that do not need to be kept secret and are more stable because the state power protects against cheating.[79] On the other hand, such arrangements may create benefits to society, for example when they aim to correct market failures or ensure distributional objectives traditionally safeguarded by state measures.[80]

Consequently, state run or backed arrangements are protected in many jurisdictions as a representation of state sovereignty or for political reasons.[81] The US state action defence, for example, provides that states are shielded from federal antitrust laws when they engage in a *bona fide* exercise of their sovereign regulatory powers and that firms are immune from antitrust liability when they act in furtherance of an articulated state policy and under active supervision.[82] In the EU, there is no clear state action defence as the principle of primacy of EU law requires Member States not to introduce or maintain in force legislative or regulatory measures that could render the competition rules ineffective.[83] Yet, in certain cases, the ECJ accepted national measures that limited the full application of the prohibition on anti-competitive agreements, recognising that a state must be allowed to exercise its sovereign power to adopt measures that it deems justified for economic or social reasons. The EU case law on this matter is complex and unclear, giving rise to much controversy on the lawfulness of cartels operating under the protection of state sovereignty.[84]

Similar questions surround the legal status of arrangements made by a number of states, most famously the operation of the Organization of Petroleum Exporting Countries (OPEC). OPEC was created in 1960 as an inter-governmental organisation to co-ordinate and unify oil

[79] Timothy J Muris 'State Intervention/State Action- A US Perspective' (2003) 04-18 *George Mason Law & Economics Research Paper*, 2.
[80] OECD Policy Roundtables, 'Regulated Conduct Defence' DAF/COMP(2011)3 (2011), available at http://www.oecd.org/regreform/sectors/48606639.pdf, 9.
[81] Ibid.
[82] Parker v Brown, 317 US at 341 (1943). Also see OECD (n 80), 188-189.
[83] Ibid, 195.
[84] For an empirical overview and analysis of the EU jurisprudence, see Brook (n 37), 230-253.

policies among its member states to uphold income from taxes and royalties payment against the backdrop of declining oil prices.[85] While there is little doubt that such arrangement would have been deemed unlawful if adopted by private entities, OPEC was not given any sovereign powers and adopts resolutions that are subject to the approval of the national governments. This raises many questions as to the power of national courts and competition authorities to assert jurisdiction and effectively bring a case against such practices.[86]

F. Regulated professions and trade associations

Similarly to the questions surrounding the lawfulness of cartels that are backed or run by a state, the conduct of regulated professions and trade associations may reflect a clash between harm to competition and the protection of the public interest. In many countries, the admission to and practice of such professions are subject to state- or self-regulation codifying ethical and safety rules. While such rules inherently restrict the freedom of action - and when adopted in the context of a trade or professional association can be seen as a cartel - they may be deemed necessary to bridge asymmetry of information gaps between customers and service providers in areas of a high level of technical knowledge, reduce externalities such services may bare on third parties (e.g., inaccurate audit reports misleading creditors or poorly constructed building jeopardising public safety), and regulate services that produce public goods for the benefit of society in general (e.g., the administration of justice or urban development).[87]

In the US, regulated professions and trade associations are only immune from antitrust law subject to the conditions of the state action defence.[88] In the EU, however, the ECJ introduced a case-specific exemption. In *Wouters*, it held that professional regulations that are

[85] OPEC, 'Statute' (1961), available at https://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf, arts 1-3.
[86] Mark R. Joelson and Joseph P. Griffin, 'The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law' (1975), 9.4 The International Lawyer 617; Irvin M. Grossack, 'OPEC and the Antitrust Laws' (1986) 20.3 Journal of Economic Issue 725, 725; Spencer Weber Waller, 'Suing OPEC', 64.1 University of Pittsburgh Law Review 105.
[87] Communication from the Commission, 'Report on Competition in Professional Services' COM(2004) 83 final (2004), para 22-30. Also see Ida E. Wendt, *EU Competition Law and Liberal Professions: an Uneasy Relationship?* (Martinus Nijhoff Publishers 2012), 1-10.
[88] Aaron Edlin and Rebecca Haw, 'Cartels by another name: Should licensed occupations face antitrust scrutiny' (2013) 162 U. Pa. L. Rev. 1093; Renee Newman Knake, 'The Legal Monopoly' (2018) 93(3) Wash. L. Rev. 1293.

inherent and necessary for the proper practice of a profession as organised by the Member States will not be deemed as unlawful despite their restrictive effects on competition.[89] In *Meca-Medina*, the Court extended this reasoning to anti-doping rules adopted by sporting associations, referring to their function in ensuring that competitive sport is conducted fairly and safeguards the equal chances for athletes, athletes' health, integrity and objectivity of competitive sport, and ethical values.[90]

G. Labour and trade unions

Collective agreements concluded by labour and trade unions may be seen as a form of collusion between employees and employers, coordinating provisions related to wages, working hours and conditions, employment security, and health and safety standards.[91] Nevertheless, EU competition law affords special protection to collective bargaining agreements between employers and employees, which are mostly justified with reference to non-economic benefits. The ECJ explained that social security systems, negotiated through collective bargaining, serve an important social objective of improving working and employment conditions for the public interest and are protected by the EU Treaty and Charter of Fundamental Rights.[92] Because those social objectives would be undermined if such agreements were made subject to the competition rules, such agreements ought to be regarded 'by virtue of their nature and purpose' as falling outside the EU cartel prohibition.[93]

The rise of the gig-economy has given birth to new questions regarding the lawfulness of collective bargaining. The EU's special protection does not currently extend to self-

[89] Case C-309/99 *J.C.J. Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98, para 97.
[90] Case C-519/04P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, para 42-43.
[91] Tito Boeri and Jan Van Ours, *The Economics of Imperfect Labor Markets* (Princeton University Press 2013), 51-80; OECD, 'Competition in Labour Markets' (2019), available at https://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.
[92] Article 151 and 152 TFEU and EU Charter on Fundamental Rights, art 28.
[93] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430, para 59-60; Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* EU:C:1999:437, para 56-57; Case C-115/97 C-116/97 C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* ECLI:EU:C:1999:434, para 56-57.

employed and to platform workers that do not enjoy the traditional worker status.[94] Yet, between 2020-2021 the Commission launched two public consultations aimed to ensure that 'EU competition law does not stand in the way of collective agreements that aim to improve the working conditions of solo self-employed people (i.e. self-employed without employees)'.[95] In parallel, some Member States have taken local initiatives to facilitate such practices. An amendment to the Irish competition act, for example, allows to exclude certain categories of self-employed workers from the act,[96] and guidelines issued by the Dutch competition authority interpret EU and national competition laws as allowing self-employed and platform workers to coordinate their rates and other conditions among each other and to collectively negotiate with their clients.[97]

IV. ASSESSMENT STRATEGIES

This section points to a disconnect between the underlining economic and non-economic justifications accepted for cartels - as presented in the previous section - and the legal, economic, and political tests used to assess their lawfulness. It calls to rationalise the assessment of lawfulness by shifting the focus away from the *types* of the arrangement towards ensuring an alignment between the *justifications* for cartels and the *assessment strategies* used to evaluate their lawfulness.

As elaborated below, there are four main strategies that guide the assessment of cartels: economic analysis, legal analysis, exclusion rules, and the exercise of enforcement discretion.[98]

[94] Case C-413/13 *FNV Kunsten Informatie en Media v The Netherlands* EU:C:2014:2411. Also see Dagmar Schiek and Andrea Gideon, 'Outsmarting the Gig-economy Through Collective Bargaining – EU Competition Law as a Barrier to Smart Cities?' (2018) 32.3 International Review of Law, Computers & Technology 275, 281-282.
[95] Commission, 'Collective bargaining agreements for self-employed – scope of application EU competition rules' (2021), available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules.
[96] Irish Competition (Amendment) Act 2017 (Act 12 of 2017).
[97] Dutch Authority for Consumer and Markets, 'Guidelines on Price Arrangements between Self-employed Workers' (2019), available at (https://www.acm.nl/sites/default/files/documents/2020-07/guidelines-on-price-arrangements-between-self-employed-workers.pdf).
[98] Brook (n 37), 21-23. This classification of the first three strategies is inspired by Christopher Townley, *Article 81 EC and Public Policy* (Bloomsbury Publishing 2009), 6-7, 28-29, which uses slightly different terminology, referring to market balancing, mere balancing, and exclusion.

The following sub-sections discuss those strategies in turn, highlighting the type of benefits they are suitable to address.

A. Economic analysis

One common strategy for the assessment of cartels is the use of economic principles to compare the impact of an agreement on competition against its quantifiable effects on other public policies. This process is based on economic cost-benefit analysis, aiming to ensure the maximisation of consumer welfare, or of an alternative economic concept.

A prominent example of economic analysis can be found in the application of Article 101(3) TFEU following the modernisation of EU competition law. As mentioned, the Commission shifted the application of the Article towards a greater focus on consumer welfare. Accordingly, its Guidelines explain that '[w]hen the pro-competitive effects of an agreement *outweigh* its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules'.[99] Similar 'efficiency defences' can be found all around the globe. *Bradford et al* show that approximately 75% of the competition regimes include such a defence.[100]

A cost-benefit analysis also guides the application of the US rule of reason, at least in its classic version.[101] Unlike the efficiency defence of Article 101(3) TFEU, the US rule determines whether an anti-competitive agreement has existed in the first place. It offers a binary test: net pro-competitive restraints are permitted, and net anti-competitive effects are prohibited.

[99] Emphasis added. Article 101(3) TFEU Guidelines, para 33.
[100] Bradford et al (n 62), 741.
[101] Feldman (n 12), 989 however, illustrates that the rule of reason was interpreted as a mix of economic and legal analysis, incorporating both cost-benefit analysis and the assessment of whether less restrictive means exist.

Using economic analysis as a strategy for assessing the lawfulness of cartels is hailed as an objective, clear, and consistent approach, which is divorced from protectionist or political influences. It is particularly suitable to assess efficiencies generated to the benefit of the users of the relevant product or service, such as those typically invoked with respect to horizontal cooperation agreements that were described in Section III(A) above. The assessment of such agreements requires reconciling between two relatively comparable economic interests (harm to competition v efficiencies to consumers), which can ultimately be measured by the impact on consumer welfare.

However, an economic analysis also carries a number of limitations: First, as many have already observed, the objectivity of the economic assessment should not be exaggerated. In many cases, the calculation of consumer welfare is not an exact science. It requires some policy choices, and may provide merely an 'illusion of certainty'.[102] Second, economic analysis is particularly problematic when it attempts to take into account non-economic benefits, by quantifying or using subjective proxies to integrate broader political and social factors within a cost-benefit analysis. In the *Chicken of Tomorrow* case, for example, the Dutch competition authority pronounced in monetary terms the animal welfare and environmental benefits resulting from a minimum sustainability standard agreed upon between supermarkets and chicken meat producers.[103] It based the application of Article 101(3) TFEU and the national equivalent provision on a consumers survey measuring the willingness-to-pay for such benefits. This methodology was criticised as failing to capture the social value attached to

[102] Robert Pitofsky, 'Political Content of Antitrust' (1979) 127 U Pa L Rev 1051, 1065. Also see Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition"' [2018] Competition Policy International, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249173; Townley (n 98), 38.
[103] Dutch Authority for Consumers and Markets, 'Analysis of the Sustainability Arrangements Concerning the Chicken of Tomorrow' (2015), available at acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow.

animal welfare initiatives that is not directly enjoyed by consumers of chicken meat as well as long-term environmental effects.[104]

Applying economic analysis to balance irreconcilable economic and non-economic benefits is therefore highly contentious. This exercise is dependent on socio-political values and preferences that cannot be solved by a cost-benefit analysis. For this reason, a sole reliance on economic analysis may not be suitable for competition law regimes that have as their goals multiple objectives beyond economic efficiency and consumer welfare, and do not offer a clear hierarchy among the different objectives.

B. Legal analysis

Assessing the lawfulness of cartels may also hinge on a legal proportionality test, considering whether an anti-competitive agreement is 'justified' or 'reasonable' for attaining a legitimate economic or public policy aim. This test is not based on economic cost-benefit analysis, but on a more abstract legal weighing of interests. A competition authority or court must determine whether the restriction did not go beyond what is necessary and whether the claimed benefits did not exceed the harm to competition.

Legal analysis has guided the assessment of many cartels that were justified with reference to non-economic benefits. In the EU, legal assessment informed the legality of cartels operating under the protection of state sovereignty, regulated professions and associations, and the special protection awarded to unions and collective bargaining. Moreover, it had characterised the application of Article 101(3) TFEU prior to the modernisation of EU competition law, allowing the Commission to exempt a broad array of crisis restructuring arrangements and sustainability agreements.[105]

[104] Holmes (n 78).
[105] See Section III above.

Legal analysis was also used to assess economic benefits. In the EU, it directed the application of the ancillary restraints doctrine, examining if a clause restricting rivalry between undertakings was necessary for the realisation of an overall legitimate commercial purpose of an agreement.[106] The EU Courts held that the doctrine does *not* entail an economic assessment weighing the pro- and anti-competitive effects, but rather a legal assessment in which the necessity of the restriction for the main operation is being assessed in the 'abstract'.[107] In the US too, the rule of reason was sometimes interpreted as entailing a form of the less-restrictive-alternative analysis to examine arrangements creating economic benefits, in place or in addition to the traditional cost-benefit analysis.[108]

Legal analysis provides competition authorities and courts with a degree of flexibility to disapply the prohibition of cartels to arrangements creating non-economic benefits that cannot be accurately captured by an economic analysis or to exempt agreements without undertaking a full cost-benefit analysis. This flexibility, however, is also the main source of criticism against it. Legal analysis introduces a degree of subjectivity to competition law enforcement as it follows a more abstract analysis, especially when it calls for striking a balance between irreconcilable economic and non-economic interests. Such balancing raises the concern that competition is used as a regulatory market-building tool, going well beyond the competition authorities' mandate and goals of protecting competition. This, in turn, also raises questions as to the democratic legitimacy and political accountability of administrative competition authorities to perform such balancing exercise, and creates legal predictability challenges.

[106] E.g., Article 101(3) Guidelines, paras 28-31 and the references there.
[107] Case T-112/99 *M6 and Others v Commission* ECLI:EU:T:2001:215, paras 107-109. Also see Case C-179/16 *Hoffmann-La Roche v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2018:25, paras 70-71.
[108] Feldman (n 12).

Such risks can be moderated if legal analysis is confined to assessing non-economic benefits that are acknowledged as legitimate in a relevant legal system. In the context of the EU, for example, it can be used to strike a balance between harm to competition and the objectives of EU competition policy (efficiency, market integration, and economic freedom) or non-economic interest explicitly protected by the cross-sectional clauses of the Treaties. Consequently, while assessing the existence and weighing of interest would remain at the discretion of the competition authority, the identification of the interest as legitimate would be left to the national legislator or judiciary.

C. Exclusion

Economic and legal analyses rest on the measuring and weighing of interests on a case-by-case basis. However, cartels can also be deemed lawful pursuant to rules of exclusion, limiting the application of the competition rules in specific practices or sectors. 49% of the worldwide competition law regimes include at least one partial or complete industry exemption; agriculture, transportation, insurance, banking, and fishing being the most commonly exempted industries.[109]

Such exclusions are common in the EU. In addition to the special sector-wide rules applicable to the supply and price variations in nuclear materials, military equipment, and the agriculture sector,[110] several Block Exemption Regulations (BERs) automatically discharge certain categories of agreements without the need to undertake a detailed analysis. Most BERs offer a presumption of legality for relatively unproblematic agreements where there are little or no competition concerns or due to overriding economic benefits. A smaller number of BERs also protect highly restrictive agreements in specific sectors in favour of promoting EU

[109] Anu Bradford et al., 'Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets' (2019) 16.2 Journal of Empirical Legal Studies 411, Figure 5.
[110] See the Treaty Establishing the European Atomic Energy Community, art 106a(3); Article 346(1)(b) TFEU, and Articles 38-44 TFEU, respectively.

industrial policy and the functioning of such sectors, even if there are limited economic efficiencies.[111] The motor vehicles BER, for example, were criticised as awarding disproportionate concern for market integration and social interest over the competitive process.[112]

Similarly, in the UK, the Secretary of State may adopt an order excluding the application of the prohibition on anti-competitive agreements for exceptional and compelling reasons of public policy.[113] Such exclusion orders were issued with respect to the defence industry, supply of oil and petroleum products, and as a response to the Coronavirus pandemic.[114]

Exclusion rules may also be case-specific. A Hungarian Act, for example, entrusts the Minister for Rural Development to exclude from the cartel prohibition agreements in the agricultural sector that provide a fair income for producers, as far as they do not preclude all market actors from joining the agreement.[115] Such exception is ultimately based on the Minister's judgment, leaving a political actor considerable discretion to accept otherwise unlawful cartels.

Exclusion rules may be susceptible to the creeping of protectionist and political influences. They are less case-sensitive, as they resolve clashes between the protection of

[111] Brook (n 37), 193-195.
[112] Sandra Marco Colino, 'Recent changes in the regulation of motor vehicle distribution in Europe–Questioning the logic of sector-specific rules for the car industry' (2010) 6.2 Competition Law Review 203, 210
[113] Competition Act 1998, Schedule 3(7).
[114] Competition Act 1998 (Public Policy Exclusion) Order 2006 (maintenance and repair of warships); Competition Act 1998 (Public Policy Exclusion) Order 2007 (strategic and tactical weapons and their supporting technology) (repealed by the Competition Act 1998 (Public Policy Exclusion) (Revocation) Order 2011 (Team Complex Weapons); Competition Act 1998 (Public Policy Exclusion) Order 2008 (design, construction, maintenance and disposal of nuclear submarines); The Competition Act 1998 (Public Policy Exclusion) Order 2012 (supply of oil fuels in an emergency); Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020; Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020; Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020; Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020; Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020.
[115] Hungarian Act No. CLXXVI of 2012 on inter-branch organisations and on certain issues of the regulation of agricultural markets, art 18/A(1).

competition and other public policies by promoting one set of interests and ignoring the other.[116] At the same time, exclusion rules deliver a number of unique advantages when they carefully used to assess cartels that are justified on the basis of public policies that are *external* to the competition law regime and merit a political choice:

First, such rules set clear, transparent, and predictable safe-havens that may increase political accountability, because unlike the economic and legal analyses, the decision to set aside the competition rules is entrusted in the hands of the parliament or government. This may be of particular value in jurisdictions having an independent administrative competition authority, lacking the political legitimacy to balance between competition and other public policies. Exclusion rules invite an open and transparent legal, economic, and public debate on the lawfulness of certain arrangements, instead of disguising them under the pretence of economic or legal analysis.

Second, since exclusion rules are not bound to the regular competition law analysis, they allow to directly exempt selected practices without the risk of spill-over effects and creation of precedent. This may be of particular value when such exceptions are planned to apply for a limited period of time (e.g., the UK Coronavirus exclusion orders), or as a tool of experimental governance when the emergence of new technologies or markets give rise to uncertainties on whether competition law should prohibit certain types of arrangements (e.g., in digital markets or the gig-economy).

D. Enforcement discretion

Finally, a cartel may be tolerated by means of exercising enforcement discretion. Differing from the three previous strategies, a decision *not* to enforce the competition rules against a specific cartel does not render it to be lawful. Nonetheless, such a decision may bear a similar

[116] Townley (n 98), 32.

de facto effect, especially in countries where private enforcement is underdeveloped or unlikely.

At times, competition authorities have declared in advance that they will refrain from enforcement of certain practices. The Dutch competition authority, for example, announced that it would seize to exercise its enforcement powers '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'.[117] This statement means that sustainability agreements resembling those which have been previously prohibited by the authority – such as the abovementioned Chicken of Tomorrow case - will no longer be actively pursued.[118] Similarly, shortly after the outbreak of the Coronavirus pandemic, various competition authorities and international stakeholders declared that they will temporary tolerate a host of anti-competitive agreements. The European Competition Network stated that it 'will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply', and the Commission announced that exchange of commercially sensitive information to adapt production, stock management, and distribution of medicine 'would not give rise to an enforcement priority'.[119]

In other situations, enforcement discretion can be used to tolerate cartels on a case-by-case basis. A competition authority can choose not to pursue infringements due to underlining economic or non-economic benefits, even if the cartel is unlikely to be deemed lawful under a legal or economic analysis or exclusion rules. Alternatively, a competition authority may decide to accept commitments to close the investigation into an arrangement that promotes

[117] Dutch Authority for Consumers and Markets, Basic Principles for Oversight of Sustainability Agreements (2016), available at https://www.acm.nl/en/publications/publication/16726/ACM-sets-basic-principles-for-oversight-of-sustainability-arrangements.
[118] Brook (n 37), 156-156.
[119] ECN, 'Statement on Application of Competition Law During the Corona Crisis' (2020), available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf; Commissions, 'Coronavirus Temporary Framework ', C(2020) 1863 final. Also see Brook (n 37), 341-345.

interests that are not directly related to the economic consequences of the anti-competitive behaviour of the relevant firms.

Competition authorities should avoid relying in a systematic manner on their enforcement discretion to avoid taking a stance on the lawfulness of cartels. The exercise of enforcement discretion is neither subject to the analytical framework applicable to the economic and legal analyses, nor to the legitimacy and accountability embedded in exclusion rules. In many competition law systems, it is limited by almost no procedural or substantive constraints and the reasons behind the authority's prioritisation decision are often not published or detailed.[120] Consequently, implicitly accepting cartels by means of enforcement discretion hampers the effectiveness of the competition rules and raises legal certainty, accountability, and legitimacy challenges. It encompasses many of the shortcomings of the previous strategies, without offering their advantages and safeguards.

V. CONCLUSION

This Chapter traced the changing international *manière de voir* towards lawfulness of cartels. It demonstrated that even after the advent of an international consensus on the harm caused by hard-core cartels, there is no common framework that can explain the dividing line between lawful and unlawful cartels. Similar types of arrangements are subject to different rules, and are assessed pursuant to various legal and economic tests or subject to political exceptions. In many cases, the assessment of lawfulness differs according to the type of cartel, rather than the degree of harm to competition or the balance of interests leading to a disconnect between the underlining economic and non-economic benefits justifying some practices and the legal, economic, or political strategies used to assess their lawfulness.

The assessment of cartels could be rationalised by shifting the focus away from the type of agreement towards ensuring an alignment between the economic and non-economic

[120] Brook (n 37), 310-313.

justifications for cartels and the assessment strategies used to evaluate their lawfulness. In particular, the Chapter suggested distinguishing between three types of underlining justifications: *economic benefits* enjoyed by the users of the relevant product or service should be assessed on the basis of a cost-benefit test; *Non-economic benefits that are recognised as legitimate* by the relevant competition law regime should be examined by a legal proportionality test; and *non-economic benefits that are external* to the relevant competition law regime should be handled by a limited number of transparent and explicit exclusion rules. In parallel, competition authorities should avoid relying on their enforcement discretion to systematically avoid taking a decision on the lawfulness of certain types of practices.

Aligning the justifications with the assessment strategies can increase the effectiveness, transparency, and accountability of the competition law regimes. Such alignment limits and streamlines the discretion of independent competition authorities, enhances the democratic legitimacy and political accountability of administrative competition law authorities to perform such balancing exercise, and provides greater legal predictability for firms.