



Coding non-competition interests under Article 101 TFEU: A Quantitative and Qualitative Study

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SUMMARY

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

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

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

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 Subsequently, many non-competition interests that had previously been taken into account under Article 101 TFEU were no longer applicable in the Commission's view.

In parallel, Regulation 1/2003, which entered into force in May 2004, swept away the old centralised notification regime in favour of radical institutional and procedural reform. The institutional pillar of modernisation, has decentralised the enforcement of Article 101 TFEU; national competition authorities and courts were entrusted with discretionary powers allowing them to fully apply Article 101 TFEU and to balance competition and non-competition interests. Since the Commission's policy papers are binding on the Commission alone, NCAs may adopt diverging interpretations. They

enjoy a wide margin of discretion to shape their national approaches to balancing on the basis of their respective legal, economic, and social traditions, bearing the serious risk that Article 101 TFEU is not enforced in a uniform manner across the EU.

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

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

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

More specifically, the empirical findings uncover six balancing tools that were used to account for non-competition interests. First, it examines substantive balancing tools, namely (i) Article 101(3) TFEU individual exemptions/exceptions; (ii) Block Exemption Regulations; and (iii) Article 101(1) TFEU exceptions. Second, the dissertation studies (iv) national balancing tools, originating from Member States’ rules. And third, procedural balancing tools, embedded in the (v) remedies imposed for an Article 101 TFEU infringement (accepting commitment or moderating fines) and (vi) priority setting choices of the various competition enforcers.

The dissertation is structured around those six balancing tools. Each chapter provides an empirical and legal overview of one balancing tool, mapping the quantitative and qualitative aspects of balancing as applied in practice. It highlights the frequency of invoking and accepting the balancing tool, and analyses the type of benefits that were taken into account, the balancing process, and the intensity of control. Moreover, each chapter examines the role of EU and national courts in scrutinising the application of the balancing tools. It illustrates that the courts have adopted diverse approaches to balancing, which have in turn left the Commission and NCAs with different levels of discretion to balance. Finally, each chapter evaluates the compatibility of a balancing tool with the objectives of Article 101 TFEU enforcement (i.e. effectiveness, uniformity and legal certainty).

The dissertation proves wrong the commonly-held view that the modernisation of EU competition law in May 2004 removed non-competition interests from the enforcement of Article 101 TFEU. It shows that non-competition interests have played and continue to play an important role in the enforcement of Article 101 TFEU. Nevertheless, the dissertation points to a remarkable three-fold shift in the manner in which non-competition interests are being taken into account in the post-modernisation era:

First, the dissertation reveals a shift in the types of balancing tools employed in practice, transitioning from substantive to procedural balancing tools. It demonstrates that prior to the modernisation, substantive balancing tools embedded in Articles 101(1) and (3) TFEU have facilitated much of the balancing debate. Yet, following modernisation, they have rarely been invoked or accepted. Instead, the balancing has shifted to national and procedural balancing tools, that is, remedies and priority setting decisions.

Second, it identifies a shift in locus of the balancing tools, from EU-based to Member States-based balancing. The dissertation uncovers a mutually determinative connection between EU and national balancing principles. It shows that Member States were not only affected by EU balancing rules when they enforced Article 101 TFEU; they also affected the scope of the prohibition of Article 101 TFEU by interpreting the EU balancing tools and adopting unique national rules. Consequently, decentralisation has afforded the Member States a new opportunity to interpret and supplement the EU balancing framework.

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

The three shifts in balancing, the dissertation concludes, have hindered the attainment of the very objectives of Regulation 1/2003, namely an effective, uniform, and legal certain enforcement. Consequently, while the modernisation of EU competition law might have been successful in general, its effect on the role of non-competition interests under Article 101 TFEU has been counterproductive.