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PRIORITY-SETTING AS A DOUBLE-EDGED SWORD: HOW MODERNISATION STRENGTHENED THE ROLE OF PUBLIC POLICY

*Or Brook**

ABSTRACT

This article questions the common view that the modernisation of EU competition law has removed public policy considerations from the public enforcement of Article 101 TFEU. Based on a large quantitative and qualitative database including all of the Commission's and five national competition authorities' enforcement actions (N=1700), it maintains that modernisation has merely shifted the consideration of public policy from the substantive scope of Article 101(3) TFEU to procedural priority setting decisions. Instead of engaging in a complex balancing of competition and public policy considerations, the competition authorities have simply refrained from pursuing cases against anti-competitive agreements that raise public policy questions or settled those cases by accepting negotiated remedies.

This outcome, the article claims, is a double-edged sword. The Commission's attempt to narrow down the scope of Article 101(3) as part of modernisation has not eliminated the role of public policy in the enforcement. Rather, undertakings can reasonably assume that restrictions of competition that produce some public policy objectives will not be enforced, even if they do not meet the conditions for an exception. These discretionary non-enforcement decisions have a detrimental impact on the effectiveness, uniformity, and legal certainty of EU competition law enforcement.

JEL: K21; K230

I. INTRODUCTION

There is a broad consensus among competition law scholars and practitioners that the modernisation of EU competition law at the beginning of the 2000s has nearly *eliminated* the role of public policy under Article 101 TFEU.[1] The modernisation has not only transformed the enforcement of EU competition law from a centralised-notification system to a decentralised self-assessment regime, but also substantively reformed the goals and standards guiding the enforcement. Following modernisation, EU competition law is based on a more economic and effects-based approach, aiming to enhance consumer welfare. In the words of then Commissioner Neelie Kroes, "[c]onsumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies".[2]

Along those lines, the Commission's new policy papers, and particularly the Modernisation White Paper and Article 101(3) TFEU Guidelines, clearly declare that the competition law provisions of the Treaty should be enforced on the basis of a consumer welfare standard and robust economic evidence.

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[1] This trend is reported, for example, by Katalin J. Cseres. "The controversies of the consumer welfare standard" 3(2) *Competition Law Review* (2006), 121-173; Philip Lowe, "Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy?" *Speech in the 13th International Conference on Competition and 14th European Competition Day*, Munich, 27 March 2007; Christopher Townley, *Article 81 EC and Public Policy* (Hart, 2009), pp. 141-176; Christopher Townley, "Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer" 10 *Cambridge Yearbook of European Legal Studies* (2008), 345-381; Alison Jones, "Left behind by modernisation? Restrictions by object under Article 101(1)" 6(3) *European Competition Journal* (2010), 649-676; Josef Drexl, Wolfgang Kerber, and Rupprecht Podszun (eds.), *Competition policy and the economic approach: foundations and limitations* (Edward Elgar Publishing, 2011); Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?* (Kluwer Law International, 2012); Victoria I. Daskalova, "Consumer welfare in EU competition law: what is it (not) about?" 11(1) *Competition Law Review* (2015), 133-162. As elaborated below, some of these scholars were critical towards this approach, noting that public policy considerations still play or should play a role.

[2] Neelie *Kroes*, "European Competition Policy – Delivering Better Markets and Better Choices" *Speech in the European Consumer and Competition Day*, London, 15 September 2005.

The Commission proclaims that public policy considerations - such as employment, sustainability, or culture – can no longer be taken into account, at least to the extent they cannot be expressed in efficiency or monetary terms.[3]

This article relies on a large quantitative and qualitative empirical database of public enforcement actions to *question this common view*. It suggests that modernisation has merely changed the *nature* of agreements that are being investigated. More specifically, the empirical findings illustrate that prior to modernisation, the Commission had accounted for public policy within the substantive analysis of Article 101(3). Article 101(3) was interpreted not only as an outlet to balance the protection of competition with economic benefits for specific consumers, but also reflected an array of political, regulatory, and social objectives. This has changed as Regulation 1/2003 entered into force. The Commission's new policy papers, as mentioned, have called to limit the room for public policy considerations under Article 101(3). In addition, the Regulation has decentralised the enforcement and transformed Article 101(3) into a directly applicable provision that is applied by national competition authorities and courts in parallel to the Commission. According to this new enforcement regime, undertakings are expected to self-assess the compatibility of their agreements with Article 101 and the Commission would only issue positive decisions accepting an Article 101(3) defence in "exceptional cases where the public interest of the Community so requires".[4]

Indeed, the empirical findings presented in this article show that under the Regulation public policy considerations were seldom invoked by undertakings or accepted by the Commission and national competition authorities in public enforcement actions ("NCAs" and together with the Commission, the "competition authorities") as justification for an otherwise anti-competitive agreement.

This, however, does not mean that public policy considerations no longer play a role. In parallel to narrowing down the scope of Article 101(3), the procedural aspects of modernisation have enhanced the competition authorities' discretion to set their enforcement priorities. The abolishment of the notification regime in favour of a self-assessment system allows the competition authorities to decide *not* to open a case against an anti-competitive agreement that generates certain public policy benefits. Hence, the Commission has declared that when it finds that an anti-competitive agreement could be saved by Article 101(3) it would use its priority setting powers to "simply not bring a case or close a case that had already been opened".[5]

The empirical findings presented in this article show that the competition authorities have chosen to dedicate their efforts to combating clear-cut infringements of competition, which are unlikely to be justified under Article 101(3) at all. Other types of agreements were mostly not investigated, or settled by means of negotiated remedies. Accordingly, such agreements were *de facto* tolerated, even if they have not fully met the conditions of Article 101(3). To this end, the changes brought by Regulation

[3] Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97), para 42 ("Article 101(3) Guidelines"); European Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (Commission Programme No 99/027) ("Modernisation White Paper"), para 57, 72. Section VI(B) below shows that although the EU Courts left some room for the consideration of public policy under Article 101(1) as part of the *Wouters* doctrine, this had a limited effect in practice.

[4] Regulation 1/2003, Preamble 14. Also see Article 10.

[5] The Commission's answers to the questioner in OECD "The Role of Efficiency Claims in Antitrust Proceedings" (2012), p. 90. Also see Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, SWD(2014) 231/2, para 26.

1/2003 have shifted the consideration of public policy from the substantive scope of Article 101 to procedural priority setting decisions.

The article asserts that in this context, modernisation has acted as a *double-edged sword*. On one metaphoric edge, the competition authorities have used modernisation as a sword to protect the integrity of EU competition law against undue public policy considerations. The Commission and the NCAs rarely accept, or even discuss, the possibility of justifying an agreement on such grounds. Yet, restricting the debate over public policy considerations did not eliminate their role. On the other edge of the sword, the systematic change in the nature of the investigated agreements has (directly and indirectly) accounted for public policy. Instead of engaging in a substantive balancing of interests under Article 101(3), the competition authorities simply refrain from pursuing such anti-competitive agreements.

The shift from substantive to procedural consideration of public policy, this article submits, has hindered the effectiveness of Article 101. As procedural-administrative decisions, prioritisation choices are not bound to any substantive tests, are not explicit, and are subject to limited judicial and public scrutiny. They can take into account public policy beyond what is permissible under the conditions of Article 101(3). Therefore, although modernisation may have enhanced the enforcement of EU competition law in general, it is counterproductive when it comes to the role of public policy. Rather than bringing the consideration of public policy in line with the legal and economic principles that guide EU competition law, it has aggravated the already questionable EU competition law's approach to the role of public policy.

Exposing the reasons behind the competition authorities' priority setting decisions in general, and the role of public policy in particular, is not an easy task. By its very nature, such study requires one to examine not only the reasons leading a competition authority to take up a certain case, but also – perhaps chiefly – the reasons that justify disregarding a case. Most competition authorities, however, do not publish and/or reason their motives for lack of action. Their priority setting decisions are aptly classified as a revolutionary and overlooked dimension of modernisation.[6] Despite some examples in the Commission's and NCAs' decisional practices, the role of public policy greatly lies in the *dark-matter* of the enforcement.[7]

In light of the above, this article offers three significant contributions. First, its novel empirical methodology provides a rigorous basis to test hypotheses on the role of public policy within the dark matter. As elaborated in the next section, the article relies on a large database of all Article 101 public enforcement actions taken by the Commission and five representative NCAs (≈1,700 cases). By identifying the entire scope of the reported enforcement activities, the empirical exercise yields important conclusions also with respect to areas that have remained untouched by the enforcement and in which anti-competitive agreements are *de facto* tolerated. The database thus allows evaluating not

[6] Damien Gerard, "The Effects-Based Approach under Article 101 TFEU and Its Paradoxes: Modernisation at War with Itself?" in Jacques Bourgeois and Denis Waelbroeck (Eds,) *Ten Years of Effects-Based Approach in EU Competition Law Enforcement* (Bruylant, Brussels, 2012), 17–41, at 21.

[7] See section II below. This was also referred to as the "known unknowns" of the enforcement - see Stephen Davies and Peter Ormosi "The Impact of Competition Policy: What are the Known Unknowns?" *Working Paper. Centre for Competition Policy, Norwich* (2013), p. 4.

only the cases the competition authorities have chosen to investigate, but also the unobserved cases they have disregard.[8]

Second, the article proposes that modernisation has shifted the consideration of public policy from the substantive scope of Article 101(3) to procedural priority setting decisions, and discusses its normative policy implications. The article, it should be emphasised from the outset, criticises neither the competition authorities' powers to set priorities, nor their focus on hard-core infringements. It merely points out that priority setting decisions become problematic when they systematically shield certain types of anti-competitive agreements or sectors from the full force of the prohibition of Article 101, or when such decisions are not based on economic and legal theory. The implications of priority setting decisions are increasingly topical in the wake of the ECN+ Directive, as Member States are required to assess and revise the priority setting powers of their respective NCAs.[9]

Third, the article sheds new light on the application of the Commission's and NCAs' enforcement efforts in general. While the impact of non-enforcement on competition policy has already been examined by US scholarship,[10] there are only a few studies in the EU context. The article contributes to an emerging strand of scholarship exploring how procedural and institutional aspects of (EU) competition law inform the substance of the law.[11] It should be noted, however, that although priority setting trends that are discussed in this article may very well impact the effectiveness of the enforcement in general, this article focuses on the unique effects of prioritisation on the role of public policy considerations.

The remainder of this article is structured as follows: section II first introduces the empirical methodology and database guiding this article. Section III provides a historical background of the debate over the role of public policy in EU competition law, and poses the hypothesis that modernisation has not eliminated the role of public policy under Article 101, but merely shifted it to priority setting decisions.

Sections IV to VI test this hypothesis. Section IV presents various examples of cases in which public policy considerations have explicitly influenced the enforcement priorities. Sections V takes a more comprehensive approach, by offering various empirical indications to the existence of such practice. Section VI examines alternative explanations to the empirical findings. It asserts that they cannot be explained by the success of the self-assessment regime, the Commission's Article 101(3) Guidelines, modernisation of Article 101(1), the *Wouters* doctrine, shift of the burden of proof, fear of

[8] *Ibid*.

[9] 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 PE/42/2018/REV/1 OJ L 11, 14.1.2019, p. 3–33 ("ECN+ Directive"). This is further discussed in Section VII below.

[10] See, for example, Robert Pitofsky, "Does Antitrust Have a Future", 76 *Geo. L. J.* (1987) 321-327; William F. Baxter, "Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law" 60 *Tex. Law Review* 661-703 (1982), at 664-673; Albert Foer, "On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust" 60(2) *The Antitrust Bulletin* (2015), 103-127; William E. Kovacic, "The modern evolution of US competition policy enforcement norms" 71 *Antitrust LJ* 71 (2003), 377-478; Thomas E. Kauper, "Competition Policy and the Institutions of Antitrust" 23 *South Dakota Law Review* (1978), 1-29; Jerome F. Leavell and Howard L. Millard, "Trade Regulation and Professional Sports" 26 *Mercer L. Rev.* (1974), 603-616; John J. Scura, "The time has come: ending the antitrust non-enforcement policy in professional sports" 2 *Seton Hall J. Sport L.* (1992), 151-173. More generally see, Norman Abrams "Internal Policy: Guiding the Exercise of Prosecutorial Discretion", 19 *UCLA L. Rev.* (1971), 1-58; Martin Shapiro, "Discretion: The Next Stage" 92(8) *The Yale Law Journal* (1983), 1487-1522.

[11] See, for example, Wouter PJ. Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis." 27(2) *World Competition* (2004), 201-224; Wouter PJ. Wils, "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement." 34(3) *World Competition* (2011), 353-382; Pablo Ibanez Colomo, *The Shaping of EU Competition Law* (CUP, 2018); Christopher Townley, *A Framework for European Competition Law: Co-ordinated Diversity* (Hart, 2018).

re-introduction of the notification system or by private enforcement actions. Section VII discusses the normative implications of the shift from a substantive to procedural assessment of public policy, and Section VIII concludes.

II. METHODOLOGY

This article is based on a large quantitative and qualitative database of public enforcement actions.[12] The database encompasses all public enforcement actions of Article 101 and the national equivalent provisions, rendered by: (i) the Commission, since the establishment of the EEC in 1958 through 2017; and (ii) the NCAs of five representative Member States,[13] including France, Germany, Hungary, the Netherlands, and the UK, since the entry into force of Regulation 1/2003 modernising competition law enforcement in May 2004 through 2017.[14]

Table 1. Number of public enforcement actions in the database

	Art. 101	Art. 101 + national equivalent	Only national equivalent	Legal provision not mentioned	Total
Commission:					736
Pre modernisation	566				
Post modernisation	170				
NCAs post modernisation:					
France		156	177	24	357
Germany		57	19	94	170
Hungary		56	117	1	174
The Netherlands[15,16]		67	88	37	192
UK		33	30	7	70
Total					**1699**

The database, as mentioned, includes only public enforcement actions. It does not contain information about the application of Article 101 in civil litigation proceedings taking place in front of

[12] The database covers public enforcement actions published in any form (decision, opinion, press release or reference in an annual report) and which employ 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 the conduct of a specific undertaking).

[13] The five Member States were chosen out of the EU twenty-eight 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 the role of public policy under Article 101(3). On those Member States' approach to public policy under Article 101(3) see Or Brook, "Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five Competition Authorities", 56(1) *Common Market Law Review* (2019), 121-156. The database includes only cases in the relevant time period that were published prior to June 2018.

[14] 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, p. 1–25 ("Regulation 1/2003"). The database is part of a larger PhD project, empirically mapping the role of non-competition interests in Article 101 enforcement. See Or Brook, *Coding non-competition interests under Article 101 TFEU: a quantitative and qualitative study* (PhD dissertation, University of Amsterdam, 2019).

[15] The number of cases includes reassessment proceedings of the Dutch NCA's decisions by an advisory committee. On this procedure see Michael Frese, *Sanctions in EU competition law: principles and practice* (Bloomsbury Publishing, 2014), p. 146.

[16] For methodological reasons, a special coding protocol was applied to the so-called Dutch construction cartel cases. In 2001, following numerous complaints, the Dutch NCA investigated anti-competitive agreements in various sectors of the Dutch construction industry. These investigations were supported by over 480 leniency applications, which in 2005 led to the imposition of fines on about 1,400 firms. Given the immense magnitude of those cases, the NCA instigated a special fast-lane procedure in which undertakings agreed to waive their right to contest the legal and factual claims of the NCA in favour of a 15% fine reduction. This procedure, and its interesting legal implications, are explored by Anna Gerbrandy and Eva Lachnit, "Bid-rigging with gingerbread candy: adventures in the land of the Dutch construction cartel." In Barry Rodger (ed.), *Landmark cases in competition law, around the world in fourteen stories* (Kluwer Law International, 2013), 203-231. Coding all of those proceedings separately would have created distortions in the data, especially since they are significantly higher in number than all of the other NCAs' enforcement activities combined. Therefore, the Dutch construction cartel cases were aggregated and coded as 11 independent cases. This categorisation was based on the case identification number allocated by the Dutch NCA, which identified 11 sectors in the construction industry in which the infringements took place.

national courts. As a result, this article can neither draw conclusions on the consideration of public policy in civil cases nor on the role of national courts in the development of a balancing framework. Section VI(D) below, nevertheless, explains why private enforcement is unlikely to substantively alter the findings of this article.

Classic systematic content analysis was applied to record quantitative and qualitative aspects of the enforcement actions.[17] For each of those actions, the database specifies: (i) whether Article 101(3) was discussed and accepted (ii) the type of procedural instrument used (e.g. formal or informal decision, leniency application, settlement, commitments and closure of the proceedings); and (iii) the relevant sector in which the agreement took place.

Systematic content analysis provides an analytical method for testing hypotheses on the basis of theory, ensuring the reliability, validity, and generalisability of the results. The comprehensive nature of the study aims to uncover previously unnoticed enforcement patterns, and to verify or refute theories that cannot be studied only on the basis of anecdotal evidence or case studies.[18] At the same time, it is important to acknowledge the inherent limitations of this method. In particular, it must be noted that not all investigations of possible Article 101 infringements result in a reasoned administrative act. Thus, while the database purports to cover all public enforcement actions of Article 101, it cannot fully reflect infringements that did not end with a reasoned decision.[19]

There are several types of infringements that have *not* been recorded in the database: the database does not include information on undetected potential infringements, which are estimated to be the vast majority of anti-competitive agreements; [20] it does not record detected infringements if no administrative procedure was initiated or if the investigation ended without publication; and it holds only partial information on cases in which competition authorities did not issue an Article 101 decision on the merits. Public policy considerations that were taken into account by means of alternative instruments (e.g. sector regulation or inquires) or procedural measures are not reflected in the database.

Consequently, there is a large body of unidentified "dark-matter" of Article 101 infringements. This caveat applies to the use of the database and what can be learned from it.[21] As illustrated by Figure 1, of the totality of anti-competitive agreements, only agreements that were concluded by a manner of a reasoned public enforcement decision on the merits (the white "core") are fully represented in the database.

[17] On the systematic content analysis methodology, see Mark A. Hall and Ronald F. Wright, "Systematic Content Analysis of Judicial Opinions", 96(1) *California Law Review* (2008), 63-122; Fred Kort, "Content Analysis of Judicial Opinions and Rules of Law", in Glendon A Schubert and Vilhelm Aubert (Ed.) *Judicial Decision Making* (Free Press, 1963); Alan L.Tyree, "Fact Content Analysis of Case Law: Methods and Limitations", 22(1) *Jurimetrics* (1981), 1-33; Kimberly A. Neuendorf, *The content analysis guidebook* (Sage, 2016).

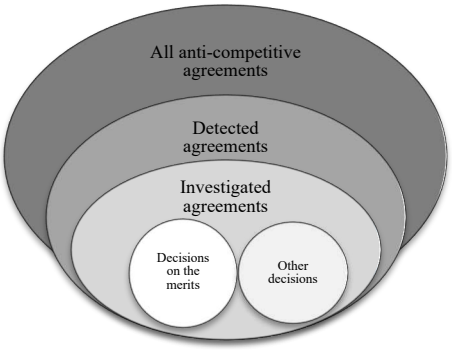
[18] Hall and Wright, op. cit. *supra* note 17, pp. 64, 100; Hall, op. cit. *supra* note 17, pp. 64, 99; Neuendorf, op. cit. *supra* note 17, pp. 16-17.

[19] Stephen Davies and Peter Ormosi "Assessing Competition Policy: Methodologies, Gaps and Agenda for Future Research" *Working Paper. Centre for Competition Policy, Norwich* (2010), pp. 34-35.

[20] For example, Emmanuel Combe, Constance Monnier, and Renaud Legal, "Cartels: The probability of getting caught in the European Union" *Bruges European Economic Research (BEER) Papers*, have estimated detection chance between 12.9% and 13.2%. Also see Davies and Ormosi, op. cit. *supra* note 19, p. 43; Davies and Ormosi, op. cit. *supra* note 7.

[21] Martin Carree, Andrea Günster, and Maarten Pieter Schinkel, "European antitrust policy 1957–2004: an analysis of commission decisions" 36(2) *Review of Industrial Organization* (2010), 97-131, at 98.

Figure 1. Article 101 infringements and the "dark matter"



Note: the proportions depicting the various types of agreements are for purposes of illustration only.

Despite these limitations, this article submits that the dark matter of enforcement is a noteworthy subject of study in itself. This is based on the assumption that the decisional practices of the competition authorities are not only a *reflection* of the law but rather *the law itself*.[22] Selection of the enforcement priorities, therefore, is critical for effective enforcement of competition law. If, for instance, competition authorities systematically ignore certain anti-competitive practices or sectors, undertakings will not be deterred from concluding such agreements.[23] In the long run, such practices might be considered as compatible with Article 101. Systematically ignoring certain anti-competitive practices or sectors, moreover, might even amount to a failure by a competition authority to carry out its duties.[24]

This assumption is predominantly true with respect to the role of public policy. As the next section shows, EU competition law does not offer a designated framework for consideration of public policy: The wording of the Treaty tells us little about the particularities of such considerations under Article 101; the non-binding Commission guidelines and notices outline only a general normative standard; and the EU Courts have not yet supplied an overall framework, in spite of regularly taking such considerations into account. In the absence of a designated framework, the role of public policy is substantially reflected by the decisional practices of the competition authorities and courts. This is especially prominent under the new self-assessment regime of Regulation 1/2003, in which undertakings must evaluate their compliance with the competition rules essentially pursuant to principles developed in the practice of the Commission, NCAs, and EU and national courts.[25]

The next section provides a historical background of the development of the role of public policy in EU competition law. On this basis, it poses the hypothesis that modernisation has not eliminated the role of public policy under Article 101, but merely shifted it to procedural priority setting decisions.

[22] Hall and Wright, op. cit. *supra* note 17, pp. 78, 84-86.
[23] International Competition Network (ICN), Anti-cartel enforcement manual, Cartel Case Initiation Chapter (2010), pp. 6, 17; Wouter PJ. Wils, "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement" 34(3) *World Competition* (2011), 353-382, at 382.
[24] Baxter, op. cit. *supra* note 10, at 685-686.
[25] Massimo Merola and Denis Waelbroeck (eds), *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* (GCLC Annual Conference, 11-12 June 2009, Groupe de Boeck, 2010), pp. 19, 58-76.

III. BACKGROUND: MODERNISATION SHIFTS THE ROLE OF PUBLIC POLICY

A. Public policy prior modernisation

The role of public policy in the enforcement of Article 101 has been subject to a heated debate for many years.[26] The wording of the Article is open-textured. Article 101(1) prohibits all agreements or concerted practices having the object or effect of restricting competition in the internal market. While Article 101(2) declares that such agreements are automatically void, Article 101(3) outlines an exception. It excludes from the prohibition an agreement that "contributes to improving the production or distribution of goods or to promoting technical or economic progress", if it provides consumers with a fair share of the resulting benefits, is indispensable to the attainment of such benefits, and does not afford the undertakings the possibility to eliminate competition in the relevant market. This vague wording does not detail *if and what types* of public policy considerations may be taken into account, or *how* they should be balanced against the protection of competition.[27]

The unclear role of public policy, nevertheless, had encountered only limited difficulties in the past. Prior to modernisation, the enforcement of Article 101 was based on a centralised notification regime. All potential anti-competitive agreements had to be notified to the Commission prior to their implementation, and the Commission held the sole power to grant Article 101(3) exemptions.[28]

Guided by the case law of the EU Courts, the Commission interpreted Article 101(3) on a case-by-case basis as leaving ample room for public policy considerations. The Courts affirmed the Commission's broad margin of discretion in this regard, noting that the "Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101](3)".[29] Accordingly, Article 101(3) was not only applied to balance the anti- and pro-competitive effects of agreements on competition or on consumer welfare. It was also utilised to account for more subjective-political aims, such as regulating economic policy, sheltering national industries from foreign competition, ensuring an adequate level of services of general economic interests, protecting SMEs, and promoting social goals.[30]

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[26] There is an impressive array of literature exploring the type of and methodology for consideration of public policy. For example see Claus Dieter Ehlermann, "The modernisation of EC antitrust policy a legal and cultural revolution", 37 *Common Market Law Review* (2000), 537-590, at 549; Rein Wesseling, *The Modernisation of EC Competition Law* (Hart, 2000), pp. 77-113; Giorgio Monti, "Article 81 EC and Public Policy" 39 *Common Market Law Review (2002*), 1057-1099; Giorgio Monti, *EC Competition Law* (Cambridge University Press, 2007), pp. 88-123; Assimakis P Komninos, "Non-competition concerns: resolution of conflicts in the integrated Article 81 EC", *University of Oxford, Working Paper (L)* 8.05 (2005); Okeoghene Odudu, *The boundaries of EC Competition Law: the Scope of Article 81* (OUP, 2006), pp. 160-174; Brenda Sufrin, "The Evolution of Article 81(3) of the EC Treaty", 51(4) *The Antitrust Bulletin* (2006), 915-981, at pp. 933-936; Heike Schweitzer, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Article 81" *EUI Working Papers LAW 2007/30 (2007);* Constanze Semmelmann, "Non-competition goals in the interpretation of Article 81 EC" 1(1) *Global Antitrust Review (*2008), 15-47; Nicolas Petit, "The Guidelines on the Application of Article 81(3) EC: A Critical Review", 4/1009 *Institut d'études juridiques Européennes Working Paper* (2009), pp. 6-9; Suzanne Kingston, *Greening EU competition law and policy* (Cambridge University Press, 2011); Van Rompuy, op. cit. *supra* note 1; Anna C. Witt, *The More Economic Approach to EU Antitrust Law* (Hart, 2016), pp. 160-174; Wolf Sauter, *Coherence in EU Competition Law* (OUP, 2016), pp. 64-75; Julian Nowag, *Environmental integration in competition and free-movement laws* (Oxford University Press, 2016).

[27] For example, see, Monti, op. cit. *supra* note 26; Townley, op. cit. *supra* note 1, pp. 141-176; Van Rompuy, op. cit. *supra* note 1, 253-266.

[28] Council Regulation 17/62 (EEC), First Regulation implementing Articles 85 and 86 of the Treaty (21.2.1962 OJ, P 013).

[29] Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision v Commission*, ECLI:EU:T:1996:99, para 118.

[30] C-26/76 *Metro v. Commission*, [1977] ECR 1875, para 20-21; T-528/93 *Métropole Télévision v Commission*, ECLI:EU:T:1996:99, para 118; T-17/93 *Matra Hachette SA v Commission*, ECLI:EU:T:1994:89, para 106-107. Also see Commission's annual report 1978, 9, 12, 49; Commission's annual report 1979, pp. 9-10; Commission's annual report 1980, p. 10; Commission's annual report 1981, p. 33; Commission's annual report 1982, pp.13-14; Commission's annual report 1983, pp. 12,

In addition to their role under Article 101(3), public policy considerations have also guided the interpretation of what amounts to a restriction of competition under Article 101(1). In cases such as *Wouters*, the ECJ held that restrictions imposed on the commercial behaviour of undertakings are not prohibited under Article 101(1) if they are necessary and proportionate to attaining legitimate public policy aims such as the proper practice of the legal profession.[31]

The role of public policy consideration under Article 101 has changed in the turn of the millennium, when the Commission has advocated a comprehensive three-pillared reform to the enforcement of the Article (together, the "modernisation"). The following sub-sections maintain that those three pillars have resulted in two opposite effects. On the one hand, the substantive and institutional pillars of modernisation (i.e. the more economic approach and the decentralisation of the enforcement) have led the Commission to advocate narrowing down the role of public policy under the substantive analysis of Article 101(3). On the other hand, the procedural pillar of modernisation (i.e. the switch from the notification to the self-assessment regime), has enhanced the Commission's and NCAs' priority setting powers. These powers have granted them new procedural ways to account for public policy considerations.

B. Substantive and institutional pillars: eliminating public policy from Article 101(3)

The common view that modernisation has limited the role of public policy under Article 101, as presented in the opening of this article, is ascribed to the interlinked effects of the substantive and institutional pillars of modernisation:

The *substantive pillar* of modernisation has introduced greater economic thinking to EU competition law. Under the heading of a more economic approach, the Commission gradually deployed economic theory and tools to apply Article 101.[32] It has introduced the notion of consumer welfare as the primary goal of EU competition policy in general, and of Article 101(3) in particular.[33] Accordingly, it has revised the analysis prescribed by the Block Exemption Regulations and its guidelines to focus on the market power held by the undertakings and on the effects of the agreements on competition.[34]

By the dint of the more economic approach, the Commission has also attempted to limit the room for the consideration of public policy under the Article. The Commission's guidelines have re-interpreted the wording of Article 101(3) to restrict the type of benefits that can be taken into account

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31, 53; Commission's annual report 1984, pp. 11-12, 16, 20, 33; Commission's annual report 1985, p. 11; Commission's annual report 1986, p. 14; Commission's annual report 1987, p. 13; Wesseling, op. cit. *supra* note 26, pp. 33; Townley, op. cit. *supra* note 1, pp. 141-175; Rompuy, op. cit. *supra* note 26, p. 155. For a comprehensive empirical data on those cases see Brook, op. cit. *supra* note 13, pp. 132-135.

[31] C-309/99 *J.CJ. Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98, para 110. Townley 2009, op. cit. *supra* note 1, pp.130-132; Van Rompuy, op. cit. *supra* note 1, pp. 241-244; Sauter, op. cit. *supra* note 26, pp. 79-81; Monti and Mulder, op. cit. *supra* note 59 pp. 645-647.

[32] In a similar vein, the Commission has created the post of the Chief Competition Economist to provide economic advice on all competition matters. See Commission's annual report 2003, pp. 5, 20; Commission's annual report 2004, p. 16.

[33] Article 101(3) Guidelines, para 33.

[34] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Official Journal L 336, 29.12.1999, p. 21-25) ("Commission Guidelines on Vertical Restraints 1999"), as revised by Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Official Journal L 102, 23.4.2010, p.1-7) ("Commission Guidelines on Vertical Restraints 2010"); Commission Guidelines on the applicability of Article 81 to horizontal co-operation agreements (OJ C3 06.01.2001) ("Commission Guidelines on Horizontal Agreements 2001") as revised by Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C11, 14.1.2011) ("Commission Guidelines on Horizontal Agreements 2011").

to "objective economic efficiencies",[35] and have required economic and empirical methodologies to assess such efficiencies.[36] As shown elsewhere, this position was consistently implemented in the Commission's decisional practice. When assessing alleged beneficial effects following modernisation, the Commission had taken into account only cost and quality efficiencies.[37] Subsequently, many public policy considerations that were previously taken into account under Article 101(3) – such as culture,[38] employment,[39] and public safety[40] - seem to be no longer applicable in the Commission's view.

The Commission has also advocated narrowing down the scope of Article 101(3) with respect to by-object restrictions. Prior to modernisation, the Commission had regularly exempted by-object restrictions.[41] Yet, its new Article 101(3) Guidelines declare that although Article 101(3) does not *a priori* exclude certain types of restrictions, "practice shows" that by-object restrictions are "unlikely" to fulfil the conditions of the Article.[42] The Commission's decisions following modernisation use even stronger language, holding that by-object restrictions "in principle (…) are not eligible for exemption", as they do not create genuine benefits, do not provide a fair share to consumers, and are not indispensable.[43] The Commission's new approach to by-object restrictions places another limitation on the type of restrictive agreement that could benefit from an Article 101(3) exception following modernisation.

While narrowing down the scope of Article 101(3) was undoubtedly motivated by the substantive pillar of modernisation, it was also attributed to the *institutional pillar* of Regulation 1/2003. Prior to modernisation, Article 101 was enforced almost exclusively by the Commission, which held the sole power to grant Article 101(3) exemptions. Only around half of the NCAs were even theoretically competent to enforce Article 101(1) under their respective national laws, and even they have rarely done so in practice.[44]

Regulation 1/2003 aimed to stimulate national enforcement. It has decentralised the enforcement, entrusting NCAs and national courts to apply Article 101 in parallel to the Commission. But NCAs still have limited powers when it comes to the application of Article 101(3). They can only assess whether

[35] Article 101(3) Guidelines, para 50, 59. Also see para 33, 43, 48-72.
[36] Article 101(3) Guidelines, para 51-58, 76, 78, 94, 109-115. Commission Guidelines on Vertical Restraints 2010, para 6, 19, 60, 96, 122-127; Commission Guidelines on Horizontal Agreements 2011, para 29, 49, 95-100, 141, 183, 217, 246.
[37] This was illustrated empirically in Brook, op. cit. supra note 11, pp. 131-132. Also see Witt, op. cit. *supra* note 26, pp. 166.
[38] IV/29.972 Langenscheidt/Hachette (1981), para 14; COMP/C2/38.014 IFPI 'Simulcasting' (2002), para 91.
[39] IV/33.814 Ford/Volkswagen (1992), para 36.
[40] IV/32.173 Continental/Michelin (1988), para 27.
[41] See, for example, IV/30.810 Synthetic fibres (1984); IV/30.863 BPCL/ICI (1984); IV/30.804 Nuovo Cegam (1984); IV/31.055 ENI/Montedison (1986); IV/32.265 Concordato Incendio (1989); IV/32.408 TEKO (1989); IV/33.100 Assurpol (1992); IV/34.494 Decision on tariff structures in the combined transport of goods (1993); IV/36.494 EACEM (1998); IV/36.718 CECED (1999); IV/36.748 REIMS II (1999); IV/38.284 Société Air France/Alitalia Linee (2004).
[42] Article 101(3) Guidelines, 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.
[43] IV/36.957 IV/36.997 IV/37.121 IV/37.138 IV/37.380 Glaxo Wellcome (2001), para 124. This approach was rejected by the GC in T-168/01 *GlaxoSmithKline Services and Others v Commission* ECLI:EU:T:2006:265, para 233 that was confirmed by the ECJ in Joined Cases C-501/06P C-513/06P C-515/06P C-519/06P *GlaxoSmithKline Services and Others v Commission* ECLI:EU:C:2009:610. Yet, the Commission continued to follow a similar approach also in later decisions, such as IV/39.401 E.ON/GDF (2009), para 265; IV/39.510 Ordre National des Pharmaciens (2010), para 705.
[44] The lack of national enforcement prior to modernisation was explained with reference to the Commission's former monopoly on applying Article 101(3). Since the national authorities were not competent to assess claims for Article 101(3) defence raised by undertakings as a justification for their anti-competitive behaviour, they were disincentivised from pursuing Article 101 infringements altogether. See Modernisation White Paper, para 39, 47. Also see Wouter PJ. Wils, "Regulation 1/2003: a reminder of the main issues", in Damien Geradin. *Modernisation and enlargement: two major challenges for EC competition law* (Intersentia nv, 2004), 9-83, at 24.

the four conditions of the Article are fulfilled but cannot adopt a binding decision in this matter.[45] As confirmed by the ECJ in *Tele2Polska*, an NCA may simply declare that an investigation was discontinued since there are "no grounds for action" on its part – in particular, in situations in which it believes that the conditions of Article 101(3) were fulfilled.[46] The Commission, another competition authority or court may reach a different decision. There is no single form for the NCAs' "no grounds for action" findings. Some NCAs have adopted such findings 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.[47]

Commentators have suggested that the Commission's new interpretation of Article 101(3) was not only motivated by the more economic approach, but was also prompted by the fear that the decentralised enforcement would induce NCAs to tolerate unlawful agreements on the basis of national public policy grounds.[48] By reframing Article 101(3) as an objective economic tool that is mostly applicable to by-effect restrictions, the Commission attempted to limit the NCAs' leeway to restrict the full force of EU competition law in favour of national and political interests. This is reflected in the Commission guidelines, explaining 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*".[49]

Other commentators have tied the Commission's new interpretation to the *procedural pillar* of modernisation. In parallel with the substantive and institutional reforms, Regulation 1/2003 has swept away the old notification system in favour of a self-assessment regime. The Commission is no longer obliged to assess all agreements prior to their implementation by issuing a formal decision or an informal comfort letter. Instead, the Regulation has transformed Article 101 into a directly applicable provision. Undertakings must now self-assess the compatibility of their agreements with the provisions of Articles 101(1) and (3), and the competition authorities only scrutinize some of the agreements *ex-post*. Direct applicability, as a concept of EU law, requires that the legal provision be clear, precise, and

[45] Regulation 1/2003, Article 5. As mentioned in Section II above, the consideration of public policy in those private enforcement actions is not reflected in the database or discussed in this article.

[46] C-375/09 *Prezes Urzędu Ochrony Konkurencji I Konsumentów v. Tele2 Polska sp. Z o.o.* ECLI:EU:C:2011:270. This is further elaborated in Section V(C) below.

[47] Brook, op. cit. *supra* note 13, pp. 139-140.

[48] Petit, op. cit. *supra* note 26, pp. 6; Rompuy, op. cit. *supra* note 26, pp. 257; Sufrin, op. cit. *supra* note 26, pp. 964; Semmelmann, op. cit. *supra* note 26, p. 39; Townley 2009, op. cit. supra note 1, p. 80; Christopher Townley, "Article 81 EC and Policy Objective" 39 *Common Market Law Review* (2002), 1057-1099, at 1092; Monti, op. cit. *supra* note 26, pp. 21; Katalin J. Cseres, "Multi-jurisdictional competition law enforcement: The interface between European competition law and the competition laws of the new member states", 3(2) *European Competition Journal* (2007), 465-502, at 169; Komninos, op. cit. *supra* note 26, p. 17; Merola and Waelbroeck, op. cit. *supra* note 25, p. 82; Wouter PJ. Wils, "Ten Years of Regulation 1/2003-A Retrospective" 4(4) *Journal of European Competition Law & Practice* (2013), 293-301, at 295' German Monopolies Commission, *Cartel Policy Change in the European Union? On the European Commission's White Paper of 28th April 1999* (2000), para 40; UK Parliament, *Select Committee on European Union Fourth Report* (2000). Available at: https://publications.parliament.uk/pa/ld199900/ldselect/ldeucom/33/3307.htm, para 11, 150; Letter from The Hon Stephen Byers, MP, UK Secretary of State for Trade and Industry. Available at: http://www.publications.parliament.uk/pa/ ld199900/ldselect/ldeucom/94/9419.htm.

[49] Emphasis added. Modernisation White Paper, para 57. Also see para 72. Section V(A) below supports this argument, by showing that the Commission did take into account public policy considerations in the period between 1999-April 2004, namely following the substantive modernisation but prior to the decentralisation.

unconditional.[50] It could be argued that in this context, narrowing down the room for public policy was necessary for adapting the application of Article 101(3) to the new regime.[51]

Although the above justifications may be convincing, so far the EU Courts have not taken a clear position on the effects of Regulation 1/2003 on the role of public policy considerations. While they have neither fully embraced nor fully rejected the Commission's new interpretation, the EU Courts have continued to follow their long-standing case law that left room for the consideration of public policy.[52] In a number of preliminary rulings after the entry into force of Regulation 1/2003, the ECJ held that public policy considerations related to financial services, regulated professions, IPRs, and sport can justify Article 101(3) exceptions.[53] Similarly, following modernisation, the EU Courts upheld a number of Commission decisions that were adopted prior to the change in its approach, holding that the Commission was right to take into account considerations related to sports, the environment, and the stability and functioning of financial services.[54]

The continued relevance of public policy is also supported by the parallel the ECJ drew between Article 101(3) and the free movement exceptions, in which public policy considerations may undoubtedly justify an exemption. In *Premier League*, for example, the Court examined an exclusive licensing agreement. When assessing the free movement rules, the Court held that the agreement restricted the freedom to provide services and could not be justified by overriding public policy considerations related to IPRs or the promotion of sport, since the restriction went beyond what is necessary. Later, the Court referred to this free movement exception to explain why the agreement also did not fulfill the conditions of Article 101(3).[55] The Court assumed, in other words, that public policy considerations were relevant both under the free movement and the competition law provisions.

Similarly, the EU Courts did not follow the Commission's new interpretation of the applicability of Article 101(3) in situations of by-object restrictions. The Courts continued to order a full analysis of

[50] C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, pp 12-13.

[51] Wesseling, "The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options" 20(8) *European Competition Law Review* (1999), 420-433, at 425, 432-433; Schweitzer, op. cit. *supra* note 26, p. 5, 8-9; Semmelmann, op. cit. *supra* note 26, pp. 196-198.

[52] Schweitzer, op. cit. *supra* note 26, p. 9; Brook, op. cit. *supra* note 13; Townley, op. cit. *supra* note 11, pp 41-44.The uncertainty surrounding the role of public policy considerations under Article 101(3) should not be confused with the question of judicial review. In cases as C-382/12P *MasterCard v. Commission*, EU:C:2014:2201, para 155, the ECJ confirmed that it will undertake a comprehensive review of whether or not the conditions for the application of EU competition rules are met, in particular – with respect to Article 101(3). For excellent analyses of the Commission's margin of discretion following modernisation see Schweitzer and Klaus Patel "EU Competition Law in Historical Context: Continuity and Change" in Schweitzer and Klaus Patel (eds.) *The historical foundations of EU competition law* (Oxford University Press, 2013), 207-230, at 217-219; Jaeger "The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?" 2(4) *Journal of European Competition Law & Practice* (2011). 295-314.; Kalintiri "What's in a name? The marginal standard of review of 'complex economic assessments' in EU competition enforcement" 53(5) *Common Market Law Review* (2016), 1283-1316.

[53] C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios* ECLI:EU:C:2006:734, para 67; C-1/12 *Ordem dos Técnicos Oficiais deContas* v. *Autoridade da Concorrência* ECLI:EU:C:2013:127, para 28, 94, 102–103; Joined Cases C-403/08 and 429/08 *Football Association Premier League Ltd* ECLI:EU:C:2011:631, para 145–146.

[54] T-193/02 *Laurent Piau* v. *Commission* ECLI:EU:T:2005:22, para 100-106, upheld by the ECJ in C-171/05P *Laurent Piau* v. *Commission* EU:C:2006:149; T-289/01 *Der Grüne Punkt – Duales System Deutschland* v. *Commission*, EU:T:2007:155, para 38, 200-203; 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.

[55] Joined Cases C-403/08 and 429/08 *Football Association Premier League Ltd* ECLI:EU:C:2011:631, para 105-124. and 145-146.

Article 101(3) conditions, also with respect to by-object restrictions. They have neither required a different analysis nor indicated a lower likelihood of success in such cases.[56]

The Commission's attempt to narrow down the scope of Article 101(3), therefore, raises considerable legal difficulties. The Commission is entrusted with the power to define the EU competition policy, but does not have the power to alter the substance of the competition rules that were defined in primary law and the case law of the European courts.[57] In particular, it does not have the legal competence to alter the scope of Article 101(3) in its soft law policy papers where this approach finds little or no support in case law.[58]

Since there is no clear EU framework as to the role of public policy considerations within Article 101(3), NCAs and national courts are not bound by the Commission's new interpretation. They may decide whether to take into account public policy considerations under Article 101(3), and if so to what extent, as long as their interpretations are in line with the wording and the case law of the ECJ. Indeed, in practice, NCAs and national courts have adopted diverging approaches as to the type of benefits that can be examined and if and how public policy considerations can still play a role.[59]

This section illustrated that the Commission's new interpretation of Article 101(3) was often understood as an expression that public policy considerations no longer play a role in the enforcement of Article 101, at least in the Commission's practice. Nevertheless, as the next section illustrates, this view fails to take into account the effects of the third, procedural pillar of modernisation, namely the competition authorities' new priority-setting powers.

C. Procedural modernisation: enhanced priority setting powers

The procedural pillar of modernisation, converting the enforcement from a notification to a self-assessment regime, was a response to strong criticism alleging that the EU's old enforcement regime had failed to adequately protect competition. The obligation to respond to all notifications, it was argued, had consumed much of the Commission's resources and left it only limited room to investigate agreements that were not notified and to shape its enforcement priorities and strategies.[60] The

[56] See, for example, Joined Cases C-501/06P C-513/06P C-515/06P C-519/06P *GlaxoSmithKline Services and Others v Commission* ECLI:EU:C:2009:610, para 68-167; T-168/01 *GlaxoSmithKline Services and Others v Commission* ECLI:EU:T:2006:265, para 214-315.

[57] C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* ECLI:EU:C:2000:689, para 46.

[58] Van Rompuy, op. cit. *supra* note 1, pp. 256-257; Schweitzer, op. cit. *supra* note 26, p. 9; Townley, op. cit. *supra* note 11, pp. 70, 178-181; Witt, op. cit. *supra* note 26, pp. 261-295.

[59] Brook, op. cit. *supra* note 13. Also see Giorgio Monti and Jotte Mulder, "Escaping the clutches of EU competition law" 42(5) *European law review* (2017), 635-656; Townley, op. cit. *supra* note 11, pp 41-44.

[60] The burden of notification was expected to increase following the accession of the Central and Eastern European countries to the EU in 2004. See Modernisation White Paper, para 40-42; Commission's annual report, 1994, p. 18; Commission's annual report 1995, pp. 7, 45; Commission's annual report 1996, p. 24; Commission's annual report 1997, pp. 7, 89; Commission's annual report 1996, p. 24; Commission's annual report 1999, p. 20; Commission's annual report 2000, p. 11; Commission's annual report 2001, p. 4. Also see Ivo Van Bael, "The Antitrust Settlement Practice of the EC Commission" 23 *Common Market Law Review* (1986), 61-90, at 62-63; John 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: http://ec.europa.eu/competition/speeches/text/sp1998_027_en.pdf, pp. 3, 4-5; Ehlermann, op. cit. *supra* note 26, pp. 541; Alan Riley, "EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part One: Regulation 1 and the Notification Burden" 24(11) *European Competition Law Review* (2003), 604-615, at 614; Wouter PJ. Wils, *Principles of European Antitrust Enforcement* (Bloomsbury, 2005), pp. 5-7; Sufrin, op. cit. *supra* note 26, pp. 917-918; Eric Gippini-Fournier, "The modernisation of European competition law: first experiences with Regulation 1/2003" *Report to FIDE Congress 2008*, pp. 5-8; Alison Jones, "The Journey toward an Effects-Based Approach under Article 101 TFEU—The Case of Hardcore Restraints" 55(4) *The Antitrust Bulletin* (2010), 783-818, at 789-790; Daniel G. Goyder, *Goyders's EC Competition Law* (OUP, 2009), pp. 52-53, 613-615; John Temple Lang, "After Fifty Years–What Is Needed for a Unified European Competition Policy?" *working paper* (2014). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519713.

abolishment of the obligation to respond to all notifications intended to allow the competition authorities to be more proactive in the selection of their enforcement priorities.[61] Those enhanced priority setting powers, consequently, are a key element of the new enforcement regime.

Setting the enforcement priorities, in the words of Commissioner Vestager, is one of the most important decisions a competition authority must make.[62] The ECN+ Directive similarly emphasises that since it is not possible to enforce every potential infringement of Article 101, prioritisation is a necessary precondition to ensure the effective enforcement.[63]

Despite such importance, EU law does not limit or direct the enforcement priorities, at neither the EU nor national levels. At the EU level, the ECJ has repeatedly emphasised the Commission's broad discretion to set priorities, as a reflection of its responsibility under the Treaty to define and implement the orientation of EU competition policy. In order to perform this task effectively, the Commission is free to select which cases to investigate, when to terminate proceedings, and to devise the procedural instruments.[64]

Admittedly, the Commission is subject to certain procedural rules when it comes to handling complaints. According to EU courts' case law, the Commission must consider attentively all matters of fact and law that the complainant brings to its attention. If it declines to continue with the examination of a complaint, it must state sufficiently precise and detailed reasons as to enable the EU courts to carry out an effective review. Yet, while the Commission is subject to certain *procedural* rules, there is almost no limit on its *substantive* discretion for choosing which complaints to investigate. In particular, the Commission is not required to take a substantive decision as to the existence or non-existence of an infringement.[65]

To this end, the EU courts' appraisal of the Commission's priority setting decisions is highly limited. The courts will only examine whether the contested decision is based on materially incorrect facts or vitiated by an error of law, a manifest error of appraisal, or misuse of powers. They do not question the substance of the prioritisation decisions as such.[66]

The same is true with respect to priority setting at the national level. The Treaty, Regulation 1/2003 and the ECN+ Directive do not direct or limit the NCAs' enforcement priorities.[67] NCAs may select cases not only on the basis of competition concerns (e.g. those having the most harmful effects on competition or consumer welfare), but also to consciously choose *not* to enforce Article 101 for other reasons.[68] As the ECN observed, they may prioritise cases according to considerations related to

[61] Modernisation White Paper, para 13.
[62] Margrethe Vestager, "Setting priorities in antitrust", Speech in GCLC, Brussels, 1.2.2016. Available at: http://ec.europa.eu/commission/2014-2019/vestager/announcements/setting-priorities-antitrust_en.pdf.
[63] ECN+ Directive Proposal (2017), Preamble 17. Also see International Competition Network, Competition Policy Implementation Working Group, Seminar on Competition Agency Effectiveness (2009), p. 6; Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, "EU Competition Law Enforcement: Elements for a Discussion on Effectiveness and Uniformity" *International Antitrust Law & Policy, Annual Proceedings of the Fordham Corporate Law Institute* (2011), 45-104, at 60.
[64] Article 105 TFEU. See C-344/98 *Masterfoods v. HB Ice Cream Ltd* ECLI:EU:C:2000:689, para. 46; C-119/97P *Ufex and Others v. Commission* ECLI:EU:C:1999:116, para 88-89; C-449/98P *IECC v. Commission* ECLI:EU:C:2001:275, para 35–37. Also see Wils, op. cit. *supra* note 11, pp. 357-360.
[65] C-119/97P *Ufex and Others v Commission*, ECLI:EU:C:1999:116, para 86-88; C-282/95P *Guérin Automobiles v Commission* ECLI:EU:C:1997:159, para 36; Case 125/78 *GEMA v Commission* ECLI:EU:C:1979:237, para 17-18.
[66] *Ibid*. Also see Wils, op. cit. *supra* note 11, pp. 357-360.
[67] As aptly summarised in the Impact Assessment accompanying the ECN+ Directive Proposal (2017), 14. However, some NCAs are subject to national rules. Also see Blanco and Lamadrid de Pablo, op. cit. *supra* note 63, p. 60.
[68] Article 3 of Regulation 1/2003 merely obliges NCAs and national courts to apply Article 101 when they apply the national equivalent provision. It does not impose duties with respect to taking up or disregarding cases.

"*public interest*, consumer welfare, market efficiencies, *or other substantive, institutional or procedural considerations*".[69]

This article suggests that the wide discretion to set the enforcement priorities has created a new way to account for public policy considerations under Article 101. Instead of engaging in a complex balancing of interests under the substantive analysis of Article 101(3), competition authorities may simply decide to refrain from pursuing a case against an anti-competitive agreement that promotes a public policy or to terminate the case by accepting commitments.

Those *non-enforcement decisions* bare similar practical effects as substantive decisions in which an NCA finds there are "no grounds for action" since the conditions of Article 101(3) are fulfilled. In both cases, agreements that promote certain public policy considerations will not be enforced.[70] However, priority setting decisions are not subject to the rigid substantive and procedural framework applicable to Article 101(3) findings. They are not limited by almost any procedural or substantive constraints and often are not published or reasoned. The next section submits that for these very reasons, competition authorities may prefer using their priority setting powers to account for public policy considerations instead of engaging in an Article 101(3) analysis.

D. Hypothesis: from substantive to procedural consideration of public policy

The previous section demonstrated how modernisation has vested the competition authorities with enhanced priority setting powers, which can be utilised to account for public policy considerations. This section submits that there are several reasons why competition authorities may *prefer* to use these powers to manage public policy considerations instead of engaging in a full substantive Article 101(3) analysis:

First, competition authorities have scarce financial, technical, and human resources. The more time they spend on each case, the fewer cases they can deal with.[71] Hence, as was envisioned by Regulation 1/2003, they are incentivised to direct their efforts to clear-cut infringements of competition, having low risks and costs or high significance. On the other side of the same coin, each authority is disincentivised from pursuing complicated and costly cases, which may end without an infringement decision or be overturned by a court.[72] In particular, they may tend to avoid cases that merit a sophisticated analysis, such as those that require assessing public policy under Article 101(3).[73]

This incentive was reinforced following the substantive modernisation. The more economic approach has increased the costs for establishing an Article 101 infringement.[74] Instead of "pigeonholing" an agreement according to its form and predetermined rules of thumb, the more economic approach demands a case-specific and complex economic analysis based on empirical evidence. Balancing competition and public policy considerations under Article 101(3) has thus

[69] ECN, R*ecommendation on the Power to Set Priorities* (2013), p. 2.
[70] In both cases, the Commission and another NCA could still decide to bring an action against the case. However, in light of the limited number of enforcement actions, undertakings face only a limited risk of a second enforcement action.
[71] See Vestager, op. cit. *supra* note 62.
[72] ICN, op. cit. *supra* note 63, p. 17; Consumer and Market Authority, *Prioritisation principles for the CMA*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf; Jennings Hilary, "Prioritisation in Antitrust Enforcement-A Finger in Many Pies." 11 *Competition Law International* (2015), 29-38, p. 31; Richard Posner, *Antitrust law* (University of Chicago Press, 2009), pp. 275-276.
[73] This is also reflected in the Commission's policy papers, see footnote 5 above.
[74] Gerard, op. cit. *supra* note 6, pp. 32-36. Also see Witt, op. cit. *supra* note 26, pp. 167-173.

become a much more costly exercise. In comparison, priority setting decisions are not subject to the same rigid legal or economic standards. In many Member States, the competition authorities are not even required to produce a reasoned decision explaining the exercise of their discretion.[75]

Second, priority setting decisions facilitate a broad variety of public policy considerations, going well beyond what is permissible under the substantive standard of Article 101(3).[76] This allows the Commission and the NCAs to take into account public policy considerations that could not be accepted under the narrow interpretation of Article 101(3) that is advocated by the Commission following modernisation, and agreements that do not fulfil the other conditions of the Article.[77]

Third, favouring priority setting to account for public policy consideration may also be tied to the political and judicial accountability of each competition authority towards its national government, parliament, ECN, Commission, the epistemic community and the general public. [78] The accomplishments and prestige of a competition authority are often measured by statistics detailing the number of infringement decisions, the level of fines imposed,[79] and the rate of success of judicial review.[80] Consequently, an authority is disincentivised from investigating agreements that might be accepted under Article 101(3) or overturned on appeal. An authority might also be disincentivised from engaging in the debate over the role of public policy because the epistemic community questions their relevance in EU competition law enforcement. This encourages the authorities to pursue clear-cut infringements that are unlikely to pose legal, academic or political difficulties. In comparison, they will tend to avoid taking up more controversial cases, such as those that involve balancing of interests, or will settle or use informal or alternative measures to close such investigations.[81]

Finally, when accountability mechanisms fail, a decision to disregard a case on the basis of public policy considerations may be driven by regulatory capture motives, such as revolving door practices or political and populism-driven dynamics.[82] The heads of an authority may be encouraged to avoid

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[75] Nicolas Petit, "How much discretion do, and should, competition authorities enjoy in the course of their enforcement activities? A multi-jurisdictional assessment" *Concurrences: Revue des Droits de la Concurrence* (2010), 44-62; ECN Working Group Cooperation Issues and Due Process, "Decision-Making Powers Report" 31 October 2012, pp. 51-53, 70-78.

[76] Compare to Abrams, op. cit. *supra* note 10, p.2.

[77] With respect to commitments, see Michael L. Weiner, "Antitrust and the Rise of the Regulatory Consent Decree" 10 *Antitrust* (1995), 4-8, at 5.

[78] Competition Commissioner Neelie Kroes in ICN, op. cit. *supra* note 63, p. 6. More generally see Katalin J. Cseres and Annalies Outhuijse, "Parallel enforcement and accountability: the case of EU competition law" in Miroslava Scholten and Michiel Luchtman (eds.) *Law enforcement by EU authorities* (Edward Elgar Publishing, 2017) 82-115, at 97-113.

[79] This is especially true when an NCA's budget is affected by the number of fines it imposes. For instance, the Hungarian NCA is allowed to use 5% of its fines indirectly for funding conferences and external research projects. See Pierluigi Sabbatini, "Funding the budget of a competition authority with the fines it imposes" *Working Paper (2009)*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492666, p.1; OECD, Progress in Policy Reforms to Improve the Investment Climate in South East Europe (2006), p. 119.

[80] The focus on these indicators is apparent in the annual statistics published in the Commission's and NCAs' policy reports. It is also prominent in qualitative studies, such as in Ariel Ezrachi, William E. Kovacic, Maria Ioannidou, Julian Nowag and Hugh M. Hollman, "Journal of Antitrust Enforcement Agency Effectiveness Study" 4(2) *Journal of Antitrust Enforcement* (2016), 229–273, at 240-241. Also see Wouter PJ. Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis." 27 *World Competition* (2004), 201, at 217; Sabbatini, op. cit. supra note 79, p. 5; Kovacic, Hollman, and Grant, op. cit. *supra* note 82, p. 27; William E Kovacic, "Creating a Respected Brand: How Regulatory Agencies Signal Quality'" 22 *George Mason Law Review* (2015), 237, at 251; Damien Geradin and Nicolas Petit "Judicial review in European Union competition law: A quantitative and qualitative assessment", in Massimo Merola and Derenne (Eds.), *The role of the court of justice of the European Union in competition law cases* (Bruylant, 2012) 21–72, at 38.

[81] Jacob Gerse, "Designing Agencies" In Daniel A. Farber and Anne Joseph O'Connell (Eds.) *Research Handbook on Public Choice and Public Law* (Edward Elgar, 2010), 333-362, at 335; Nicolas Petit and Miguel Rato, "From Hard to Soft Enforcement of EC Competition Law-A Bestiary of Sunshine Enforcement Instruments", In Charles Gheur (ed.) *Alternative enforcement techniques in EC competition law: settlements, commitments and other novel instruments (*Bruylant, 2009), pp. 212-213.

[82] Petit op. cit. *supra* note 75, p. 45; Gerse, op. cit. *supra* note 81, pp. 334-336; William E Kovacic, Hugh M. Hollman and Patricia Grant, "How Does Your Competition Agency Measure Up?" 7(1) *European Competition Journal* (2011), 25-45, at 29. More generally see Richard A. Posner, "The federal trade commission" 37(1) *The University of Chicago Law Review* (1969), 47-89, at 86.

politically charged issues that may *not* be accepted under Article 101(3),[83] such as agreements involving public policy considerations.

Combining the above, the article suggests that the power to set the enforcement priorities offers an attractive tool from the standpoint of the competition authorities to account for public policy. Hence, it poses the following hypothesis: *the three pillars of modernisation have incentivised the competition authorities to direct their enforcement efforts towards clear-cut infringements of Article 101 that are unlikely to be justified by public policy considerations. Agreements requiring a balance between competition and public policy are likely to be disregarded or resolved by other means, such as negotiated remedies or by closing the probe into the case, even if they do not meet the conditions for an Article 101(3) exception.*

The following sections test this hypothesis. The next section presents various case studies in which public policy have explicitly influenced enforcement priorities, and the following section offers empirical indications of a systematic shift from substantive to procedural consideration of public policy.

IV. CASE STUDIES

Priority setting choices, as mentioned in the opening of this article, are an intriguing area of study precisely since they are often implicit and overlooked. Although the influence of public policy on setting the enforcement priorities was mostly invisible, there were some cases in which NCAs have openly decided *not* to pursue a case after a national parliament, government or administrative body have taken an unfavourable view of such enforcement on public policy grounds.

In some cases, national policies have directly required taking into account overriding public policy considerations. A prominent example is the *Dutch policy rule on sustainability agreements*. In December 2016, following a lengthy political debate, the Dutch NCA declared that it would no longer 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".[84] The NCA, in other words, proclaims that it will not prohibit anti-competitive agreements that are incompatible with Article 101 given their environmental benefits and on the basis of a political criterion ("broad social support"). This policy rule had a considerable effect. Following its adoption, the Dutch NCA had not investigated anti-competitive agreements resembling those it had previously prohibited.[85]

In other cases, national policies held a more implicit effect. For instance, a controversial Hungarian law allows the Hungarian Minister for Agriculture and Rural Development to limit the competition law enforcement against cartels in the *agriculture sector*. The Minister may exempt from the national

[83] Kovacic et al, op. cit. *supra* note 82, p. 38.

[84] Netherlands Authority for Consumers and Markets, ACM sets basic principles for oversight of sustainability agreements (02-12-2016). Available at: https://www.acm.nl/en/publications/publication/16726/ACM-sets-basic-principles-for-oversight-of-sustainability-arrangements. On the political debate leading to the adoption of the rule see Monti and Mulder, op. cit. *supra* note 59.

[85] The Dutch ACM had refused to grant Article 101(3) exceptions to agreements on basis of sustainability considerations in The Netherlands Authority for Consumers and Markets, *analysis of the planned agreement on closing down coal power plants from the 1980s*. Available at: https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closingdown-5-coal-power-plants-as-part-of-serenergieakkoord.pdf; *De troomversnelling* (ACM/DM/2013/205913); *Chicken for tomorrow* (ACM/DM/2014/206028).

competition law an anti-competitive agreement that guarantees a fair income for farmers. In such a case, the Minister may order the Hungarian NCA not to impose a fine for breach of Article 101.[86] This law has affected the priority setting decisions of the Hungarian NCA. The NCA is still competent to investigated anti-competitive agreements in the agriculture sector, to make findings of infringements, and to impose fines where the Minster did not order otherwise. Yet, following the adoption of the law, the NCA has chosen to refrain from enforcement in the agriculture sector altogether. Despite its active enforcement in the past, it has not opened new investigations in this sector and closed all of its active investigations.[87]

Along the same lines, other NCAs have avoided investigating agreements that fall under their competence but are also *governed by a sector regulator*. In Germany, for instance, the NCA declared that when an agreement comes under a sector-specific regulation, it would generally refrain from investigating it.[88] Sector regulation also seemed to affect the enforcement of Article 101 in systems of *concurrent enforcement* of competition law. A prominent example is the UK, in which the CMA and certain sector regulators hold parallel powers to apply competition law.[89] Each case is allocated to the authority that is "better or best placed to do so".[90] When a case is allocated to a sector regulator, it must decide whether to use its competition or sector specific powers. In practice, the UK sector regulators have seldom used Article 101, and preferred to rely on their sector regulation powers.[91] *In Energy Trade Association (2013)*, for instance, the British Gas and Electricity Markets Authority (Ofgem) explained that it "considers that its resources would likely be better devoted to further work on the regulatory environment" rather than conducting an Article 101 proceeding.[92]

Applying sector regulation instead of enforcing Article 101 has a significant impact on the role of public policy. Sector regulation does not always have the same aim as competition law. It does not necessarily focus on either making markets more competitive or on enhancing short-term consumer welfare. Rather, it is often directed at securing a broad range of social objectives, such as ensuring the security of supply, providing an essential but uneconomic service, protecting vulnerable consumers, and reaching

[86] Act No. CLXXVI of 2012 on inter-branch organisations and on certain issues of the regulation of agricultural markets adopted on November 19 which amended Act CXXVIII of 2012. For discussion on this act, also see Pal Szilagyi, "Hungarian Competition Law & Policy: The Watermelon Omen" 10 *Antitrust Chronicle* 10 (2012), 2-5, at 3-4; Tihamer Toth, "The Fall of Agricultural Cartel Enforcement in Hungary" *Working paper* (2013), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515967; Álvaro Pina, *Enhancing Competition and the Business Environment in Hungary*. No. 1123. OECD Publishing (2014), p.16; Balázs Csépai, "The ceasefire is over", 36(9) *European Competition Law Review* (2015), 404-405, at 404-405.

[87] The Hungarian NCA had previously enforced anti-competitive agreements in the agriculture sector in Vj-199/2005 Egg cartel (2006) as upheld by 7.K.30.838/2007/33 Egg cartel (2008); Vj-69/2008 Wheat mill products I (2010); Vj–89-2003/58 Hunting cartel (2004), as upheld by the court in 3.K.33.949/2010/17 Hunting cartel (2011); Vj-132/2003/37 Council for Wild Animals Products and Services (2005) as upheld by the Court in 3. K. 31. 984/2005/30 Council for Wild Animals Products and Services (2008).

[88] Meinrad Dreher, *Germany report to the LIDC conference* (2009). Available at: http://www.ligue.org/index.php?page=vienna-september-2009, para 4.2.

[89] Similar concurrency models are present in Ireland, Greece and Cyprus. See Jon Stern, "Sectoral Regulation and Competition Policy: The UK'S Concurrency Arrangements—An Economic Perspective" 11(4) *Journal of Competition Law & Economics* (2015), 881-916, at 896.

[90] Competition and Market Authority, *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (2014), para 3.22-3.25.

[91] The empirical findings show that between May 2004 to 2017, sector regulators have enforced Article 101 in seven cases. Five of those cases were closed without a finding of an infringement (Electric trackside lubricators (2005); 213479.02 Supply of grease for use in electric trackside lubricators (2005); CW/00842/06/05 BBC broadcast's provision (2007)), or closed on priority setting grounds (Energy trade association (2013); Third party intermediaries ("TPI"s)/Price comparison websites (2016)). The other two cases were closed by accepting commitments (Provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain (2015)) and a settlement (East Midlands International Airport (2017)). In all of those cases, no fine was imposed for the infringement of Article 101.

[92] Energy Trade Association (2013), 1.

environmental or redistributive goals. Consequently, sector regulation strikes a different balance between competition and public policy considerations.[93] Moreover, the application of sector regulation is grounded on different substantive, procedural, and institutional enforcement settings, which in turn confers a different balancing method.[94] Most noticeably, contrary to the enforcement of Article 101 following modernisation, sector regulation is typically applied *ex-ante*, aiming to dictate the behaviour of undertakings. By favouring the application of sector regulation in place of their competition powers, the sector regulators have transferred the balancing of competition and public policy considerations from the scope of Article 101(3) to the legal and economic tests applicable to sector regulation.

Finally, at times, public policy considerations played a role upon an *initiative of an NCA on a case-by-case basis*. For example, the Dutch NCA examined the conduct of trade unions of textile retailers, which have negotiated a new collective labour agreement with the Association for Wholesale Retailers in the Textile Business (VGT).[95] After the negotiations failed, VGT advised its members to unilaterally modify the employment conditions applicable to new personnel. This led the trade unions to submit a complaint to the Dutch NCA, arguing that the proposed employment conditions contained anti-competitive price arrangements. The NCA initially rejected the complaint by asserting that VGT had not acted as an undertaking when negotiating the collective labour agreements. Since the agreements were not classified as agreements between undertakings, Article 101(1) did not apply. Upon reassessment of the case, the NCA found that the VGT's advice had indeed infringed Article 101(1). Nevertheless, it decided to reject the complaint with reference to its priority setting powers. It declared that the dispute merits a balance between competition and social policy. Although the NCA is formally competent to undertake such a task, it maintained that it ought to be performed by the legislator, or at least by a civil court.[96] Consequently, an infringement of Article 101(1) that could not have been justified under Article 101(3) was not prohibited.

Similarly, the German NCA was requested to examine an array of *sustainability initiatives*, by which industry members have agreed on voluntary standards aiming at environmental, animal welfare, and social aims. Limiting competition in favour of promoting other public policies, such agreements were often supported by political parties. The NCA noted the difficulty of assessing the compatibility of those agreements with competition law, given the unclear role of non-competition interests under EU competition law and the need to strike a balance between the competing aims. Hence, while it

[93] Giorgio Monti, "Managing the Intersection of Utilities Regulation and EC Competition Law" 4(2) *Competition Law Review* (2008), 123-145, at 136; Katalin J. Cseres, "Integrate or separate. Institutional design for the enforcement of competition law and consumer law" *Amsterdam Centre for European Law and Governance working paper series* 2013-01 (2013), p. 27-36; Niamh Dunne, "Between competition law and regulation: hybridized approaches to market control" 2(2) *Journal of Antitrust Enforcement* (2014), 225-269, at 230. Also see Peter Freeman, *Is competition everything?* Talk at the Law Society on 21 July 2008. Available at: http://www.docstoc.com/docs/28498545/Peter-Freeman-Speech-at-the-Law-Society-European-Group---Is, p.3; Joaquín Almunia, *Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?* Speech in Centre on Regulation in Europe (CERRE) 23 March 2010, Brussels, p.3.

[94] House of Lords Select Committee on Regulators, *UK Economic Regulators*, 1st report of session 2006-2007 (2007), for instance, notes that the promotion of competition is just one of the sector regulators' objectives, and that the manner of balancing between the objectives is not obvious. Also see National Audit Office, *Review of the UK's Competition Landscape* (2010); National Audit Office, *The UK Competition Regime* (2016), p. 25. In particular, the UK health regulator does not have an active duty to *promote* competition. It is merely required to protect choices and *prevent* anti-competitive agreements, see Section 62(3) of the Health and Social Care Act of 2012. Also see Competition and Market Authority, op. cit. *supra* note 90, para 299-300; Albert Sanchez-Graells, "Monitor and the Competition and Markets Authority" SSRN (2014).

[95] 5170 VGT (2005) and 5170 VGT (2006). As confirmed by the Court in MEDED 06/4638 STRN VGT (2007), 5-6. The 2005 decision is unpublished, but is summarised in the 2006 decision.

[96] 5170 VGT (2006), para 31. Also see Dutch NCA's annual report (2006), 63.

made reservations with respect to some arrangement, it had explicitly made use of discretionary powers deciding not to enforce an agreement with respect to others.[97]

V. EMPIRICAL SUPPORT

Exposing the reasons behind prioritisation decisions in general, and the role public policy played in particular, is not an easy task. Most competition authorities, as mentioned in the opening of this article, do not publish those decisions. Even when published, the decisions often do not fully disclose the authorities' motives for lack of action.[98] Despite some examples that were presented in the previous section, it is difficult to provide a comprehensive empirical account of the influence of public policy on such decisions. It greatly lies in the *dark-matter* of the enforcement.

This section, nevertheless, offers several empirical indications in support of the hypothesis that public policy considerations have shifted from substantive to procedural assessment. It should be noted that those empirical indications are tentative and suggestive in nature. Rather than offering a decisive proof, they should be understood as indicators, inviting future research into the matter.

This section begins by examining the substantive assessment of public policy by the Commission following modernisation. Sub-sections A and B present the Commission's practice, revealing a steep decrease in the number of enforcement actions in which an Article 101(3) defence was invoked or accepted and a change in the procedural instruments used to enforce Article 101. Sub-section C examines national "no grounds for action" findings, in which NCAs make non-binding declarations that they believe that the conditions of Article 101(3) were fulfilled. It affirms that similar to the Commission's practice following modernisation, NCAs have made limited use of the substantive Article 101(3) standard to balance between competition and public policy considerations. Sub-section D points to the shift from substantive to procedural consideration of public policy. Assessing the practice of both the Commission and NCAs, it suggests that commitments were used as an alternative-procedural tool to account for public policy outside the substantive standard of Article 101(3).

A. Steep decrease in Article 101(3) defence claims

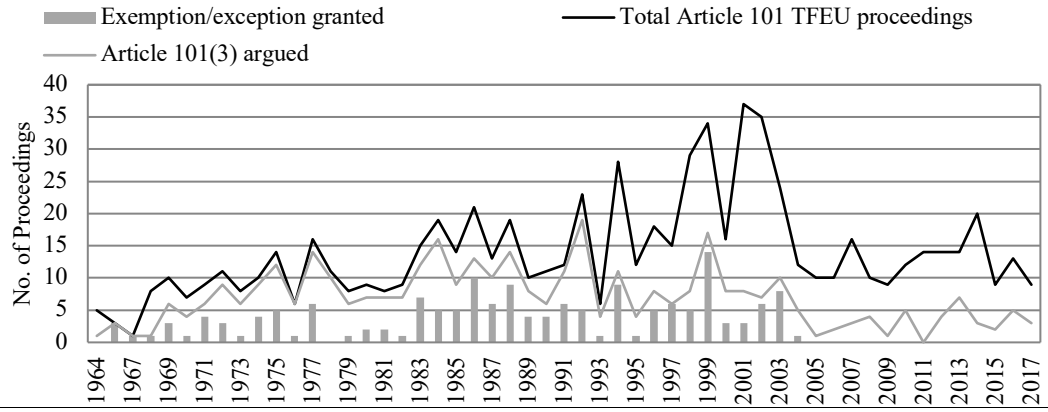
A first indication of a shift in the consideration of public policy from the substantive scope of Article 101(3) to procedural priority setting decisions is related to the patterns of applying the Article by the Commission. To this end, Figure 2 outlines the application of Article 101(3) by the Commission, from its first Article 101 decision in 1964 and until 2017. The upper black line represents the total number of the Commission's Article 101 enforcement actions. The grey line reflects the number of cases in which Article 101(3) was discussed, and the grey bars the number of cases in which the Commission accepted such defence.

The figure is expected to fully depict the consideration of Article 101(3) claims in the Commission's Article 101 enforcement actions. The ECJ held that the Commission is obliged to indicate if Article 101(3) was considered in each case and to provide reasons for accepting or rejecting

[97] German NCA's activity report (2015/2016), p. 54.
[98] See footnote 75 above.

it. This duty applies both to formal and informal proceedings, and failure to do so may result in annulment of the Commission's decision.[99]

Figure 2. **Article 101(3), Commission**



	Total cases	101(3) argued	101(3) accepted	%argued from total	%accepted from argued	%accepted form total
Pre modernisation	576	329	162	57%	49%	28%
Post modernisation	160	40	0	25%	0%	0%

Note: the figure includes all of the Commission's Article 101 proceedings, excluding unpublished comfort letters.[100] Article 101(3) claims and exemptions refer only to individual exemptions. They do not include the application of the Block Exemption Regulations.

The figure testifies to what was described as the "death of Article 101(3)".[101] Prior to the entry into force of Regulation 1/2003, the Commission regularly issued Article 101(3) exemptions. Exemptions were granted in 49% of the proceedings in which they were requested, representing 28% of the total Article 101 proceedings during that time (grey bars). While some of those exemptions were based on cost and quality efficiencies, many others were justified by public policy considerations.[102]

The figure also shows that the Commission has never accepted an Article 101(3) defence following May 2004, neither on the basis of economic efficiencies nor due to public policy considerations. It has not issued a positive decision or individual informal guidance explaining how the conditions of the provision could be successfully applied in the realm of the more economic approach.

The fact that Article 101(3) was not accepted following the entry into force of Regulation 1/2003 could initially be seen as a confirmation of the common view that the Commission has narrowed down the scope of Article 101(3) in general, and that public policy considerations do no longer play a role in the enforcement in particular. According to this view, the Commission's endeavour to narrow down the scope of Article 101(3) has changed the substantive scope of the provision by limiting the consideration of public policy.

[99] Joined Cases C-8/66 C-9/66 C-10/66 C-11/66 *Noordwijks Cement Accoord*, EU:1967:75, pp. 93-94. Joined Cases T-231/01 and T-214/01 *Österreichische Postsparkasse v Commission*, ECLI:EU:T:2006:151, para 114.

[100] In addition to the proceedings that are reflected in Figure 2, the Commission has issued comfort letters. Although most comfort letters remain unpublished, the Commission has provided general information on the comfort letters issued between 1990 to April 2004. As shown elsewhere, the Commission has invoked Article 101(3) in approximately 30% of the proceedings to explain why the relevant agreements were compatible with EU competition law. See Brook, op. cit. supra note 14, p. 378.

[101] David Bailey, "Reinvigorating the Role of Article 101 (3) Under Regulation 1/2003" 81(1) *Antitrust Law Journal* (2016), 111-144; Alfonso Lamadrid de Pablo, "The slow death of Article 101(3)" *Chillin'Competition blog*, 28.10.2011. Available at: https://chillingcompetition.com/2011/10/28/the-slow-death-of-article-1013/.

[102] See footnote 26. For a comprehensive empirical summary of the type of benefits alleged by undertakings to justify an Article 101(3) defence see Brook, op. cit. supra note 14, pp. 108-109.

A closer look at the empirical findings, however, *does not* support this conclusion. Figure 2 does not only prove that the Commission did not accept Article 101(3) defence following May 2004. It also shows a steep decline in the number of proceedings in which Article 101(3) was invoked as a defence *immediately* after Regulation 1/2003 came into force (grey line).[103] While prior to modernisation the Article was examined in 57% of the Commission's Article 101 enforcement actions, following modernisation it was only mentioned in 25% of the proceedings.

Furthermore, the limited number of cases in which Article 101(3) was invoked did not involve public policy considerations. Rather, they focused on economic efficiencies, which were typically rejected by the Commission outright.[104] Hence, modernisation did not only diminish the *likelihood* of accepting Article 101(3), but also the very *debate* over the role of public policy under the Article.

This phenomenon could be explained by a change in the *nature of agreements* enforced by the Commission following modernisation.[105] Per the Commission's declared policy,[106] since May 2004 it has almost exclusively enforced clear-cut and hard-core restrictions of competition. Along those lines, while the Commission's total number of Article 101 proceedings was reduced following modernisation, the number of prohibition decisions against hard-core cartels has significantly increased: during the 1990s, the Commission issued an average of 2 prohibition decisions per year against cartels; yet, from the beginning of the 2000s it issued an average of 6.5 prohibition decisions.[107] Moreover, as the number of proceedings against cartels tripled, the fines increased by more than tenfold, indicating that they involved particularly serious infringements.[108]

The change in the nature of agreements enforced entails that following modernisation, Article 101(3) was mainly examined in situations of price fixing, market sharing and restrictions having equivalent effects.[109] As detailed in Section III(B) above, following modernisation, the Commission declared that such by-object restrictions are unlikely to justify an Article 101(3) defence. The Commission's new approach, therefore, entails that the Commission would seldom accept an Article 101(3) defence with respect to by-object restrictions regardless of the type of overriding benefits. This has a direct bearing on the likelihood that any type of benefits – efficiencies as well as public policy – could justify an Article 101(3) defence in such situations. Therefore, the "death" of Article 101(3) could be explained by the change in the nature of the agreements and the Commission's new approach

[103] Section VI(A) below asserts that the *immediate* decline in the number of proceedings invoking Article 101(3) defence, suggests that the decline cannot be explained only by the compliance with the Commission's guidelines.

[104] COMP/C-3/37.980 Souris-Topps (2004), para 143-158; COMP/C.37.750/B2 Brasseries Kronenbourg, Brasseries Heineken (2004), para 75; COMP/38.456 Bitumen Nederland (2006), para 162-168; COMP/39181 Candle Waxes (2008), para 317; COMP/39188 Bananas (2008), para 340; 38549 Barême d'honoraires de l'Ordre des Architectes belges (2004), para 104-110; COMP/C2/38.698 CISAC (2008), para 231-237; 39510 Ordre National des Pharmaciens en France (ONP) (2010), para 703-706; AT.39633 Shrimps (2013), para 438. For a comprehensive empirical summary of the type of benefits alleged by undertakings to justify an Article 101(3) defence see Brook, op. cit. supra note 14, pp. 108-109.

[105] Section VI below argues that this cannot be linked, *inter alia*, to the success of the self-assessment regime or the clarity brought by the Commission's Article 101(3) Guidelines.

[106] Commission's annual report 2004, p. 36; Commission's annual report 2005, pp. 4, 62; Commission's annual report 2006, p. 11.

[107] Commission's statistics on cartels, see http://ec.europa.eu/competition/cartels/statistics/ statistics.pdf, tables 1.9 and 1.10.

[108] Commission's statistics on cartels, see http://ec.europa.eu/competition/cartels/statistics/ statistics.pdf, table 1.2.

[109] COMP/C.37.750/B2 Brasseries Kronenbourg, Brasseries Heineken (2004), para 75; 38549 Barême d'honoraires de l'Ordre des Architectes belges (2004), para 104-110; COMP/38662 GDF-ENEL (2004), para 143-145; COMP/38662 GDF-ENI (2004) 120-122; COMP/C-2/37214 DFB (Joint selling of the media rights to the German Bundesliga) (2005), para 24; 38.456 – Bitumen – NL (2006), para 162-168; COMP/C-2/38.173 The Football Association Premier League Limited (2006), para 30; COMP/39181 Candle waxes (2008), para 317; COMP/39188 Bananas (2008), para 339-343; COMP/39125 Carglass (2008), para 529-532; 39510 Ordre National des Pharmaciens en France (ONP) (2010), para 703-706; COMP/39596 BA/AA/IB (2010), para 77-80; AT.39258 Airfreight (2010), para 1040-1045; COMP/39736 SIEMENS/AREVA (2012), para 82-83; AT.39633 Shrimps (2013), para 438-440; AT.39839 Telefónica and Portugal Telecom (2013), para 439-446.

to by-object restrictions, rather than by narrowing down the room for public policy as part of the substantive modernisation.[110]

This explanation is further supported when studying the Commission's practice in the period between 1999 and April 2004, after the Commission has introduced the more economic approach but before the switch to the decentralised self-assessment regime. Figure 2 demonstrates that during that period, Article 101(3) was discussed and accepted in a record number of proceedings. The Commission maintained that various public policies, such as environmental considerations, stability of insurance schemes, special protection of SMEs, and self-regulation of sporting activities, could and did justify exemptions.[111] The role of public policy following the substantive modernisation is also reflected in the Commission's policy papers adopted in that period. The Horizontal Guidelines of 2001, in particular, specifically declare that environmental agreements benefiting society as a whole may justify an Article 101(3) exemption.[112] The Commission's practice and policy paper thus suggest that the procedural, rather than the substantive modernisation has reduced the role of public policy under Article 101(3).

Finally, this explanation is also supported by a closer analysis of the limited number of cases in which the Commission examined Article 101(3) following modernisation. Remarkably, the Commission has rarely referred to the consumer welfare standard in those cases and *did not* reject the possibility that public policy considerations could – in theory – justify an exception.[113] Rather, Article 101(3) defence was mostly unsuccessful since the undertakings could not substantiate the relevant benefit or since the restriction was not indispensable. In parallel, the Commission's policy papers and public statements insist that there is still room for public policy considerations in the analysis.[114] One may argue that if public policy considerations could no longer justify an Article 101(3) defence, the Commission would (or should) have declared that openly.

To conclude, the fact that Article 101(3) was hardly discussed and never accepted by the Commission following modernisation is not necessarily tied to narrowing down the room for public policy considerations. The empirical findings propose that by focusing on clear-cut infringements, which are unlikely to be justified under Article 101(3), the Commission has avoided the need to assess the role of public policy under this provision altogether.

[110] Brook, op. cit. supra note 14, pp. 147, shows that the EU Courts and some NCAs have not followed this Commission's new approach to by-object restrictions.

[111] IV/F.1/36.718 CECED (1999); IV/36.213/F2 GEAE/P&W (1999); COMP/34493 COMP/37366 COMP/37299 COMP/37288 COMP/37287 COMP/37526 COMP/37254 COMP/37252 COMP/37250 COMP/37246 COMP/37245 COMP/37244 COMP/37243 COMP/37242 COMP/37267 DSD (2001); IV/37.893 IV/37.894 CECED (2001); IV/D-1/30.373 IV/D-1/37.143 P & I CLUBS (1999); COMP D3/35470 COMP D3/35473 Austrian system for the disposal of packaging waste (2003); COMP/C2/380.14 IFPI 'Simulcasting' (2002); COMP/37124 FIFA rules on players' agents (2002).

[112] Commission Guidelines on Horizontal Agreements 2001, para 10. Also see Competition Commissioner Monti's speech in Press Release IP/00/148 of 11.2.2000 holding that "that environmental concerns are in no way contradictory with competition policy (…) provided that restrictions of competition are proportionate and necessary to achieving the environmental objectives aimed at, to the benefit of current and future generations".

[113] In a few cases, the Commission merely mentioned the notion of consumer welfare without explaining its scope or how it applies to Article 101(3). See, COMP/34.579 COMP/36.518 COMP/38.580 MasterCard I (2007), para 690, 733; COMP/39188 Bananas (2008), para 341-342; AT.39230 Rio Tinto Alcan (2012), para 94; AT.39612 Perindopril (Servier) (2014), para 1206-1209.

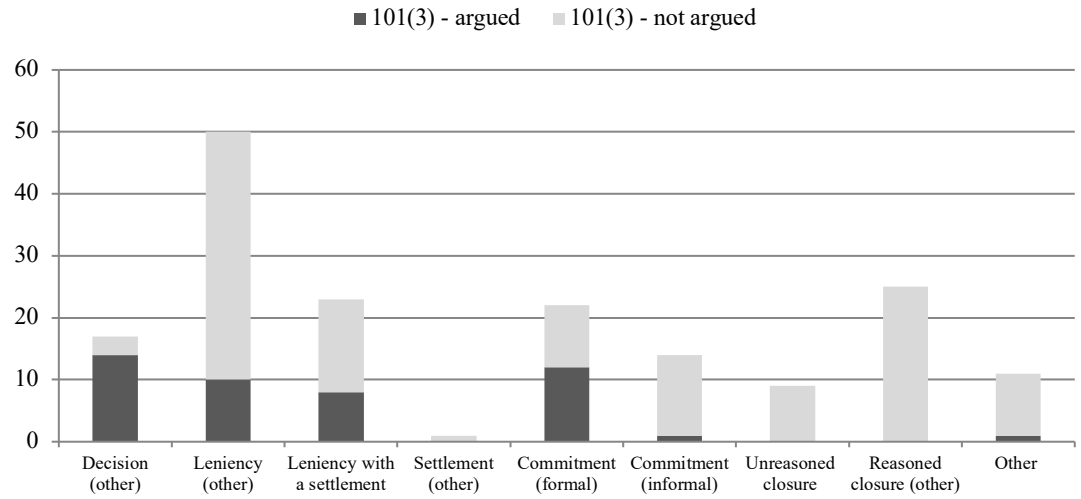
[114] For instance, paragraph 42 of the Commission's Article 101(3) Guidelines, stating that "[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101](3)"; Commissioner Vestager's stated in her answer on behalf of the Commission to a Parliamentary Question on sustainability agreements that "EU competition rules [Article 101(3)] leave ample room for taking into account impact on society." See Parliamentary Questions: Answer Given by Ms Vestager on Behalf of the Commission (1 June 2017).

B. Procedural instruments unsuitable for Article 101(3) defence

The change in the nature of agreements examined by the Commission is also reflected by the type of procedural instruments used.

Figure 3 below reveals that subsequent to modernisation, the Commission has directed much of its enforcement efforts towards cases supported by leniency applications and/or resolved by settlements.[115] These types of procedures are limited, by definition, to hard-core infringements, which are unlikely to be justified under Article 101(3).[116] To this end, the figure specifies the number of cases in which Article 101(3) was discussed (dark grey bars) and not discussed (light grey bars) according to the various types of procedural instruments.

Figure 3. Types of procedures, Commission



The figure shows that following modernisation, 81% of the Commission's infringement decisions were conducted by means of a leniency application and/or a settlement. Arguably, since Article 101(3) defence is highly unlikely to justify such hard-core infringements, the undertakings have not even attempted to invoke it.[117] In comparison, the Commission has assessed Article 101(3) claims when examining other types of proceedings. Such claims were examined in 82% of the infringement decisions that were not supported by leniency application or concluded by accepting a settlement, and in 55% of the formal commitments decisions. This too suggests that the decline in invoking – and perhaps accepting – Article 101(3) defence is tied to the shift in the nature of agreements enforced by the Commission.

[115] The settlement procedure first came into force in July 2008. If undertakings, having seen the evidence in the Commission file, choose to acknowledge their involvement in the cartel, the precise nature of their infringement and their liability for it, the fine imposed on the parties will be reduced by 10%. See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3). Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1); Commission's annual report 2008, p. 6.

[116] The Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ C 298, 8.12.2006, p. 17–22*, preamble 1 states that it aims to reveal "secret cartels", in which the undertakings agree to fix-prices or market sharing. Similarly, Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *OJ L 123, 27.4.2004, p. 18–24* (as amended by Commission Regulation 622/2008 of 30 June 2008), provides that the settlement procedure is applicable to cartel cases.

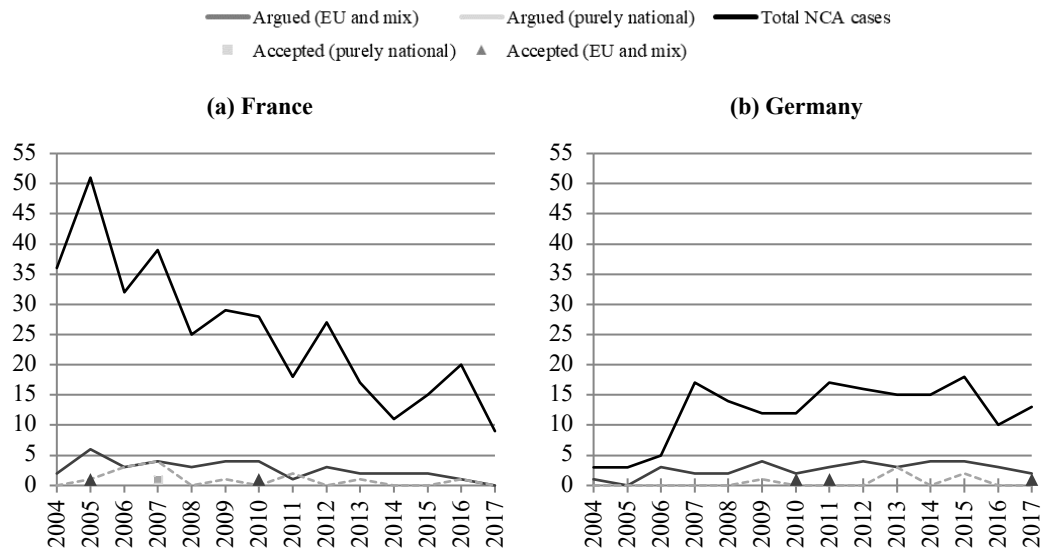
[117] The small rates of Article 101(3) defences could also be explained with reference to the negotiated nature of those procedures.

Notably, the fact that Article 101(3) was not mentioned in the Commission's case closure decisions does not mean that the provision did not play a role. As mentioned, the Commission has declared that when it finds that an anti-competitive agreement could be saved by Article 101(3) it would use its priority setting powers to disregard the case or close an investigation.[118] Since the Commission has provided little or no information on the reasons behind those decisions, it is difficult to determine if and how Article 101(3) and public policy considerations affected the analysis of those cases.

C. NCAs' practice: "no grounds for action" findings

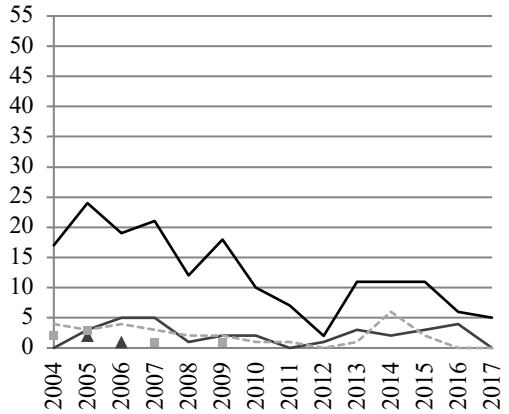
The empirical findings on the NCAs' enforcement actions reveal similar enforcement patterns as the Commission's practice. Like the Commission, the NCAs have made limited use of Article 101(3) analysis following modernisation. Figure 4 presents the application of Article 101 and the national equivalent provisions by the NCAs. The figure indicates the total number of public enforcement actions (upper black line). It differentiates between cases having an effect on trade between Member States and cases having a purely national effect. Accordingly, it specifies the number of cases in which Article 101 and the national equivalent cartel prohibitions were discussed (dark grey line), and the number of cases in which NCAs adopted a "no grounds for action" decision noting that they believe that the conditions of Article 101(3) were fulfilled (dark grey triangles). It also specifies the number of cases in which only the national equivalent to Article 101(3) was examined (light grey lines), and accepted (light grey squares).

Figure 4. Article 101(3), NCAs

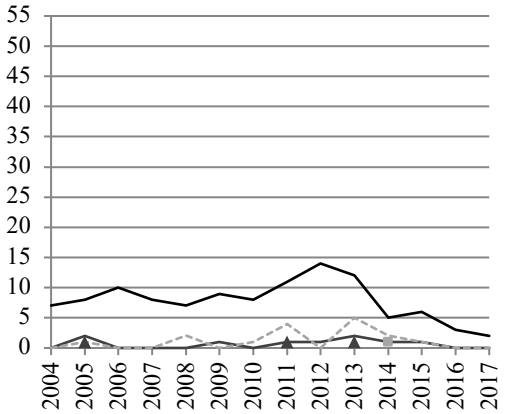


[118] See footnote 5 above.

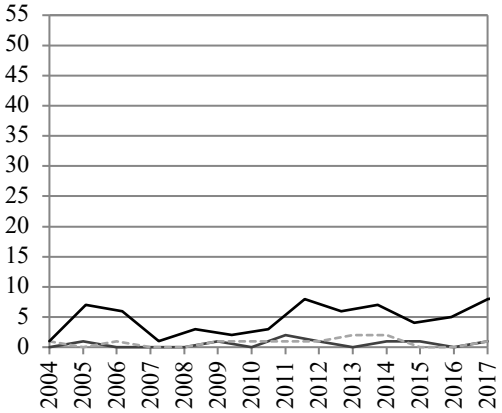
(c) Hungary



(d) Netherlands



(e) UK



	Total cases	Article 101(3) argued	Article 101(3) accepted	%argued from total	%accepted from argued	%accepted form total
FR	357	50	3	14%	6%	1%
DE	170	43	3	25%	7%	2%
HU	174	60	10	34%	17%	6%
NL	110	25	4	23%	16%	4%
UK	70	19	0	27%	0%	0%

Note: Article 101(3) refers only to individual exemptions and does not include the application of the Block Exemption Regulations. The cases in which Article 101(3) was accepted refer to no grounds for action findings.

The figure uncovers that like the Commission, most of the NCAs have discussed the conditions of Article 101(3) only in a small percentage of their proceedings. While some of them have accepted an Article 101(3) defence, they have done so only in a handful of cases.

Some commentators have tied this limited consideration of Article 101(3) to Article 5 of Regulation 1/2003 and its aforementioned interpretation in *Tele2Polska*.[119] They maintained that NCAs are disincentivised from dedicating their scarce resources to issuing "no grounds for action" findings, because such findings are concluded without an observable decision output. Arguably, for the same reasons, NCAs are likely to prefer using their priority setting powers to settle cases that raise public policy considerations instead of engaging in a complex and resource-intensive Article 101(3) analysis.

[119] See Section III(D) above. Alexandr Svetlicinii, Maciej Bernatt, and Marco Botta, "The Dark Matter in EU Competition Law: Non-Infringement Decisions in the New EU Member States Before and After Tele2 Polska" 43(3) *European Law Review* (2018), 424-446, at 428; Nicolas Petit, "The Perverse Effects of the Court's Ruling in Tele2 Polska". *Chillin'Competition blog* (17.6.2011). Available at: https://chillingcompetition.com/2011/06/17/the-perverse-effects-of-the-courts-ruling-in-tele2-polska/.

The hypothesis that competition authorities will tend to use their priority setting powers instead of Article 101(3) analysis is further supported by studying the effects of national procedural reforms on the enforcement patterns. From the five NCAs examined in this article, such reforms have occurred in France and Hungary.

In the past, the French NCA had only limited priority setting powers. Until 2009, it was obliged to undertake a formal investigation and issue a reasoned decision with respect to any possible infringement that had come to its attention.[120] This changed when a reform has bestowed the NCA with the powers to open and conclude investigations on its own motion.[121] When concluding such investigations, the NCA is no longer obliged to reason its decision for taking on or disregarding a case.[122] The empirical findings show that the NCA's enhanced priority setting powers have changed its enforcement patterns. In particular, Figure 4(a) discloses that shortly after the reform, the French NCA ceased to issue no grounds for action findings.

A similar trend is observed in Hungary. The old national regime had afforded the NCA limited priority setting powers. Like the old EU regime, the national enforcement was based on a notification system. The empirical findings demonstrate that most of the agreements in which an Article 101(3) defence was accepted in Hungary were actually notified to the NCA.[123] After a national reform switched to a self-assessment regime in July 2005, the Hungarian NCA has rarely adopted no grounds for action findings on the basis of an Article 101(3) defence.

Finally, it should be noted that the NCAs that have accepted an Article 101(3) defence have often interpreted the provision in broader terms compared to the narrow interpretation advocated by the Commission following modernisation. As shown elsewhere,[124] two out of the three proceedings in which Article 101(3) defence was accepted in Germany, related to agreements that formed an inherent part of the implementation of a national law or plan.[125] They were justified with reference to the operation of a national scheme rather than by purely economic efficiencies. The Dutch NCA had even taken a broader approach, most famously with respect to sustainability agreements.[126] The agreements in which Article 101(3) defence was accepted in the Netherlands have not only related to economic efficiencies, but also to public health, environmental, and social coherence benefits.[127]

It could be argued that the competition authorities that have interpreted Article 101(3) as limited to narrow economic efficiencies (e.g. the Commission, and the UK and Hungarian NCAs)[128] were compelled to use their priority setting powers to account for certain public policy considerations. By

[120] Laurence Idot, "Reform of Regulation 1/2003: Power to set priorities", 3-2015 *Concurrences* (2015), 51-58, at 53-54; Eva Lachnit, *Alternative Enforcement of Competition Law* (dissertation, Utrecht University, 2016), p. 46.
[121] Article L 462-4 of the French Commercial Code (Code de Commerce, Version consolidee au 16 mars 2016, Book IV)
[122] L 462-8 of the French Commercial Code; Wils, op. cit. supra note 23, pp. 374.
[123] Vj-169/2003/68 Fertilizers; Vj–132/2004/26 Card issuance; Vj-200/2004/13 Funeral service in Szolnok; Vj-178/2004/5 Pont Audio; Vj-23/2005 Rába Group and Integris; Vj-207/2004/51 Rába IT agreement.
[124] Brook, op. cit. *supra* note 13, pp. 146-147.
[125] B4-152/07 Coordination of tenders for sales packaging waste collection services by compliance schemes (2010), p. 6; Construction of corvettes (2017) (press release of 19 July 2017). The reasoning in this case was not revealed on account of the confidentiality requirements in the affected security sector.
[126] The Netherlands Authority for Consumers and Markets, Vision Document Competition and Sustainability (2014), para 2.6; Also see Rutger Claassen and Anna Gerbrandy, "Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach", 12(1) *Utrecht Law Review* (2016), 1-15, at 3.
[127] 4713 Preference policy Medicine (2005); 7011/23.827 Shrimps (2011); 14.1134.15 ATMs in rural areas (2014).
[128] Brook, op. cit. *supra* note 13, pp. 141-142.

refraining from investigating such agreements in the first place, they averted the need to engage in costly and contentious balancing issues.

D. Commitments as a substitute for an Article 101(3) analysis

In addition to the competition authorities' general priority setting powers, Regulation 1/2003 has vested the Commission and NCAs with new powers to accept commitments ("formal commitments").[129] The Regulation has codified a long-standing practice in which the Commission resolved investigations by accepting voluntary commitments ("informal commitments").[130] These powers are often seen as an extension, or a special case of the competition authorities' priority setting discretion. Like other aspects of priority setting, they are not bound to a substantive test. Regulation 1/2003 merely prescribes that "commitment decisions should find that there are *no longer grounds for action* by the Commission without concluding whether or not there has been or still is an infringement".[131] Such decisions leave open the question of whether the agreement violated Article 101 in the first place, or whether the modified agreement satisfies the conditions of Article 101(3). As a result, the competition authorities have the extraordinary discretion to accept commitments, outside of the regular substantive analysis of Article 101.[132]

Commentators have already suggested that these features offer competition authorities an indirect way to account for public policy.[133] The lack of a substantive test for accepting commitments, combined with their *ex-ante* nature, allows competition authorities to regulate markets and to promote public policy considerations that are not directly related to the economic consequences of the anti-competitive behaviour of the undertakings concerned. Especially after the Commission attempted to narrow down the scope of Article 101(3) as part of modernisation, commitments provide the authorities with a flexible tool to negotiate and tailor the application of Article 101 to a specific context.

Commitments can account for public policy in three manners.[134] First, a commitment may *apply the law* in cases which Article 101(3) conditions are likely to apply due to efficiencies or public policy considerations. A commitment might, for instance, amend an anti-competitive agreement to bring it in line with the four conditions of the Article.[135] In those cases, commitments are a substitute for granting

[129] Regulation 1/2003, Articles 5 and 9 and Preamble 13. Also see Commission's Press Release of 17.9.2004, Article 9 of Council Regulation 1/2003: providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour, MEMO/04/217.

[130] On the Commission's practice to accept informal commitments see Van Bael, op. cit. *supra* note 60; Denis Waelbroeck, "New Forms of Settlement of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?" 11(4) *European Law Review* (1986), 268-280, at 268-280; Wouter PJ. Wils, "Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003" 29(3) *World Competition* (2006), 345-366, at 347; Firat Cengiz, "Alrosa v. Commission and Commission v. Alrosa: Rule of law in post-modernisation EU competition law Regime." *TILEC Discussion Paper Series* 2010 (2010), p. 2-3, 7-8; Van Rompuy, op. cit. *supra* note 1, p. 270; Frederic Jenny, "Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions" *Fordham Int'l LJ* 38 (2015), 701-770, at 703-706. Also see Commission's annual report 1975.

[131] Emphasis added. Regulation 1/2003, Preamble 23. Also see C-547/16 *Gasorba SL and others v. Repsol Comercial de Productos Petrolíferos SA* ECLI:EU:C:2017:891, para 25-26.

[132] C-441/07P *Commission v. Alrosa* ECLI:EU:C:2010:377, para 36-50; ECN+ Directive, Preamble 39. Also see Forrester, "Creating New Rules or Closing Easy Cases: Policy Consequences for Public Enforcement of Settlements under Article 9 of Regulation 1/2003" *European Competition Law Annual 2008*, pp. 640-641; Cengiz, op. cit. *supra* note 130, p. 3; Rompuy, op. cit. *supra* note 26, pp. 272.

[133] Rompuy, op. cit. *supra* note 26, pp. 270, 274; Heike Schweitzer, "Commitment decisions under article 9 of regulation 1/2003: The developing EC practice and case law" *European Competition Law Annual* (2008), 547-577, at 553; Blanco and Lamadrid de Pablo, op. cit. *supra* note 63, pp. 80-82; Cengiz, op. cit. *supra* note 130, p. 11; Summary note of the CMA's Roundtable on the Use of Commitments in Competition Enforcement (2015), para 11.

[134] More generally, see Weiner, op. cit. *supra* note 77, p. 4.

[135] In B7-17/06 T-Mobile, Vodafone and O2 (2007), para 81, for instance, the German NCA declared that it is likely that following the acceptance of the proposed commitments, any remaining anti-competitive effects would be justified under Article 101(3).

an Article 101(3) exception by the Commission or issuing a "no grounds for action" finding by a NCA. Second, a commitment may *extend or change the law*. It can be used to protect public policy considerations that could not have been considered otherwise or to impose conditions that could not have been attached in the context of a regular infringement decision.[136] Finally, a commitment may *regulate business behaviour,* thereby shifting the competition authority's action from enforcement to regulation. Whereas following May 2004, Article 101(3) is examined in an *ex-post* manner, competition authorities can use commitments as a forward-looking tool to shape market structures and affect business conduct.[137]

Although the possibility to use commitments to account for public policy considerations has already been observed by various scholars, it is difficult to identify if and how such considerations were taken into account in an individual case. In a number of cases, the competition authorities have explicitly mentioned not only the impact of commitments on competition, but also on other public policies. For instance, when accepting formal commitments in *eBooks* and *Cross-border access to pay-TV*, the Commission stated that the provision of Article 167(4) TFEU on cultural diversity obliges it to take into account cultural policies when examining proposed commitments.[138] By a similar vein, in *Virtual Print Fee agreements*, the Commission referred to the cultural benefits created by the informal commitments, pointing to their positive effects on small-budget and art-house films.[139]

Nevertheless, most commitments decisions do not reveal whether public policy considerations have played a role. The competition authorities have often accepted commitments without explaining whether the original agreement violated Article 101 and if the proposed commitments could remedy such a violation. A comprehensive empirical analysis of all commitments decisions, however, could assist in filling this gap. Despite the fact it cannot *prove* the consideration of public policy by means of accepting commitments, it could offer *proxies* indicating that such practice might have taken place.

Previous comprehensive studies of the Commission's formal commitments decisions have suggested that commitments have substituted the functions of Article 101(3) exemptions. Ibanez Colomo, for example, concluded that commitments were used to settle practices that are similar "in their nature, purpose and impact" to those which have been exempted by Article 101(3) prior modernisation.[140] Similarly, Dunne pointed to the regulatory nature and function of the Commission's commitments decisions, noting that they have essentially "replicate[d] the functions performed by the Regulation 17 notification procedure".[141]

The empirical findings presented in this article offer an additional proxy, specifically linked to the role of public policy. They suggest that commitments have substituted Article 101(3) as the venue for

[136] Heike Schweitzer, "Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement within a Federal Enforcement Regime" *Working Paper* (2012), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101630. Also see Forrester, op. cit. *supra* note 132, p. 646; Cengiz, op. cit. *supra* note 130, p. 10; Melchior Wathelet, "Commitment Decisions and the Paucity of Precedent" 6(8) *Journal of European Competition Law & Practice* (2015), 553-555, at 553.

[137] Petit, op. cit. *supra* note 82, p. 32; Pablo Ibanez Colomo, "On the application of competition law as regulation: elements for a theory" 29(1) *Yearbook of European Law* (2010), 261-306, at 286; Niamh Dunne, "Commitment decisions in EU competition law" 10(2) *Journal of Competition Law and Economics* (2014), 399-444, at 407; Summary note of the CMA's Roundtable on the Use of Commitments in Competition Enforcement (2015), para 11; OECD, Commitment decisions in antitrust cases, Background paper by the Secretariat DAF/COMP(2016), para 38-39.

[138] COMP/AT.39847 Ebooks (2012), para 152; AT.40023 Cross-border access to pay-TV (2016), para 73-74.

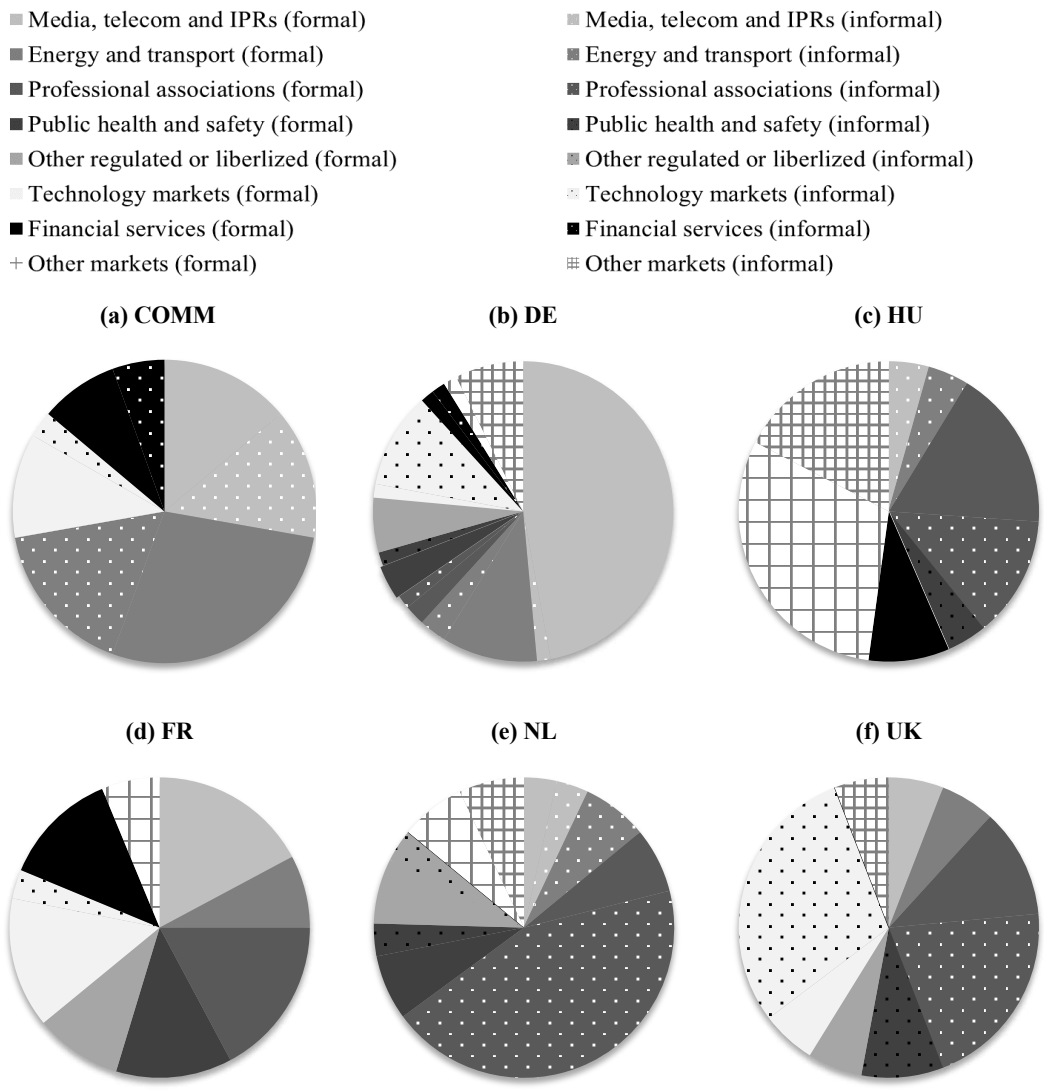
[139] IV/39.673 Virtual Print Fee agreements (2011), press release IP/11/257 of 4 March 2011, p. 1.

[140] Ibanez Colomo, op. cit. *supra* note 11, p. 288.

[141] Dunne, op. cit. *supra* note 137, p. 406.

accounting for public policy. This proxy relates to the types of sectors in which commitments were accepted. The empirical findings reveal that almost all of the commitments accepted by the Commission and NCAs following modernisation related to agreements in a *limited number of sectors*. As elaborated below, these sectors are fundamentally identical to those in which the Commission had regularly granted Article 101(3) exemptions prior to May 2004. As affirmed by Figure 5, these sectors can essentially be divided into three groups: (i) regulated and liberalised markets; (ii) technology markets; and (iii) financial services.[142]

Figure 5. commitments, Commission and NCAs (May 2004-2017)



Note: The Figure includes all formal and informal commitments decisions adopted by the competition authorities. Commitments that could not fall within those three groups were classified as "other".

The figure illustrates that the Commission and NCAs have used formal and informal commitments to address potential anti-competitive agreements in sectors that carry an intrinsic tension between competition and public policy considerations:

[142] These categories were previously identified by Dunne, op. cit. *supra* note 137, p. 406. Also see Competition and Market Authority, Roundtable on the use of commitments in competition enforcement (2015), para 11, 13.

The first group, agreements in regulated and liberalised markets (grey markers), represents most of the accepted commitments. These commitments addressed agreements having similar features to those exempted by the Commission under Article 101(3) prior to modernisation.[143] In fact, many of the agreements subject to the first commitments decisions adopted by the Commission under Regulation 1/2003, were actually notified under the old notification regime for the purpose of receiving an exemption.[144] Commitments were seen as an appropriate tool to deal with those transitional cases.[145] They often involved a process of negotiation with the undertakings, modifying the terms of the potentially anti-competitive agreements to strike a case-specific balance between competition and public policy considerations related to the liberalisation of markets and sector-regulation. In *Joint selling of the media rights to the German Bundesliga* and *The Football Association Premier League*, the Commission secured amendments to systems of central marketing of media exploitation rights in new emerging media markets.[146] In *REPSOL*, it accepted commitments in newly liberalised gas and electricity markets, revising the terms of standard supply agreements of oil companies.[147] In *Cannes*, commitments were given to extend an agreement between collecting societies and music publishers that was previously exempted under Article 101(3) by means of a comfort letter.[148]

Also in later cases, which were not notified, commitments emphasised the applicable regulatory frameworks governing the agreements and their sector-specific aims. Such regulatory frameworks have often pursued public policy aims going beyond the narrow competition concerns stemming from the relevant agreement. They were typically directed at securing a broad range of social objectives, such as ensuring the security of supply, providing an essential but uneconomic service, protecting vulnerable consumers, and reaching environmental or redistributive goals. As mentioned, those sector-specific regulations strike a different balance between competition and public policy considerations.[149]

For example, the Commission accepted commitments in a number of cases related to access to *Technical information for car repairs*, which altered the provisions of standard agreements between car manufacturers and their after-sales services partners. It explained that those commitments would be binding for a transitional period, after which the EU vehicle emission regulation will govern them.[150] In *Ship Classification*, it accepted commitments amending the membership rules of the International Association of Classification. The Commission noted that the commitments were not only necessary for improving the competitive situation in the market, but also to promote the efficiency and quality of the Association's technical work and standards.[151] In *Cross-border access to pay-TV*, the commitments modified the provisions of a licensing agreement involving geo-blocking provisions aimed at the industrial policy aim of the Digital Single Market.[152] The Commission, moreover, have used

[143] Brook, op. cit. supra note 14, pp. 126-129.
[144] COMP/C-2/37.214 Joint selling of the media rights to the German Bundesliga (2005), para 7; COMP/C-2/38.173 The Football Association Premier League Limited (2006), para 11; COMP/B-1/38.348 REPSOL (2006), para 5; COMP/C2/38.681 Cannes Agreement (2006), para 13.
[145] Gippini-Fournier, op. cit. *supra* note 60, p. 43.
[146] COMP/C-2/37.214 Joint selling of the media rights to the German Bundesliga (2005), para 7; COMP/C-2/38.173 The Football Association Premier League Limited (2006). Also see Commission's annual report 2005, para 104.
[147] COMP/B-1/38.348 REPSOL (2006). Also see Commission's annual report 2005, para 58.
[148] COMP/C2/38.681 Cannes Agreement (2006).
[149] See footnote 93 above.
[150] COMP/E-2/39.140 DaimlerChrysler (2007); COMP/E-2/39.141 Fiat (2007); COMP/E-2/39.141 Toyota Motor Europe (2007); COMP/E-2/39.143 Opel (2007); Commission's annual report 2007, para 67.
[151] COMP/39.416 Ship Classification (2009), para 31.
[152] AT.40023 Cross-border access to pay-TV (2016). Also see Commission's annual report 2016, p. 7.

commitments to address by-object restrictions in regulated markets.[153] The choice to use the soft commitments instrument instead of imposing a fine for clear-cut infringements of competition, suggests that the Commission may have taken into account broader public policies.

Commitments decisions that balanced competition and regulatory objectives were also adopted by NCAs.[154] Although the competition authorities have not always acknowledged this explicitly, many of those commitments essentially involved the negotiations of the terms and conditions of agreements in regulated and liberalised markets, in a similar manner as was done by the Commission when attaching conditions and obligations to Article 101(3) exemptions prior to modernisation.

The second group of commitments relates to practices in technology markets, and especially to online platforms (white markers). This type of cases typically engaged with novel legal and economic questions on the applicability of Article 101, and the balancing of competition, innovation, privacy, consumer protection and IPRs. The use of commitments in technology markets was justified by the need to adopt a timely solution in fast-changing markets. When accepting the commitments in *eBooks*, for example, the Commission noted that traditional enforcement mechanisms might not have been rapid enough to reflect the quick changes in the industry thus rendering a decision redundant.[155] Similarly, the NCAs have used commitments to solve new and open questions regarding the applicability of Article 101 to restrictions of online sales by members of selective distribution systems[156] and the use of online platforms.[157] In such circumstances, commitments served as a tool to

[153] COMP/39.596 BA/AA/IB (2010); COMP/39736 Siemens/Areva (2012); COMP/AT.39595; Continental/United/Lufthansa /Air Canada (2013); AT/39850 Container Shipping (2016); AT.40023 Cross-border access to pay-TV (2016).

[154] For instance, in France in 05-D-12 EUROPQN (2005); 06-D-40 Association conducting surveys on magazine press (2006); 06-D-29 Access of local radios to national advertisement (2006); 07-D-46 Distribution of Medicine (III) (2007); 07-D-45 Distribution of Medicine (II) (2007); 07-D-32 Remuneration of press distributors (2007); 07-D-31 Citroën (2007); 07-D-22 Distribution of Medicine (I) (2007); 07-D-17 Films (2007); 08-D-34 funeral services in Marseille (2008); 08-D-26 UAT taxis Abbeilles (2008); 09-D-27 MGSR (2009); 09-D-01 Pleasure boats (2009); 10-D-18 Veterinary analyses (2010); 10-D-01 iPhone marketing (2010); 11-D-18 CT and MRI (2011); 12-D-29 FFGolf (2012); 13-D-15 Europe-Antilles Sea Freight (2013); 15-D-12 Guides in refuge du Gouter (2015); 17-D-12 Sugar production (2017). In Germany: B8–113/03-6 Long-term gas supply (2007); B8–113/03-7 Long-term gas supply (2007); B8–113/03-8 Long-term gas supply (2007); B8–113/03-15 Long-term gas supply (2007); B8–113/03-05 Long-term gas supply (2007); B8–113/03-04 Long-term gas supply (2007); B8–113/03-11 Long-term gas supply (2007); B8–113/03-03 Long-term gas supply (2007); B8–113/03-10 Long-term gas supply (2007); B8–113/03-12 Long-term gas supply (2007); B8–113/03-09 Long-term gas supply (2007); B8–113/03-02 Long-term gas supply (2007); B4-32/08 Quantity transfer contracts (2008); B2-90/01 Timber (2008); B10–44/09 B10–45/09 B10–47/09 B10–48/09 B10-10/10 B10-11/10 B10–13/10 B10–14/10 B10–18/10 B10–19/10 B10-20/10 B10–21/10 B10–22/10 B10–23/10 B10–24/10 B10-25/10 Gas and electricity suppliers resale bans (2010); B10–17/11 Markkleeberg (2011); B10–6/11 Dinkelsbühl (2011); B9-96/09 Lufthansa (2012); B7– 22/07 Basic Encryption of TV Programs (2012); B6-114/10 Joint selling of media rights (2012); B6-32/15 Joint selling of media rights to matches of the German Bundesliga (2016); B3-11/13 Ophthalmologists (2013); B7-30/07-1 fire detection systems in Düsseldorf (2013); B3–123/11 pharmacists association in Westphalia-Lippe (2014). In Hungary: Vj–44/2007/19 Taxi in Győr (2007); Vj-60/2006/37 Hungarian Chamber of Pharmacists (2007); Vj-84/2007 Bar Association of Békés (2009); Vj-97/2013 Driver training ethics code (2015). In the Netherlands: 5709 Day-care (2008); 5998 Insurance pool (2010); 7138/47-BT930 Home care providers (2011); 7245/151Federation Textile Management Netherlands (2011); 7191/138 National Association of General Practitioners (2012); 6895 Amsterdam hospitals (2012); 13.0612.53 Mobile operators (2014). In the UK: CA98/03/2005 TV Eye (2005); CE/2479/03 London-wide newspaper distribution (2006); CE/9388-10 Motor Insurers (2011); ORR decisions regarding provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain (2015); 50243 Showmen's Guild of Great Britain (2017).

[155] AT/39847 Ebooks (2012), para 146. Similar justifications were invoked by the UK NCA, for instance in 50408 Live online bidding auction platform (2017), para 4.16 and CMA, op. cit. *supra* note 142, para 12. Also see Joaquín Almunia, "Remedies, commitments and settlements in antitrust" *SV Kartellrecht, Brussels (SPEECH/13/210)* 8 (2013), p.3; OECD, *Commitment Decision in Antitrust Cases*, Background paper by the Secretariat (2016), para 16; op. cit. *supra* note 130, pp. 731-735.

[156] In France: 06-D-28 Home Cinema (2006); 06-D-24 Bijourama (2006); 07-D-07 Sale of cosmetic products on the internet (2007); 15-D-06 Online hotel booking (2015); Adidas (2015). In Germany: B5-100/10 Sanitary fittings (2011); B7-1/13-35 Sennheiser (2013); B2-98/11 Online sales of ASICS running shoes (2015).

[157] The Commission: 40360 Production and distribution of audiobooks (2017). In Germany: B6-46/12 Amazon (2013). In the UK: Yamaha (2006); CE/9692/12 Amazon's price parity policy (2013); CE/9320-10 Hotel online booking (2014); CE/9857-14 Bathroom fittings (2016); BMW car comparison sites (2017); 50408 Live online bidding auction platform (2017).

overcome the so-called "regulatory disconnection" problem, occurring when innovation in the market is stifled because the legal framework cannot keep pace with the rapid technological developments.[158]

The third group of commitments focused on practices in financial services markets (black markers). While some of those commitments were directed at eliminating specific competition constraints,[159] others were used to regulate the prices of financial products.[160] In *Visa MIF*, for instance, the commitments accepted by the Commission have capped the interchange fees that could be charged by an association of banks with relation to certain debit card payments.[161] Similar price regulating commitments were also accepted by NCAs.[162] Those commitments did not only aim to *resolve* the competition concerns, but also *regulated* the future development of EU financial markets.

To conclude, the empirical findings indicate that almost all of the commitments that were accepted following modernisation were adopted in the very sectors that involved the consideration of public policy under Article 101(3) prior to modernisation. This could suggest that following modernisation, commitments decisions were used as a *substitute* for an Article 101(3) exception by the Commission or issuing a "no grounds for action" finding by a NCA. As such, they were likely to facilitate, at least to a degree, the consideration of public policy.

VI. REJECTING ALTERNATIVE EXPLANATIONS

The previous section offered empirical indications supporting the hypothesis that modernisation has shifted the consideration of public policy from the substantive scope of Article 101(3) to procedural priority setting decisions. To complete the picture, this section examines - and rejects – some alternative explanations to the empirical findings. In particular, it demonstrates that they could not be explained by the success of the self-assessment regime, modernisation of Article 101(1), the *Wouters* doctrine, a shift in the burden of proof, fear of re-introduction of the notification system, or by private enforcement.

A. Success of the self-assessment regime and the Commission's Guidelines

A first alternative explanation to the empirical findings could be that the self-assessment regime of Regulation 1/2003 was highly successful. According to this explanation, the small number of proceedings discussing and accepting Article 101(3) simply indicates that undertakings have managed to self-assess the compatibility of their agreements with Article 101 correctly. In particular, they have properly determined if and to what extent public policy consideration have justified an otherwise anti-competitive agreement. Since the application of Article 101(3) did not encounter difficulties, the argument goes, the Commission and NCAs did not have the opportunity to discuss those issues.

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[158] On regulatory disconnection see Anna Butenko and Pierre Larouche, "Regulation for innovativeness or regulation of innovation?" 7(1) *Law, Innovation and Technology* (2015), 52-82; Lyria Bennett Moses, "How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target" 5(1) *Law, Innovation and Technology* (2013), 1-20, at 1; Roger Brownsword and Morag Goodwin, *Law and Technologies of the Twenty-First Century* (CUP, 2012), pp. 369-420; Roger Brownsword and Han Somsen. "Law, innovation and technology: before we fast forward—a forum for debate" 1(1) *Law, Innovation and Technology* (2009), 1-73, pp. 26-31.

[159] 39177 Tickets for the 2006 World Cup (2005); 39876 EPC Online Payments (2013); AT/39745 CDS Information Market (2016).

[160] Also see Dunne, op. cit. *supra* note 142, p. 410.

[161] COMP/39.398 Visa MIF (2010).

[162] In France: 11-D-11 "CB" payment card (2011); 12-D-17 Non-cash means of payment (2012); 13-D-18 Visa (2013); 13-D-17 MasterCard (2013). In Hungary: Vj-152/2006/86 Budapest Stock Exchange (2008).

This alternative explanation, however, is unconvincing. As was shown in Section III above, the role of public policy under Article 101(3) is one of the most contentious areas of EU competition law, which is subject to an ongoing debate. There is no consensus between the Commission, NCAs, and EU and national courts, on the scope and method for accounting for public policy under the provision.[163] Therefore, it is unlikely that despite those uncertainties, undertakings have managed to apply Article 101(3) almost perfectly.

Moreover, it is doubtful that the Commission's Article 101(3) Guidelines have allowed the undertakings to align their conduct to the Commission's approach. Although the Guidelines have rebranded Article 101(3) as an economic defence which is based on a consumer welfare standard,[164] they do not clearly explain if public policy considerations can be taken into account, and if so how. They merely state that "[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101](3)".[165] In fact, the Commission had consciously left these questions open, proclaiming that they are case specific.[166] Hence, the Commission Guidelines do not appear to provide the necessary degree of clarity that could explain the steep decline in the invocation rate of Article 101(3).[167]

Ascribing the decline in Article 101(3) claims to the success of the self-assessment regime or to the Commission's Guidelines is also incompatible with the empirical findings presented in Figure 2 above. As mentioned, the figure reveals that the decline in Article 101(3) defence occurred *immediately* after the entry into force of Regulation 1/2003. This decline, therefore, cannot be exclusively attributed to undertakings adjusting their claims to the Commission's approach in its Guidelines or to its decisional practice. In contrast, the figure shows that as soon the procedural enforcement regime changed, undertakings have invoked Article 101(3) in a significantly smaller percentage of cases. In light of the uncertainty surrounding the application of Article 101(3) and the change in the Commission's approach, it seems unlikely that undertakings (and their lawyers) have not even attempted to raise it following modernisation.

B. Modernising Article 101(1) and the *Wouters* doctrine

A second alternative explanation is linked to the change in the definition of what amounts to a restriction of competition in the sense of Article 101(1). As part of the substantive modernisation, the more economic approach has also led the Commission and ECJ to limit the types of agreements that are prohibited by the provision. Consequently, certain agreements that were classified as restrictive due to a formalistic approach, do not longer fall under the ambit of Article 101(1).[168]

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[163] Also see Brook, op. cit. *supra* note 13.
[164] See Section III(B) above.
[165] Commission's Article 101(3) Guidelines, para 42.
[166] ICN, "Competition enforcement and consumer welfare – setting the agenda" ICN 10th Annual Conference, 17-20 May 2011, p. 27.
[167] Petit, op. cit. *supra* note 26; Ioannis Lianos, "Some reflections on the question of the goals of EU competition law". In Ioannis Lianos and Damien Geradin (eds.) *Handbook on European Competition Law, Substantive Aspects* (Edward Elgar 2013), 1-84, at 16; Daskalova, op. cit. *supra* note 1, pp. 144-151; Anna Gerbrandy, "Addressing the legitimacy problem for competition authorities taking into account non-economic values: The position of the Dutch competition authority" 5 *European law review* (2015), 769-781, at 771-772.
[168] On the interpretation of what considered as restriction of competition in the sense of Article 101(1) see, for example, Renato Nazzini, "Article 81 EC between time present and time past: a normative critique of restriction of competition in EU law" 43(2) *Common Market Law Review* (2006), 497-536; Jones, op. cit. *supra* note 60, pp. 666-667; Pablo Ibanez Colomo and Alfonso

Scholars have already pointed to a link between the scope of Articles 101(1) and (3). They noted that when Article 101(1) is interpreted broadly, the competition law analysis is likely to centre on the conditions of Article 101(3), and *vice versa*.[169] Accordingly, one can argue that the decline in Article 101(3) defence is fully or partially explained by focusing the analysis on the interpretation of Article 101(1).

Modernising Article 101(1), nevertheless, cannot account for the drastic decline in the invocation and acceptance rates of Article 101(3). As was illustrated in the previous section, following May 2004 the Commission has mainly targeted hard-core restrictions of competition, which are clearly prohibited by Article 101(1) both according to its interpretation prior and post modernisation. The modernisation of Article 101(1) has no bearing on the invocation rates of Article 101(3) in those cases.

Moreover, as was already mentioned, although the Commission shifted to a more effects-based approach in the late 1990s, it continued to account for public policy considerations under Article 101(3) up to the entry into force of Regulation 1/2003 in May 2004. The changes in the application of Article 101(3) were only apparent after the Commission and NCAs were invested with enhanced priority setting powers.

Likewise, there is no indication that the consideration of public policy has systematically shifted from the scope of Article 101(3) to the inherent restrictions doctrine. As was mentioned above, shortly before Regulation 1/2003 has entered into force, the ECJ has narrowed down the scope of Article 101(1)'s prohibition in cases such as *Wouters*, by holding that restrictions imposed on the commercial behaviour of undertakings are not prohibited under Article 101(1) if they are necessary and proportionate to attaining a legitimate aim.[170] According to the Court, therefore, certain public policy considerations may limit the scope of Article 101(1) prohibition.[171] Nevertheless, as shown elsewhere, the Commission and NCAs have made scarce use of this doctrine.[172] The doctrine cannot account for the decline in the invocation and acceptance rates of Article 101(3).

C. Burden of proof and re-introduction of the notification system

Some scholars have tied the small number of formal and informal decisions accepting an Article 101(3) defence to the shift in the burden of proof brought about by modernisation. According to Regulation 1/2003, a competition authority only bears the burden of proving an Article 101(1) infringement. When such infringement is established, the undertakings must prove that the four conditions of Article 101(3) have been fulfilled.[173] This has created a degree of asymmetry, in which the standard for proving a justification under Article 101(3) has become significantly higher than the standard for proving an

Lamadrid de Pablo, "On the notion of restriction of competition: what we know and what we don't know we know" in Damien Gerard Massimo Merola, and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017), 333-374, at 336-340.

[169] Ibanez Colomo, op. cit. *supra* note 11, p. 86.

[170] C-309/99 *J.C.J. Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98, para 110.

[171] Townley 2009, op. cit. *supra* note 1, pp.130-132; Van Rompuy, op. cit. *supra* note 1, pp. 241-244; Sauter, op. cit. *supra* note 26, pp. 79-81; Monti and Mulder, op. cit. *supra* note 59, pp. 645-647.

[172] Brook, op. cit. supra note 14, pp. 225, 271; Monti and Mulder, op. cit. *supra* note 59, pp. 647; Jonathan Faull and Ali Nikpay (eds.), *Faull and Nikpay: The EU Law of Competition*, third edition (OUP, 2014), p. 193.

[173] Regulation 1/2003, Preamble 5 and Article 2.

infringement of Article 101(1). This asymmetry makes it more difficult to successfully invoke Article 101(3) compared to the pre-modernisation rule.[174]

Other scholars suggested that the competition authorities were reluctant to issue Article 101(3) decisions because of a fear of returning to the notification system through the back door. According to this explanation, issuing decisions declaring that the conditions of Article 101(3) were fulfilled will impair the principle of self-assessment, as undertakings will prefer to get assurance from the authorities.[175]

Although those two factors could certainly explain the empirical findings, they do not detract from the hypothesis that public policy considerations have shifted from Article 101(3) to priority setting decisions. Regardless of the motivation behind such a shift, competition authorities have favoured priority setting decisions over an Article 101(3) analysis.

D. Private enforcement

A fourth explanation for the empirical findings could be the advent of private enforcement. One may argue that while the Commission focuses on clear-cut infringements of Article 101, agreements necessitating the consideration of public policy are litigated in civil cases in front of national courts. Indeed, the US legal scholarship has already acknowledged that private actions could assist in combating undue limitation of the scope of enforcement resulting from the competition authorities' priority setting decisions.[176]

Nevertheless, this explanation too is not supported by the empirical findings. The sharp decline in the consideration of public policy under Article 101(3) occurred *immediately* after the entry into force of Regulation 1/2003, during the period in which the private enforcement of EU competition law was still in its "infancy".[177] Especially prior to the adoption of the Damage Directive in 2014, private enforcement played only a minor role in the EU competition law regime.[178] Furthermore, while private enforcement gradually increases, it is still limited in the majority of Member States.[179] It is unlikely, therefore, that private actions have largely replaced public enforcement as the forum for balancing competition and public policy considerations.

VII. IMPLICATIONS

The theoretical explanations, case studies, and empirical indications presented in the previous sections support the hypothesis that modernisation has resulted in a shift in the nature of agreements examined by the Commission and NCAs, which in turn transformed the role of public policy considerations. In

[174] Merola and Waelbroeck, op. cit. *supra* note 25, pp. 19-20.
[175] Lachnit, op. cit. *supra* note 120, p. 200; Ehlermann, op. cit. *supra* note 26, p. 566.
[176] Donald F Turner, "The virtues and problems of antitrust law" 35 *Antitrust Bulletin* (1990), 297-310, at 306; William M. Landes and Richard A. Posner, "The Private Enforcement of Law", 4 *Journal of Legal Studies* (1975), 1-46, at 41.
[177] Opinion of AG Geelhoed in Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:67, para 29. Also see Douglas H. Ginsburg, "Comparing antitrust enforcement in the United States and Europe" 1(3) *Journal of Competition Law and Economics* (2005), 427-439, at 435-438. For a comparative overview of private enforcement efforts see, for example, Barry Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Law International, 2014).
[178] European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.
[179] Pier Luigi Parcu, Giorgio Monti, and Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar, 2018), 1-14.

the past, when the Commission had limited discretion to set its enforcement priorities, it was compelled to actively engage in the balancing of competition and public policy considerations under Article 101(3). This procedural obligation prompted an abundance of Article 101(3) decisions, explaining how and in which circumstances public policy considerations justify a restriction of competition.

This has changed following the entry into force of Regulation 1/2003. Upon the decentralisation of the enforcement and the shift from a notification to a self-assessment regime, the competition authorities focused their enforcement efforts on hard-core restrictions of competition. Those types of restrictions, which were often handled by means of leniency applications and settlements, are unlikely to be justified by Article 101(3) altogether. The public enforcement of other cases, including those that are likely to involve the consideration of public policy, was mostly disregarded or solved by accepting commitments, regardless of whether the agreements were compatible with Article 101(1) or could be justified by Article 101(3).

Based on the above, the article questioned the common view that public policy considerations no longer play a role under Article 101. Rather, it proposed that the balancing has shifted from the substantive scope of Article 101(3) analysis, to procedural priority setting decisions.

It should be emphasised that the article does not challenge the change in the nature of agreements that are being targeted in itself. The selection of the enforcement priorities is clearly an inherent feature of the competition authorities' administrative activity.[180] It is a necessary and important tool to ensure an efficient allocation of the authorities' limited resources to combat serious restrictions of competition.[181] Moreover, the article acknowledges that in certain circumstances, a non-enforcement decision based on public policy grounds may be desirable. The open-textured wording of Article 101, which is at times over-inclusive, may prohibit agreements that do not fit the economic and legal rationale of the prohibition. In such circumstances, a decision not to enforce Article 101 may actually enhance the effectiveness of EU competition law.[182] Using priority setting to account for public policy becomes problematic when it is not limited to excluding unforeseeable circumstances from Article 101, in which one can confidently assume that the legislature would not want to have them covered.[183]

The article, nevertheless, warns against a *systematic* shift in the consideration of public policy, in a manner that is *not based on economic or legal theory*. It demonstrated that the competition authorities have a *carte blanche* when accounting for public policy consideration as part of their priority setting decisions. Setting the enforcement priorities is not bound to any substantive legal or economic tests, is not explicit, and is subject to very limited judicial or political scrutiny. There is no limit to the type of benefits they can take into account, method guiding their assessment, or intensity of evidence. As a result, priority setting decisions allow competition authorities to account for public policy beyond what could have been integrated under Article 101(3), even according to the Commission's and EU courts' broad interpretations prior to modernisation.

[180] T-24/90 *BMW AG and BMW Italia SpA v. Commission* ECLI:EU:T:2017:748, para 77.
[181] ECN+ Directive Proposal (2017), Preamble 17. Also see ICN, op. cit. *supra* note 63, p. 6; Blanco and Lamadrid de Pablo, op. cit. *supra* note 63, p. 60.
[182] Kovacic, op. cit. *supra* note 10, at 401-402. On non-enforcement to combat over-inclusiveness of the law in general see, Wils, op. cit. supra note 11, pp.376-377; Okeoghene Odudu, "Developing Private Enforcement in the EU: Lessons from the Roberts Court", 53 *Antitrust Bulletin* (2008), 873-902, at 885–886; Landes and Posner, op. cit. *supra* note 176, pp. 38–41; Turner, op. cit. *supra* note 176, pp. 297-298; Baxter, op. cit. *supra* note 10, at 664-673.
[183] Wils, op. cit. supra note 11, pp. 376-377.

In those circumstances, the shift from substantive to procedural consideration of public policy may hinder the application of Article 101 in four aspects:

First, accounting for public policy in priority setting decisions can lead to *ineffective outcomes in specific cases*. Commentators have warned against "À la carte enforcement" of Article 101, which takes into account political and policy objective in the decision of whether to investigate a case,[184] and may lead to arbitrary discrimination of undertakings.[185] As was pronounced by the former US Attorney General for Antitrust, Donald Turner, prioritisation decisions should strictly rest on interpretation of competition law that "reflect a clearly sound economic analysis of the competitive pros and cons of the conduct in question".[186] Competition authorities should not select cases according to criteria unrelated to effective enforcement or efficient allocation of resources.[187] This reasoning is applicable also to the EU, especially following the introduction of the more economic approach.

Second, this shift affects the *de facto* scope of Article 101. When competition authorities systematically ignore categories of agreements or sectors (e.g. those that raise public policy considerations), undertakings can reasonably assume that restrictions of competition that produce some public policy benefits will not be subject to Article 101 public enforcement, even if the conditions of Article 101(3) are not fulfilled. Furthermore, since the change in the nature of the targeted agreements is not based on EU primary or secondary law, this practice might amount to a failure by the competition authorities to carry out their function.[188] Regulation 1/2003 and the case law of the EU courts have vested the competition authorities with the discretion to choose which cases to pursue and which to disregard. They have not granted them discretion to change the content of the provision.[189]

Third, the shift impairs the *deterrence effect of EU competition law*. Effective deterrence does not require that every infringement be prosecuted, but rather that the expected fine exceeds the expected gains. In many cases – especially those involving overriding public policy considerations – the cost of enforcement may exceed the economic benefits. Yet, even if such enforcement actions may be ineffective from a standalone perspective, they may carry deterrent and precedent effects.[190] A single case can have a big impact when it deters law breaking.[191]

On the other side of the same coin, the uncertainties surrounding the role of public policy in the enforcement of EU competition law may also lead to over-deterrence. The unclear interpretation of the Article may produce a chilling effect, discouraging undertakings from conducting welfare enhancing agreements that might fulfil the conditions of Article 101(3).[192]

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[184] Ivo Van Bael, "Insufficient Judicial Control of EC Competition Law Enforcement" *Fordham Corporate Law Institute* (1993), 733-744, at 773-734; Petit, op. cit. *supra* note 82, p. 49.
[185] Petit, op. cit. *supra* note 82, p. 50; Wils, op. cit. supra note 11, p. 381.
[186] Turner, op. cit. *supra* note 176, pp. 297-298.
[187] Baxter, op. cit. *supra* note 10, at 685-686, 688-689.
[188] Baxter, op. cit. *supra* note 10, at 685-686.
[189] Wils, op. cit. supra note 11, pp. 367.
[190] Wils, op. cit. supra note 11, p. 377; Kovacic, op. cit. *supra* note 10, at 405.
[191] Vestager, op. cit. *supra* note 62.
[192] Along these lines, the UK Fair Trade Foundation reported on basis of interviews with members of the industry, that the uncertainties surrounding the room Article 101(3) leaves to sustainability agreements have caused such an effect in the UK grocery sector. See Fair Trade Foundation, *Competition Law and Sustainability, A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector* (2019). Available at: https://www.fairtrade.org.uk/Media-Centre/News /November-2017/Competition-Law-fears-deter-businesses-working-together-to-promote-sustainability-in-supply-chains. For a similar position see Anna Gerbrandy, "Solving a Sustainability-Deficit in European Competition Law" 40(4) *World Competition* (2017), 539-562, at 545.

Fourth, the shift is also ineffective to the extent it hampers the *overall development of EU competition policy*. The competition authorities' enforcement choices are not just about gaining compliance with Article 101, but are also about determining what the scope and boundaries of the Article are.[193] Competition law and policy are, to a large extent, the result of a dynamic give and take between the Commission, NCAs, EU and national courts, EU institutions, Member States, industry and other interest groups. Selecting cases that do not involve public policy considerations has prevented the emergence of a body of case law in which the relevant institutions could have clarified if and how such policies should be taken into account under the substantive assessment of Article 101. As such, modernisation has not only limited the substantive room for consideration of public policy under Article 101(3) but has also almost eliminated the *debate* over the role of public policy.

Hampering the development of the law is especially significant in light of the multi-level governance system of the EU. Since the competition authorities have not followed a clear, uniform legal standard to account for public policy in the enforcement of Article 101(3), the actual scope of the prohibition of Article 101 and the room it leaves for public policy may differ across Member States. Hence, accounting for public policy by means of priority settings leads to fragmentation and legal uncertainty.

Despite the immense importance of priority setting decisions, the competition authorities' powers in this regard is mostly ungoverned by EU law. The Commission has taken first steps to harmonise the NCAs' powers as part of its recent ECN+ Directive initiative. Yet, the Directive does not touch upon the substantive principles of priority setting. It mainly covers procedural elements, such as safeguarding the NCAs' independence from external intervention of governments and other private or public entities.[194] The ECN+ Directive, therefore, regulates merely the tip of the iceberg of priority setting. It does not deal with many of the core weaknesses of the current enforcement regime, which allows competition authorities to directly or indirectly take public policy considerations into account when setting their enforcement priorities.

VIII. CONCLUSION: MODERNISATION AS A DOUBLE-EDGED SWORD

This article explored how modernisation has changed the role of public policy consideration in the public enforcement of Article 101. It argues that these changes have become a *double-edged sword*.

On the one edge, the Commission attempted to use the substantive and institutional pillars of modernisation as a sword, to defend EU competition law against undue influence of public policy considerations. The Commission's policy papers have advocated narrowing down the room for public policy under Article 101(3). They have called to limit the type of benefits that can be taken into account, supported an effects-based approach confined to enhancing consumer welfare, and increased the quality and strength of evidence required to justify an exception.

This, in itself, has not necessarily reduced the role of public policy under Article 101. On the contrary, on the other edge of the sword, the procedural pillar of modernisation might have actually *increased it*. It has entrusted the competition authorities with new discretionary powers to take into

[193] Paraphrasing Julia Black, *Managing discretion*. Unpublished manuscript, London School of Economics, UK (2001), p. 3.
[194] ECN+ Directive, Preamble 16-18; ECN+ Directive Proposal (2017), Explanatory Memorandum, 2, 15.

account public policy considerations going beyond what is permissible under Article 101(3), even under its broad interpretation.

The article offered theoretical explanations, case studies, and empirical indications to support the hypothesis that the balancing of competition and public policy considerations has shifted from the substantive assessment of Article 101(3) to procedural prioritisation decisions. Instead of engaging in a complex balancing exercise under Article 101(3), competition authorities used their discretionary powers not to pursue a case or to close proceedings by accepting commitments. As a result, undertakings can reasonably assume that restrictions of competition that produce some public policy benefits will not be enforced, even if they do not meet the substantive conditions of Article 101(3).

The article warns against a systematic shift in the consideration of public policy, in a manner that is not based on economic or legal theory. Such a practice undermines the effectiveness of the enforcement. It leads to arbitrary results in specific cases, alters the *de facto* scope of Article 101, hinders deterrence, and prevents further development of the law. In addition, it hampers the uniformity and legal certainty of the enforcement in the context of the multi-level governance system, because the competition authorities do not follow a single clear legal standard to account for public policy.

Against this backdrop, this article calls into question the Commission's contention that the competition authorities' new priority setting powers have prompted a more effective use of the authorities limited resources, while allowing them to focus on deterring behaviour that poses the greatest threat to competition and consumers.[195] Rather, it emphasises that the success of competition enforcement is also dependent on key aspects of competition policy design. It includes not only the content and scope of the substantive competition rules themselves, but also the incentives and decisions guiding the application of the competition authorities' prioritisation decisions. Therefore, although modernisation may have enhanced the enforcement of EU competition law in general, it was counterproductive when it comes to the role of public policy. Instead of bringing the consideration of public policy in line with the legal and economic principles that guide EU competition law, it has aggravated the already questionable approach.

[195] ECN, Recommendation on the power to set priorities (2013), para 1, 4. Also see Article 4(2)(e) and preamble 17 of the ECN+ proposal.