1

Introduction and Methodology

1.1 INTRODUCTION

1.1.1 *Research Question*

'I have never known much good done by those who affected to trade for the public good', stated Adam Smith in his 1776 *Wealth of Nations*; 'it is an affectation, indeed, not very common among merchants, *and very few words need be employed* in dissuading them from it'.[1] While Smith's work has fundamentally inspired the economic theory underlying (European Union – EU) competition law, this statement does not reflect the EU state of affairs. On the contrary, much ink has been spilled over the question of whether – and, if so, how – non-competition interests should or could be taken into account to justify an otherwise anti-competitive agreement prohibited by Article 101 TFEU (Treaty on the Functioning of the European Union). For lack of a better term, this process is referred to in this book as the *balancing* of competition and non-competition interests ('balancing').[2]

The story behind Article 101 TFEU balancing is, to a large extent, the tale of the development of EU competition law and policy itself.[3] It can be traced as far back as 1957, when Article 101 TFEU (formerly Article 85 EEC - The Treaty establishing the European Economic Community was first included in the Rome Treaty establishing the European Community. The vague wording of the Article suggests that there is room for consideration of non-competition interests, but it details neither the precise extent of such balancing nor the test guiding it. Over the years, the Council, Commission, EU Courts, and European Parliament have repeatedly endorsed consideration of non-competition interests – such as employment, environment, and culture – within the enforcement of Article 101 TFEU. They have emphasised

[1] Emphasis added (Smith, 1937, 572).
[2] On the different meanings of balancing in EU competition law, see Section 1.2.2.
[3] See Chapter 2.

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that EU competition law is not an end unto itself, but rather an instrument for achieving the EU Treaty's economic and social goals.[4] Despite this, the rationale, method, and limits for considering non-competition interests remain persistently subject to political discussion. Favouring consensus over clarity, the EU institutions and the Member States have never codified the Article's goals or defined a comprehensive balancing framework in EU primary or secondary law.

At the same time, in the past, this practice had rather limited consequences. Article 101 TFEU was mostly applied to purely private situations and was not fully enforced in regulated and liberalised sectors that have traditionally been considered to be part of the public realm. This had resulted in narrow areas of conflict between competition and non-competition interests.[5] Moreover, the enforcement structure was well suited to address those conflicts. Under the old enforcement regime of Regulation 17/62, all agreements were notified to the Commission prior to their implementation for the purpose of receiving an exemption. The Commission balanced competition and non-competition interests in a centralised and *ex-ante* manner. Although the Commission did not develop a set of balancing principles, undertakings across the EU learned about the compatibility of their agreements with Article 101 TFEU prior to their implementation.

Therefore, the debate over the role of non-competition interests was only revived around the turn of the millennium, when the Commission advocated a comprehensive three-pillared reform to the enforcement of EU competition law (the 'modernisation'). As elaborated below, each of the three pillars raised fundamental questions as to the role of non-competition interests in the enforcement of Article 101 TFEU.[6]

Under the first *substantive pillar of modernisation*, the Commission adopted a set of guidelines and notices introducing more stringent economic thinking to EU competition law and policy. Those policy papers offered a new interpretation of Article 101 TFEU, which considerably reduced the role of non-competition interests under the Article. According to this new approach, Article 101 TFEU must be understood as directed at the protection of competition as a means of enhancing consumer welfare. Subsequently, many non-competition interests that had previously been taken into account under Article 101 TFEU were no longer applicable in the Commission's view, at least to the extent they could not be expressed in efficiency or monetary terms.

The Commission's new approach encountered a two-front opposition: First, from a constitutional perspective, the compatibility of the Commission's new approach with EU law is, at the very least, questionable. The limited role of non-competition interests cannot be squared with the EU Courts' earlier case law on balancing.

[4] For example, former Competition Commissioner Karel van Miert (1993, 1). See also *Ibid.*

[5] See Section 2.5.3.1.

[6] The three pillars of modernisation and their effects on balancing are elaborated in Section 2.5.4.

Legally and hierarchically, the Commission is not competent to alter the substantive scope of the EU competition provisions by means of soft-law policy papers.

Second, from a political perspective, the development of the EU has created new areas of conflict between competition and non-competition interests. In particular, as more and more traditional public sectors of the economy become subject to EU competition law, the Commission has to balance the protection of competition against the Member States' sovereignty as a reflection of their national public interests. The tension between competition and non-competition interests was pronounced following economic and societal upheavals brought about by the economic crisis of 2008, the rise of populist movements from the beginning of the 2010s, Brexit, and the coronavirus pandemic. Questions on how to strike the right balance have been raised in the context of regulating online platforms and Big Tech, the growing demand to consider sustainability considerations in market regulation, and the development of the EU's industrial policy to compete with foreign competition supported by national subsidies. All of those challenges bring to the forefront new questions about the desirable boundaries of EU competition law.

To make matters even more complicated, the balancing also transformed in the wake of the procedural and institutional pillars of modernisation. In parallel with the substantive modernisation, Regulation 1/2003, which entered into force in May 2004, swept away the old centralised notification regime in favour of radical institutional and procedural reform. Under the *institutional pillar of modernisation*, the enforcement of Article 101 TFEU became decentralised; national competition authorities (NCAs) and courts were entrusted with powers allowing them to fully apply Article 101 TFEU. To this end, NCAs exercise discretionary powers to balance competition and non-competition interests. Since the Commission's notices and guidelines are binding on the Commission alone, NCAs may adopt diverging interpretations where EU primary and secondary laws and the EU Courts' case law do not prescribe otherwise and subject to the duty of sincere cooperation anchored Article 4(3) TEU (Treaty on the European Union).[7] NCAs enjoy a wide margin of discretion to shape their national approaches to balancing based on their respective legal, economic, and social traditions. Accordingly, this decentralisation, coupled with the lack of a clear balancing framework, bears the serious risk that Article 101 TFEU is not enforced in a uniform manner across the EU.[8]

The *procedural pillar of modernisation* further aggravates this risk. Under the realm of Regulation 1/2003, undertakings no longer give notification of their

[7] The impact of Article 4(3) TEU on the Member States' and national enforcers' discretion to adopt diverging balancing interpretations is further discussed in Sections 3.6.3.1 and 5.2.2.

[8] Section 2.5.4.2 argues that one of the motivations for introducing the substantive modernisation was to combat this risk. The more economic approach attempted to rebrand Article 101(3) TFEU as an objective tool facilitating economic assessment that is devoid of national political considerations.

agreements prior to implementation. Rather, the Regulation has transformed Article 101(3) TFEU into a directly applicable provision. Undertakings must self-assess the compatibility of their agreements with Article 101 TFEU, and particularly, they must evaluate whether non-competition interests can justify an otherwise anti-competitive agreement. This self-assessment regime is based on the assumption that the principles governing the enforcement of Article 101 TFEU are sufficiently clear, precise, and unconditional. In such circumstances, the lack of a coherent and uniform framework to guide balancing runs counter to the very premise of the self-assessment regime, thereby raising serious concerns about legal uncertainty and fragmentation.

Against this background, this book addresses the following research questions: *How have the rationale, method, and limits for balancing competition and non-competition interests in the enforcement of Article 101 TFEU evolved in the first sixty years of its existence? How has this process of evolution affected the objectives of Regulation 1/2003, namely effectiveness, uniformity, and legal certainty? And what role should non-competition interests play in order to conform to such objectives?*

1.1.2 *Novel Approach*

An impressive array of legal scholarship has already explored the role of non-competition interests under Article 101 TFEU and the shift in the Commission's approach from doctrinal, historical, constitutional, and economic perspectives.[9] Yet, thus far, only limited attention has been given to the manner in which the EU and national competition enforcers have actually administered this balancing in practice.

Studying balancing as applied in practice is vital for understanding the factual and analytical richness of questions that come before competition authorities and courts, how undertakings structure their arguments, and how the authorities reason their decisions. It is especially important in the context of the EU, where – in the lack of a designated balancing framework in primary and secondary laws – the balancing rules are developed in the decisions of the competition authorities and the judgements of EU and national courts.

[9] For example, see Frazer (1990), Gyselen (1994, 2002), Wesseling (1999, 77–113), Ehlermann (2000), Mortelmans (2001), Schmidt (2001), Monti (2002, 2007, 88–123), Odudu (2006, 160–174), Sufrin (2006, 933–936), Schweitzer (2007), Semmelmann (2008a), Townley (2009, 2018, 141–176), Parret (2009), Petit (2009, 6–9), Vedder (2009), Lavrijssen (2010), Prosser (2010), Kingston (2011, 97–194), Ginsburg and Haar (2014), Witt (2012, 2016b, 160–174), Gerber (2012), Van Rompuy (2012), Kieran (2013), Lianos (2013), Maziarz (2014), Gerbrandy (2015), Sauter (2016, 64–75), Bailey (2016), Claassen and Gerbrandy (2016), Talbot (2016), Schinkel and Spiegel (2016), Kloosterhuis (2017), Monti and Mulder (2017), Loozen (2019), and Dunne (2020).

Against this backdrop, this study takes a novel combination of empirical, evaluative, and normative approaches. It contributes to the existing scholarship on the role of non-competition interests under Article 101 TFEU in four ways.

First, this study examines the role of non-competition interests on the basis of an *original large quantitative and qualitative database*. Comprising more than 3,100 enforcement actions, the database was composed by applying systematic content analysis ('coding') on *all* Article 101 TFEU public enforcement actions taken by the Commission, the EU Courts, and the NCAs and courts of five representative Member States[10] (the 'competition enforcers') from the creation of the EEC in 1957 through 2017. Using a bottom-up approach, it lays down a comprehensive description of the development of the principles, rules, and concepts governing balancing in practice over the years and across the Member States.[11]

With this first contribution, this study establishes a robust empirically based point of reference for reflection on the existing balancing practices. The empirical findings are used to identify previously unnoticed balancing patterns, to verify and refute previous theories on balancing that have been based on case studies, and to draw innovative policy recommendations.

Second, the bottom-up approach applied by this study has identified *new balancing tools* used by competition enforcers to account for non-competition interests, which were not yet explored. Traditionally, Article 101(3) TFEU has been seen as the main Treaty provision for balancing non-competition interests within Article 101 TFEU and was the focus of most scholarship. Most scholars argue that since Article 101(3) TFEU defence was not accepted by the Commission following modernisation, non-competition interests no longer play a role in the enforcement of Article 101 TFEU or at least in the Commission's practice.

This conclusion, however, is *not* supported by the empirical findings presented in this book. This study reveals that Article 101(3) TFEU is certainly not the only legal tool to take account of non-competition interests. In fact, far from being the primary balancing tool, Article 101(3) TFEU can be classified as one of the following five types of balancing tools:[12]

(1) Article 101(3) TFEU individual exemptions/exceptions
(2) Block exemption regulations (BERs)
(3) Article 101(1) TFEU exceptions

[10] The five Member States are France, Germany, Hungary, the Netherlands, and the UK. On the jurisdiction selection, see Section 1.3.2.2.

[11] On the methodology and database, see Section 1.3.

[12] Monti (2007, 113–117) and Van Rompuy (2012, 229–281) have identified various methods to integrate non-competition interests via Article 101(1) and (3) TFEU and commitments. By systematically mapping the enforcement practices, this study builds on their observations and points to additional balancing tools and methods.

(4) Unique national balancing tools originating from rules adopted by NCAs and Member States
(5) Enforcement discretion and priority setting choices of the competition enforcers

In addition to the above, the Treaties exclude certain sectors from the scope of EU competition rules. This includes trade in nuclear materials, arms, ammunition, war materials, and, prior to the expiration of the ECSC Treaty in July 2002, also coal and steel agreements. The Treaties also enact special rules for the agriculture sector.[13] Those types of exceptions are not discussed in this study.

With this second contribution, the empirical approach followed by this study not only assists in identifying *explicit-substantive* forms of balancing in which competition enforcers have overtly considered non-competition interests (i.e. the balancing tools of Article 101(1) and (3), BERs, and some national balancing tools) but also shows that balancing has taken place in an *implicit-procedural* manner, in the competition enforcers' choices *not to apply* the Article to agreements that promote non-competition interests, or by settling such cases by means of alternative enforcement mechanisms (e.g. negotiated remedies, informal opinions, or sector regulation). As such, the book is the first to shed light on the *dark matter of balancing*, namely invisible forms of balancing triggered by the institutional set-up and the specific enforcement procedures of the Commission and various NCAs.

The book demonstrates that the choice between the various balancing tools is not neutral. Each tool assigns a different weight and function to non-competition interests. The book points to a great divergence in the frequency with which the Commission, NCAs, and EU and national courts have invoked and accepted the various balancing tools, as well as in the legal and economic tests that guided their application. Those differences, the book submits, impacted the rationale, method, and limits for balancing and the manner in which balancing has conformed to the objectives of the enforcement.

Third, the book studies *national balancing practices*. The study of national balancing is particularly significant following the entry into force of Regulation 1/2003, by which the vast majority of the public enforcement of Article 101 TFEU – and, consequently, of balancing – takes place in front of NCAs.[14] Nevertheless, to date, national enforcement practices have gone predominantly unnoticed. Most of the scholarship has been confined to the balancing prescribed at the EU level, as applied by the Commission and EU Courts.[15]

This study points to two parallel trends in the context of national balancing. In the first place, the book shows that given the lack of a clear and binding EU framework for balancing, national enforcers devised distinctive interpretations on how to apply the balancing tools of Article 101(1) and (3) TFEU and the BERs. They differed in

[13] See, for example, Goyder (2009, 126–137) and Bailey and Whish (2015, 1017–1021).
[14] See Section 2.5.4.1.
[15] See note 9 and Gerber (2012, 89–91).

their interpretations of the objectives of Article 101 TFEU, the types of economic or non-economic benefits that can be taken into account, the balancing method, the intensity of control, and the frequency in which they applied the different types of balancing tools.

In the second place, the national approaches have also led to the creation of unique national balancing tools. Some Member States have shielded certain agreements from the prohibition of Article 101 TFEU by adopting rules that explicitly or implicitly limit the enforcement of EU competition law in favour of promoting non-competition interests. Consequently, the decentralisation of the enforcement has afforded the Member States a new opportunity to introduce national balancing principles that supplement the EU balancing framework.

With this third contribution, the book provides a unique perspective on the enforcement challenges in the era of decentralised enforcement and discusses the compatibility and limits of the national balancing practices and tools. Relying on a functional comparative law approach, it acknowledges that EU competition law is applied by different enforcers, which vary in their legal and political structures, competencies, and interpretations of the law. As such, it is sensitive to the implication of such diversity in the decentralised enforcement regime of EU competition law.

Fourth, in addition to the focus on the role of non-competition interests, the book advances the very *limited empirical study of EU law in general, and of EU competition law in particular*. In fact, this is one of the first studies to present a complete qualitative and quantitative analysis of Article 101 TFEU formal and informal enforcement actions and the development of the enforcement practices throughout the years.[16] Hence, in addition to the study of balancing, the empirical findings may contribute to the legal and empirical study of the more economic approach, decentralised enforcement, EU multilevel governance, the objectives of EU competition law, and the functioning and success of EU competition law following the entry into force of Regulation 1/2003's reform.

With the combination of the above four contributions, the book establishes a fundamental point of reference for reflecting on or reforming existing balancing practices.

1.1.3 *Structure and Argument*

The book is structured as follows. Chapter 1 introduces the research topic and context and sets out the definitions and the methodology guiding the study.

[16] There is some quantitative empirical research on the enforcement of Article 101 TFEU. For example, Carree, Günster, and Schinkel (2010) surveyed Commission decisions, and Massadeh (2015) examined the practices of UK, French, and German NCAs. In addition, Ibáñez Colomo (2018) and Ibáñez Colomo and Kalintiri (2020) undertook a comprehensive study of the Commission and EU Courts' formal enforcement practices.

Chapter 2 provides a historical overview of the development of Article 101 TFEU balancing to frame and identify the uncertainties surrounding it. The chapter begins with the EU primary and secondary law provisions, illustrating that they do not prescribe a clear balancing framework. Against this backdrop, the chapter shows that the balancing principles have been greatly shaped by the practices of the Commission and EU Courts. It affirms that the development of the balancing principles is best understood by sorting the practices into four enforcement periods, which are then explored throughout the empirical chapters of the book. In addition to the developments at the EU level, the chapter devotes special attention to the competition law set-up and balancing approaches of each of the five Member States examined in the study.

Chapters 3–7 present and evaluate the empirical findings. Each chapter first provides an empirical and legal overview of one of the five types of balancing tools presented above, mapping the quantitative and qualitative aspects of balancing as applied in practice. They highlight the frequency of invoking and accepting the balancing tool, the types of benefits that were taken into account, the balancing method, and the intensity of control. Moreover, each chapter examines the role of EU and national courts in scrutinising the application of the balancing tools. They illustrate that the courts have adopted diverse approaches to balancing, which have in turn left the Commission and NCAs with different levels of discretion. Finally, each chapter evaluates how the balancing tool has evolved over the years.

Chapters 3–5 first detail the application of the explicit-substantive balancing tools. Chapter 3 studies the balancing function of Article 101(3) TFEU individual exemptions/exceptions. It reveals a great divergence in the frequency with which the Commission, NCAs, and EU and national courts have invoked and accepted Article 101(3) TFEU, as well as their interpretations of the types of relevant benefits, the balancing process, and the intensity of control. Moreover, it uncovers the 'death' of Article 101(3) TFEU defence in the Commission's practice following modernisation.

Chapter 4 focuses on the balancing embedded in BERs. This balancing tool has received limited attention in scholarship, especially following modernisation. The chapter demonstrates that BERs were initially introduced to EU competition law to accommodate the enormous number of notifications that resulted from the set-up of the old enforcement regime. Although this workload-reducing function perished following the entry into force of Regulation 1/2003, the special BER instrument still remains in force. This chapter concludes that this may be related to the fact that BERs play, and have played in the past, an important role in addition to their administrative function. BERs, like Article 101(3) TFEU individual exemptions, may also reflect a form of balancing between competition and non-competition interests. They offer a pre-determined, clear balancing rule. This chapter shows that balancing under BERs takes place in both the adoption and the application of a BER. It discusses different types of BERs and the effects of modernisation of BERs in the late 1990s.

Chapter 5 is dedicated to Article 101(1) TFEU balancing tools. It examines tools aimed at balancing competition with state or public interests, such as the state action defence, the notion of undertakings, the Article 106(2) TFEU exception for services of general economic interests, the exception for collective bargaining agreements between employers and employees, and the inherent restriction doctrine. The chapter also studies tools for balancing competition and commercial interests, such as the rule of reason, objectively necessary agreements, ancillary restraints, and the *de minimis* doctrine.

The chapter shows that unlike most of the explicit-substantive balancing tools that are based on EU primary or secondary law and which were largely developed by the Commission, the wording of Article 101(1) TFEU does not explicitly refer to a balancing function. Rather, the balancing tools of Article 101(1) TFEU are predominantly derived from the CJEU's (Court of Justice of the European Union) case law. It reveals that the CJEU introduced those tools to counterbalance the Commission's broad interpretation of what constitutes a restriction of competition falling within the ambit of Article 101(1) TFEU. The Court has held that agreements restricting the commercial freedom of parties might escape the prohibition of Article 101(1) TFEU if they are necessary for attaining social or efficiency-related goals.

In short, Chapters 3–5 demonstrate that prior to the modernisation, the Commission and EU Courts accounted for non-competition interests by reference to the explicit-substantive balancing tools of Article 101(1) and (3) TFEU. They have interpreted those balancing tools as entailing a flexible legal proportionality test, leaving ample room for consideration of non-competition interests on a case-by-case basis. The Commission and Courts did not limit the types of benefits that could justify an exemption and set a low evidential threshold for proving the existence of those overriding benefits.

This has changed upon the modernisation of EU competition law. In line with the Commission's attempts to limit the room for non-competition interests as part of modernisation, the explicit-substantive balancing tools were seldom accepted, or even invoked, after May 2004. These findings could initially be viewed as confirmation of the commonly held view that non-competition interests no longer play a role in the enforcement of Article 101 TFEU.

Nevertheless, Chapters 6 and 7 argue that the consideration of non-competition interests has only *shifted* to national and implicit-procedural balancing tools. Accordingly, Chapter 6 studies the balancing entrenched in unique national rules of the Member States. Those national balancing tools bear significantly on balancing in the decentralised enforcement era, during which almost 90% of Article 101 TFEU enforcement actions have taken place in front of NCAs. This chapter highlights the doubts about the compatibility of those national tools with EU competition law, a topic that has been largely overlooked by legal scholarship.

Chapter 7 examines the implicit-procedural balancing tools, embedded in the exercise of the competition enforcers' enforcement discretion and priority setting

powers. Setting enforcement priorities is an inherent feature of any administrative action. It is a necessary precondition for allowing the Commission and NCAs to make effective use of their scarce resources to ensure effective enforcement of Article 101 TFEU. At the same time, enforcement choices are not just about achieving compliance with Article 101 TFEU but are also for determining the scope and boundaries of the Article. To this extent, this chapter shows that the modernisation has entrusted the Commission and NCAs with a new balancing tool in the form of their discretional enforcement powers.

More specifically, the chapter maintains that under the old notification regime, when the Commission had limited discretion to set its enforcement priorities, it was compelled to actively apply the designated balancing tools of Article 101(1) and (3) TFEU. This has prompted an abundance of decisions explaining how and in which circumstances non-competition interests may justify a restriction of competition.

Yet, following the entry into force of Regulation 1/2003, two contradicting effects of modernisation have incentivised the Commission and NCAs to direct their enforcement efforts towards clear-cut infringements of Article 101 TFEU, which are unlikely to be justified by overriding non-competition interests: On the one hand, the more economic approach (substantive pillar of modernisation) has narrowed down the room for the consideration of non-competition interests under the explicit-substantive balancing tools. In parallel, on the other hand, the shift to the decentralised self-assessment enforcement regime (procedural and institutional pillars of modernisation) have incentivised the competition enforcers to focus 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. The competition enforcers have used their detection, target, instrument, and outcome discretion to decide *not to* enforce Article 101 TFEU against other types of agreements even when they do not meet the conditions for an exception under Article 101(1) and (3) TFEU. As a result, investigations into agreements that raised balancing questions were often settled with negotiated remedies or terminated by closing the probe into the case altogether.

Finally, Chapter 8 reflects on the empirical findings presented in the previous chapters and offers policy recommendations. It points to a remarkable three-fold shift in the role of non-competition interests in the post-modernisation era and concludes that those three shifts have hindered the attainment of the very objectives of Regulation 1/2003, namely, the effectiveness, uniformity, and legal certainty of the enforcement.[17]

First, the chapter points to a shift in the *types of balancing tools* employed in practice, reflecting a transition from explicit-substantive to implicit-procedural

[17] Regulation 1/2003, Preamble 1, 3, 22; Modernisation White Paper (1999), para 43–51. Those objectives also guided the old enforcement regime governed by Regulation 17/62 (see in the Preamble).

balancing tools. It submits that in contrast to the balancing tools of Article 101(1) and (3) TFEU, competition enforcers have a *carte blanche* to account for non-competition interests when applying their enforcement discretion. There is neither a limit on the types of benefits they can take into account nor a legal or economic test that guides the assessment. Consequently, competition enforcers may take into account non-competition interests beyond what would be deemed permissible under the explicit-substantive balancing tools, even in their broad interpretation prior to modernisation. There is no guarantee that the competition and non-competition interests are being balanced and weighed against each other or that the harm to competition will be limited to what is necessary for respecting the non-competition interests.

Second, the chapter uncovers a shift in the *locus of the balancing tools*, transitioning from EU-based to Member States-based balancing. Given the lack of a clear and binding EU framework, national enforcers devised distinctive interpretations on how to apply the explicit-substantive balancing tools and were subject to different national rules when exercising enforcement discretion. Moreover, as described in Chapter 6, the national approaches have also led to the creation of unique national balancing tools. As a result, non-competition interests did not have a uniform role across the EU.

Third, the chapter affirms a shift from an *active to a passive role of the EU Courts* in shaping the balancing principles. It shows that the EU Courts, and especially the CJEU, had an active and leading role in shaping the balancing principles prior to modernisation. In a series of landmark cases, the Courts have laid out the fundamental balancing principles. They shaped the types of benefits that can be recognised under Article 101 TFEU, introduced the balancing standard, interpreted the scope of the BERs, and devised new balancing tools to account for state involvement and commercial interests under Article 101(1) TFEU.

This changed following modernisation. When the Commission embarked on the substantive modernisation in the early 2000s, it also took the reins on the development of the balancing principles. The Commission's new balancing approach, which is clearly incompatible with the CJEU's old case law, had created an urgent need for judgements clarifying the scope of balancing in the post-modernisation era.

This gap, however, was not filled by the EU Courts. On the one hand, the EU Courts did not embrace the Commission's new approach to balancing, at least in part. On the other hand, the Courts have not staked out a clear position on the applicable balancing principles. Departing from their active role in the past, the Courts have missed the opportunity to shape the balancing framework following modernisation.

Combining the above three transitions in balancing, Chapter 8 highlights the great ambiguity surrounding the role of non-competition interests following modernisation and concludes that while the modernisation of EU competition law might have been successful in general, its effect on balancing has been counterproductive.

After identifying the three transitions in balancing and analysing their impacts, the chapter moves to make policy recommendations. It advocates re-shifting the

balancing towards the ambit of the explicit-substantive balancing tools and limiting balancing practices by exercising enforcement discretion. An active and transparent application of the explicit-substantive balancing tools, the book maintains, will oblige competition enforcers to clarify many of the open questions surrounding balancing and will facilitate public debate on political issues related to the objectives of Article 101 TFEU, the types of benefits that can be taken into account, the balancing method, and the limits of the implicit and national balancing tools.

1.2 DEFINITIONS

The mystery surrounding the role of non-competition interests is manifested by the lack of consensus over the basic terminology guiding this debate. There are no universally accepted definitions of 'balancing', 'competition', and 'non-competition interests'. Therefore, to structure the debate and set the scene for this study, this section defines those terms for the purposes of this book.

1.2.1 *Competition and Non-Competition Interests*

1.2.1.1 A Narrow Definition

The term *competition interests* is used in this book in a narrow sense. It refers to the *protection of the competitive process and structure as such*.[18] Competition interests thus reflect an objective and independent economic value.

All other interests are referred to as *non-competition interests*. These interests include economic and non-economic values such as consumer welfare, economic efficiency, industrial policy, growth, market and social stability, market integration, environment, and culture. Hence, as further elaborated in Section 2.2.3.1, non-competition interests include both economic benefits (cost and qualitative efficiencies that either affect prices or provide additional non-price value for consumers) and non-economic benefits (non-market driven public policy interests).[19]

In particular, interests that are often attributed to the *objectives of EU competition policy*, namely economic freedom, market integration, and economic welfare, are classified as non-competition interests. Section 2.2.1 shows that those three objectives

[18] Competitive process relates to the dynamic interaction of firms during a specified time frame. Competitive structure refers to a static state of a market during a specific period in time. See Nazzini (2011, 15).

[19] That section demonstrates that this definition matches the classification of benefits drawn up by a group of experts and summarised by the OFT Roundtable on Narrow versus Broad Definition of Benefits (2010). A similar definition is also followed by UNCTAD Coherence Between Competition and Government Policies (2011), 3, which defines competition as 'the pressure exerted in the market by different players in search of market shares and profits. It is a game of outdoing one another in winning customers, so that customers will purchase a given company's goods or services'.

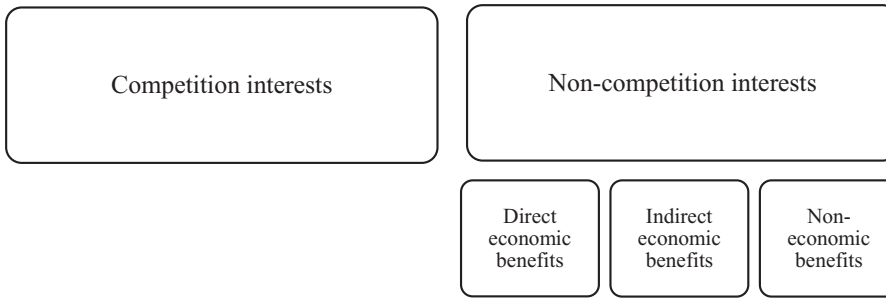

FIGURE 1.1. Competition and non-competition interests

encompass various political-societal values, none of which are directly related to the competitive process or structure as such. The protection of competition interests is an instrument to achieve these outcomes or objectives, which might need to be balanced against other (economic and non-economic) non-competition interests.

This narrow definition of competition interests is represented in Figure 1.1.

The narrow definition of competition interests followed in this book is *not normative*. It represents an agnostic view of the normative question of the role of non-competition interests. It does *not* entail that protecting the competitive structure and process is an end in itself. It does *not* deny that the three objectives of EU competition policy (i.e. consumer welfare, economic freedom, and market integration), or any other interest for that matter, are or should be the overarching aims of EU competition policy, of Article 101 TFEU, or enjoy primacy over competition interests in a specific case.

Put differently, the narrow definition of non-competition interests is not the end of the process of balancing, but only the beginning. It is perfectly acceptable that after acknowledging the harm to the competitive structure and process, a competition enforcer may decide to give preference to the promotion of welfare, economic freedom, market integration, or to the protection of other non-competition interests. As elaborated below, this definition merely recognises from a theoretical and empirical-methodological point of view that the objectives might not be entirely consistent with the promotion of competition or with one another.

This approach is of value to those who believe that the protection of the competitive process and structure should be the main aim of Article 101 TFEU.[20] It also serves those who advocate a consumer welfare centric or a polycentric competition policy, because it allows the various elements that constitute EU competition law and policy to be captured and evaluated. In particular, as will be demonstrated in Chapter 7, the narrow definition of competition interests is well-suited for questioning whether consumer welfare centric or polycentric competition

[20] For an interesting discussion on the benefits of this approach in the context of US antitrust law, see Wu (2018).

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policies truly achieve their declared aims and how the institutional set-up and specific enforcement procedures trigger the invisible forms of balancing that derive from the implicit-procedural tools.

In order to reflect the different types of non-competition interests, however, the empirical findings distinguish between economic and non-economic benefits. The narrow approach to the definition of non-competition interests, therefore, does not preclude including or excluding them from further analyses or by scholars who subscribe to a different definition of competition and non-competition interests.

1.2.1.2 Dialectic Approach

The narrow definition of competition interests adhered to in this book reflects the *dialectic approach* to competition law, advocated by and detailed in the work of *Andriychuk*.[21] Dialectics is a method of legal reasoning in which controversy between norms is considered inevitable and productive. Instead of searching for a definition of competition interests that reconciles the various objectives of Article 101 TFEU and EU competition policy as a whole, the dialectic approach focuses on the discourse between the different objectives. Inconsistency between those social and economic objectives is regarded, in and by itself, as an engine that stimulates the development of competition law.[22] The manner in which competition interests interact with non-competition interests is used to reflect on the internal conflicts within the law and to understand the scope of Article 101 TFEU.

Notably, the dialectic approach to the definition of competition interests used in this book departs from those used in previous scholarship on the role of non-competition interests in Article 101 TFEU. Many studies have incorporated into the notion of competition interests, or comparable terms, not only the protection of the competitive process and structure but also some of the objectives of EU competition policy and, particularly, welfare. Those definitions centre on the *outcomes or effects* of competition, and not on the competitive *structure and process* as an independent value. For instance, *Semmelmann*, *Townley*, *Van Rompuy*, and *Dunne* classify efficiency-related considerations as competition interests.[23]

[21] Andriychuk (2010, 2012).

[22] Andriychuk (2010, 156–157) and Lianos (2013, 30).

[23] Semmelmann (2008b, 17) defines 'non-competition goals' as those characterised by an absence of a cost–benefit analysis as their driving force; Townley (2009, 1) defines the term 'public policy objectives' by means of a particular negation to encompass all public policy objectives with the exception of economic efficiency; Van Rompuy (2012, 8) defines 'non-efficiency considerations' as a catchall concept covering any consideration that cannot be strictly confined to economic efficiency; Dunne (2020, 3) uses the term 'public interest concerns' to encompass any application of the competition rules that embraces values that extend beyond the conventional (if disputed) wisdom that competition law aims, in the final analysis, to enhance efficiency.

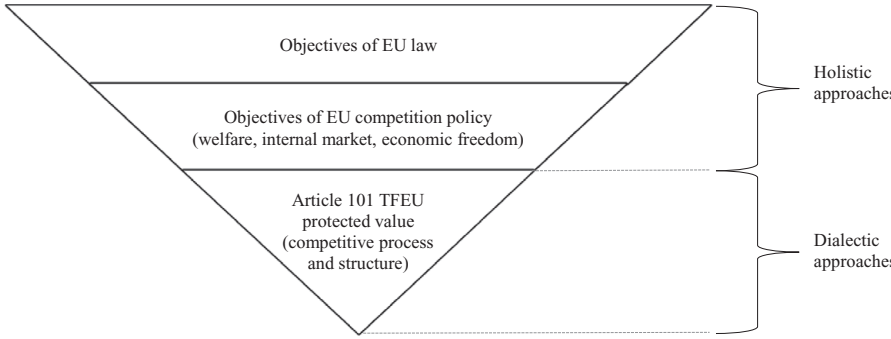

FIGURE 1.2. Dialectic and holistic approaches
The objectives of EU competition policy are detailed in Section 2.2.1, and the protected value of Article 101 TFEU is described in Section 2.2.2.

Monti opts for an even broader definition that includes, in addition to efficiency, economic freedom and market integration.[24]

These broad definitions represent a *holistic approach*. They do not focus on the core value protected by Article 101 TFEU, namely the promotion of competition process and structure. Instead, they define competition interests in light of the overarching objectives of the EU in general and EU competition policy in particular.[25] As elaborated below, under a holistic approach, the definition of competition interests reflects an internal balance between the various economic and social objectives of EU competition policy. Unlike the dialectical approach, such a holistic definition entails a policy choice. It seeks to establish a harmonious homogeneous hierarchy between the competing objectives. Agreements are classified as promoting competition interests to the extent they help attain certain *outcomes*, e.g. enhancing welfare, promoting the single market, and protecting individual freedoms.

The differences between the dialectic and holistic approaches are illustrated in Figure 1.2, which shows that a dialectic approach defines competition interests and assesses balancing in light of the narrow value protected by Article 101 TFEU, i.e. the protection of the competition process and structure itself. In comparison, holistic approaches are result-oriented and focus on the general function the Article serves in the EU legal order.

The following sub-sections maintain that a dialectic approach offers an array of theoretical and methodological advantages for the purpose of the study documented in this book.

1.2.1.3 Theoretical Justifications: The Example of Consumer Welfare

EU primary and secondary laws have not come up with a clear economic or legal theory that fully delimitates the competition interests protected by Article 101 TFEU

[24] Monti (2002, 1064).
[25] Andriychuk (2012, 359).

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or which serve to explain the balancing practices. Article 101 TFEU prohibits agreements having as their 'object or effect the prevention, restriction or distortion of *competition* within the internal market', and Regulation 1/2003 declares that the objective of the Article is the 'protection of *competition* on the market'.[26] Yet, the Treaty and Regulation do not explain what competition is.

The EU Courts have also not developed a clear definition. In some cases, the CJEU has alluded to a holistic definition, which ties the protection of competition to its *outcomes*. In a series of cases, the Court declared that the function of the EU competition rules is to 'prevent competition from being distorted *to the detriment of the public interest, individual undertakings and consumers*, thereby *ensuring the well-being of the European Union*'.[27] However, in other cases, the Court has invoked an independent-dialectic *value* of competition, holding that Article 101 TFEU aims to protect 'competition as such'.[28] It should be noted that even when the Court has taken a holistic approach, it has referred to a host of uncommerciable values and not provided a clear standard to define competition interests.

Furthermore, the empirical findings presented in this book show that the interpretations ascribed to the term competition also cannot be fully explained by the economic, legal, or political objectives of the EU's competition policy. Rather, those objectives are widely defined policy preferences that shift over time.[29] The meaning of restriction of competition under Article 101(1) TFEU, the justification for such restriction under Article 101(3) TFEU, and the exercise of enforcement discretion when adopting remedies and setting priorities are constantly evolving and cannot be ascribed to one legal or economic theory of competition. A holistic definition of competition and non-competition interests, therefore, may lead to loss of information, as it does not fully illuminate how the clashing interests are reconciled over time and between jurisdictions.

The theoretical difficulties of using a holistic approach to define competition can be illustrated by the attempt to equate the protection of competition with the maximisation of consumer welfare.[30] The concept of consumer welfare was imported to EU competition law from US antitrust law. It had emerged from the writings of Bork in the mid-1970s and was further developed by the Chicago

[26] Emphasis added. Regulation 1/2003, Preamble 9. See also Section 2.2.1.

[27] Emphasis added. C-52/09 TeliaSonera (2011), para 22, quoting C-46/87 C-227/88 Hoechst (1989), para 25. This was repeated by the GC, for example, in T-458/09 T-171/10 Slovak Telekom (2012), para 38; T-357/06 Bitumen (Netherlands) (2012), para 230; T-325/16 Falcon (2018), para 173; T-705/14 Perindopril (2018), para 306; T-701/14 Perindopril (2018), para 236; T-691/14 Perindopril (2018), para 238; T-682/14 Perindopril (2018), para 167; T-680/14 Perindopril (2018), para 88; T-679/14 Perindopril (2018), para 200.

[28] C-8/08 T-Mobile (2009), para 38; C-501/06P C-513/06P C-515/06P C-519/06P GlaxoSmithKline (2009), para 63; C-68/12 Slovak Banks (2012), para 18. The CJEU's approach is elaborated in Section 2.5.3.2.

[29] Lianos (2013, 3), Talbot (2016, 264).

[30] This will be elaborated in Sections 2.5.4.4 and 3.4.4.1.

School.[31] While this concept has become the cornerstone of both the EU and US systems, it does not have a clear definition. In fact, consumer welfare has been dubbed 'the most abused term in modern antitrust analysis'.[32] It is often used loosely, without the credence of a robust standard economic definition. Nevertheless, there are two main approaches to the definition of consumer welfare:

The first definition equates consumer welfare with the economic concept of *consumer surplus*. This definition refers to the price consumers would be willing to pay for a good or service, less what they actually had to pay. The second definition, which was advocated by Bork, links consumer welfare to the economic concept of *total welfare*.[33] According to this definition, consumer welfare amounts to the aggregate of the consumer and the producer surplus produced by a certain agreement. In addition to benefits for consumers, this definition takes into account the value of the product that was produced less the cost of producing it.

Equating competition interests with either of those definitions of consumer welfare ties the notion of competition to the notion of economic efficiency. It shifts the analysis away from focusing on the protection of the competition process and structure as an independent *value* to seeking to maximise economic welfare as an *outcome*.[34] Other benefits that may result from protecting the competition process and structure – such as the promotion of unquantifiable social objectives – will not be taken into account to the extent they are not reflected in the creation of economic welfare.

The choice between the two definitions of consumer welfare entails a policy preference. The first definition, which focuses on the wealth created for consumers, is sensitive to wealth transfer effects between different members of society – i.e. between consumers and sellers. The second definition, which measures the aggregated wealth created for the society, does not take into account distributional concerns and does not distinguish between the effects of an agreement on various types of members of society. An agreement that increases total welfare may nevertheless harm the economic welfare of many other groups in society, such as (vulnerable) consumers or SMEs.[35]

[31] Bork (1978, 107–115). On the development of the consumer welfare standard in the US, see also Brodley (1987), Orbach (2011), Fox (2013), and Melamed and Petit (2019).

[32] Brodley (1987, 1032). See also Motta (2004, 19–22), Geradin (2006, 313), Cseres (2007b, 122), ICN Competition Enforcement and Consumer Welfare (2011, 7–9), Orbach (2011, 134, 137), Keyte (2017), Foer and Durst (2018, 497–499), Townley (2018, 37–40), and European Court of Auditors, Special Report on the Commission's EU Merger Control and Antitrust Proceedings (2020, para 6).

[33] Bork (1978, 90) argued that consumer welfare 'is merely another term for the wealth of the nation'. In the second edition of the book, he continued to defend the position that wealth transfer should not be taken into account, noting that '[t]he distribution of that wealth or the accomplishment of noneconomic goals are the proper subjects of other laws' Bork (1993, 427). See also Orbach (2011, 148–149).

[34] Wu (2018, 2).

[35] Hovenkamp (1982, 5), Farrell and Katz (2006, 6), Foer (2006, 566), Cseres (2007b, 125), ICN Competition Enforcement and Consumer Welfare (2011, 27), and Fox (2013, 2159).

Hence, a mere reference to consumer welfare does not offer a clear and decisive theoretical definition of competition interests, which can be used to explain the limits of competition and how it is balanced against other interests. Rather, it already reflects an internal balance between different economic, social, and political preferences.[36] By equating competition interests with consumer welfare, one may run the risk of overlooking how different competition enforcers have interpreted the notion of consumer welfare when applying Article 101 TFEU and how they have weighted and reconciled tensions between the competing economic, social, and political considerations.

A holistic definition based on a concept of consumer welfare may also distort the study of balancing since the calculation of consumer welfare is not a straightforward task. Measuring the effect of an agreement on consumer welfare can merely provide an 'illusion of certainty'.[37] It merits sophisticated calculations and predictions about past and future consumer behaviour. Rather than a purely mathematical exercise, it necessitates making some assumptions and simplifications. As a result, in many cases, different economic experts present conflicting opinions.[38]

In particular, the definition of consumer welfare under either approach requires determining the relevant period of time in which the consumer or total welfare should materialise and the relevant type of benefit that can be considered in the analysis. In terms of time, some competition enforcers follow a *short-term consumer welfare standard*, which focuses on measuring static efficiency, namely, the optimal distribution of resources among alternative production targets at a certain point in time (typically, between 1 and 3 years). Others observe a *long-term consumer welfare standard* and also take into account dynamic efficiency, namely the increase of welfare over time in light of the incentive to innovate and renew processes and products.[39]

In terms of the relevant types of benefits, competition enforcers that follow a *narrow consumer welfare standard* are limited to calculating parameters related to price, output (quantity, quality, or range), and innovation. A *broad consumer welfare standard* is more flexible, allowing other non-economic benefits that improve living quality to be taken into account within the efficiency framework, such as health and safety, environmental protection, or culture.[40]

[36] Section 1.2.2.1 defines this as an economic balancing process.

[37] Pitofsky (1979, 1065).

[38] Cseres (2007b, 122–123) and ICN Competition Enforcement and Consumer Welfare (2011, 17–36). This was also extensively discussed in the context of US antitrust law. Foer and Durst (2018, 497), for example, have warned that consumer welfare 'is nowhere near as scientific as it sounds'. Wu (2018, 2) added '[e]conomics does not yield answers, but arguments'. Orbach (2011, 136) noted that it can be used to promote ideas that have questionable economic merit, while dismissing the genuine economic objections to those ideas.

[39] Cseres (2007b, 125), ICN Competition Enforcement and Consumer Welfare (2011, 31–33), and Vision Document on Competition and Sustainability (2014, para 2.6).

[40] Cseres (2007b, 134–135), ICN Competition Enforcement and Consumer Welfare (2011, 31–33), and Claassen and Gerbrandy (2016, 3).

Finally, equating competition with consumer welfare is also problematic for the purposes of this study because no definition of consumer welfare has been able to fully seize the scope of the prohibition contained in Article 101 TFEU. An agreement is only prohibited under that Article if it harms the competitive process or structure. The Article cannot be applied to an agreement that does not harm competition in this narrow sense, even if it has negatively affected total or consumer surplus. In other words, even if one adheres to a holistic definition that links competition interests to consumer welfare, an agreement can only be prohibited if there is: (i) harm to the competitive structure or process (i.e. competition interests in their narrow definition) and (ii) harm to consumer welfare.[41] Collapsing those two stages into a single holistic definition would mean that the term competition interests already reflects a complex balance between harm to the competitive structure or process and various types of efficiencies. This too could distort the study of balancing by overlooking the relationship between the harm to competitive structure and process, creation of efficiencies, and the promotion of other non-economic benefits.

Defining competition interests as a form of consumer welfare, therefore, does not produce a precise legal or economic yardstick that can be used to investigate the role of non-competition interests in the enforcement of Article 101 TFEU. The application of the consumer welfare standard inherently entails explicit or implicit policy choices, involving an internal balancing between conflicting interests.[42] Indeed, the empirical findings presented in this book reveal that even those competition enforcers that have chosen to rely on consumer welfare in the application of Article 101 TFEU have relied on different theories and tests. Similar theoretical problems are likely to arise if competition interests are equated with the other two objectives of EU competition policy, namely market integration and economic freedom.[43]

Admittedly, the dialectic definition of competition interests also fails to provide a balancing formula that can be precisely calculated. Yet, unlike the holistic definitions, it does not attempt to do so. Instead of trying to *resolve* conflicts between competition and non-competition interests, the proposed dialectic approach aims to *understand* how competition is balanced vis-à-vis other interests.[44] Therefore, from a theoretical perspective, the narrow definition of competition interests is beneficial to avoid integrating incommensurable economic and political-societal values into a single reference framework.

1.2.1.4 Methodological Justifications

A dialectical approach also comes with methodological advantages as it corresponds to the systematic content analysis methodology deployed in this study and detailed

[41] Evans (1985, 104), Farrell and Katz (2006, 10), and Melamed and Petit (2019, 746).
[42] Cseres (2007b, 122).
[43] Lianos (2013, 30–31).
[44] Andriychuk (2010, 156–157) and Lianos (2013, 30).

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in Section 1.3. A dialectical approach deconstructs the legal and economic notions guiding balancing into basic building blocks, which can be recorded empirically. Because a dialectical approach defines competition interests as a self-standing value, competition and non-competition interests can be accurately identified. A holistic approach, on the other hand, is unsuitable for systematic content analysis. Since the objectives of EU competition policy are broad and vague, a holistic definition requires discretion in deciding how to classify an agreement.

Moreover, a holistic approach cannot empirically capture situations of conflict amongst the three objectives of EU competition policy themselves (i.e. between economic freedom, market integration, and economic welfare). In most cases, such conflicts do not arise. Competition law usually serves multiple economic and political goals. Protecting the process and structure of competition is expected to promote economic efficiency, remove barriers to the single market, and reduce the undue concentration of economic power. Yet, in some instances, the protection of the competitive process and structure may be at odds with one or more of the objectives of EU competition policy.[45] For instance, a price-fixing agreement between manufacturers from several Member States might be classified as anti-competitive because it increases prices and impedes consumer welfare (the welfare objective) but also pro-competitive because it makes it easier to trade across borders (the market integration objective). Therefore, a holistic approach is unsuitable for pinpointing and categorising balancing between the three objectives.

A dialectical approach to competition interests is also better suited to capture the differences between the balancing practices of the EU and national enforcers. There is no consensus among the Member States that the three objectives of EU competition policy should guide the enforcement practices of their NCAs.[46] One prominent example is Germany, which declares that it focuses on the competitive process rather than on the consumer welfare standard advanced by the Commission.[47] The Member States that have embraced the consumer welfare standard ascribe different meanings to it, and they differ considerably in the scope and degree to which they protect other values and public policies beyond competition.[48] Therefore, a holistic definition that classifies the three objectives as competition interests may be inconsistent with national interpretations. A narrow definition of competition interests allows a more nuanced analysis of national practices.

[45] Such situations are examined, for example, in Sections 2.5.1, 2.5.3.3, 3.4, and 3.6.2.
For a similar discussion with respect to US antitrust law, see Elzinga (1977, 1192–1194), Pitofsky (1979, 1066), and Brodley (1987, 1033–10334).

[46] ICN Report on Interface between Competition Policy and Other Public Policies (2010). See Sections 2.2.1 and 2.6.

[47] Heitzer (2008, 3).

[48] Dunne (2020, 6).

1.2.2 *Balancing*

This book studies whether non-competition interests should or could be taken into account to justify an otherwise anti-competitive agreement prohibited by Article 101 TFEU. This process is referred to as the *balancing* of competition and non-competition interests.

This term is not without its flaws. In constitutional law, balancing often refers to theories of constitutional interpretation based on the identification, valuation, and comparison of competing interests. Each interest must be recognised on its own and directly compared with competing interests.[49] The meaning of balancing in this study is broader in scope. It includes not only the weighing of competition interests against non-competition interests but also other techniques in which non-competition interests play a role in the enforcement – such as excluding one interest in favour of another or measuring the impact of the interests on a consumer welfare standard.

The various techniques of balancing confer varying roles to non-competition interests, which will be elaborated throughout the empirical chapters of the book. To capture those differences, the following sub-sections identify various aspects of balancing, which will be used throughout the book to explore the balancing practices. Such aspects relate to the balancing process, the remedy pursued by balancing, and the level of discretion.

1.2.2.1 Process: Legal Balancing, Economic Balancing, and Exclusion

There are several possible processes, or mechanisms, to balance competition and non-competition interests. The definition of the balancing process, as set out below, is based on the classification offered by *Townley*, who distinguishes three types of balancing processes:[50]

First, an *economic balancing process* uses economic principles to compare the quantifiable impact of an agreement on competition against its quantifiable effect on non-competition interests. This balancing is based on an economic cost–benefit analysis. It aims to ensure the maximisation of consumer welfare (under either of the definitions presented in Section 1.2.1.3), or of an alternative economic concept. Therefore, applying economic balancing to a specific case does not require the prioritisation of one type of interest over another. Rather, the effects of both competition and non-competition interests on consumer welfare are expressed in monetary terms. If the welfare generated by non-competition interests offsets the

[49] Aleinikoff (1986, 945).

[50] Townley (2009, 6–7, 28–29). Townley uses slightly different terminology, referring to market balancing, mere balancing, and exclusion.

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harm caused by an anti-competitive agreement, the agreement will be permitted, and *vice versa*.

Second, a *legal balancing process* is not linked to an economic welfare assessment. Competition and non-competition interests are balanced by means of a legal proportionality analysis. The competition enforcers examine whether an anti-competitive agreement has gone beyond what is required to attain a legitimate non-competition interest and whether the claimed benefits exceed the harm to competition interests. A legal balancing process introduces a degree of subjectivity to competition law enforcement. Both the decision to recognise a non-competition interest as legitimate and the weighing of competing interests are at the competition enforcer's discretion. Consequently, legal balancing provides a more abstract analysis compared to the economic balancing process.

Third, balancing can take place by way of *exclusion*. The two balancing processes described above are based on a compromise, reconciling competition and non-competition interests. Exclusion, on the other hand, resolves clashes between competition and non-competition interests by promoting one interest and ignoring the other. For example, Chapter 4 shows that certain practices or sectors were excluded from the application of Article 101 TFEU altogether by means of BERs, irrespective of the agreement's actual impact on competition.

1.2.2.2 Remedy: Corrective and Regulatory Balancing

The possibilities for taking non-competition interests into account under Article 101 TFEU also depend on the type of remedy pursued by balancing. In this regard, a distinction is made between balancing within corrective versus regulatory enforcement:[51]

Corrective balancing aims to restore the situation that would have occurred in the absence of the anti-competitive agreement. Accordingly, balancing within corrective enforcement takes non-competition interests into account only to the extent required to ensure that the rights of consumers, undertakings, and third parties are not adversely affected by the enforcement of Article 101 TFEU. A corrective tool does not promote non-competition interests any more than is required to remedy a specific competitive harm.

Regulatory balancing, on the other hand, uses the enforcement of Article 101 TFEU as a means to regulate markets and promote interests that are not directly related to the anti-competitive behaviour of the undertakings concerned.[52] A regulatory tool might protect non-competition interests even where no harm has been inflicted on competition interests, or at any rate not disproportionately; it could

[51] Townley (2009, 42–43), Lavrijssen (2010, 655), Ibáñez Colomo (2010, 263), and Gerard (2013, 18–22).

[52] The regulatory function of Article 101 TFEU is also elaborated in Sections 2.5.2.1 and 2.5.3.1.

utilise the enforcement of Article 101 TFEU to prevent an agreement harming other public policies. For instance, a competition enforcer might invoke Article 101 TFEU to prohibit an agreement that impedes market integration or public health even if such an agreement *does not* have a significant negative impact on competition.

1.2.2.3 Level of Discretion

Finally, the leeway to account for non-competition interests is also dependent on the level of discretion left to the competition enforcer when administrating each balancing tool. A competition enforcer, like any other administrative authority, can be said to have discretion whenever the law leaves it a certain amount of freedom to choose among various possible courses of action.[53] There is room for discretion when the applicable legislative, constitutional, and case law has not laid down rules that fully specify which course of action the enforcer must take.

Discretion is a matter of degree. An enforcer will have narrower or wider discretion according to the extent to which the law circumscribes the range of possible choices. The law can limit the range of choices, for instance, by excluding certain courses of action, prescribing the objectives to be pursued, or requiring that certain elements be considered during the decision-making process.[54] This study differentiates between balancing tools having a high versus a low level of discretion.

Balancing tools that are characterised by *a low level of discretion* are the most constraining on the competition enforcer's courses of action. Once the facts of the case have been identified and it has been determined that a certain agreement lies within a relevant category, a pre-determined categorical rule applies that requires a rigid set of balancing principles. Hence, such balancing tools apply equally and consistently to all types of agreements.

Balancing tools that are characterised by *a high level of discretion*, in comparison, employ indeterminate terms by referring, for example, to the purpose of a regulation, a proportionality test, or to a vague consumer welfare standard. The outcome of balancing in a specific case is essentially based on the discretion of the competition enforcer and is, therefore, less certain.

1.3 SYSTEMATIC CONTENT ANALYSIS

Systematic content analysis of legal texts can be described as a hybrid of traditional legal methodologies and empirical research, or as a unique legal empirical methodology.[55] It consists of recording features of legal documents – in this study: decisions of the Commission and NCAs and judgements of EU and national courts – and

[53] On administrative discretion, see Galligan (1990, 1–2), Wils (2011, 354), and Mendes (2014, 7).
[54] Galligan (1990, 6–7) and Wils (2011, 354).
[55] Hall and Wright (2008, 64).

drawing inferences about their use and meaning. This technique is also labelled as *coding*.[56]

Because systematic content analysis is a technique rarely used in European legal scholarship, it may be worth dedicating a few words to the methodology guiding the coding and the design of this study. Before moving to present the case selection and coding protocol, therefore, this section begins by discussing the benefits and risks of systematic content analysis.

1.3.1 *Promises and Pitfalls of Systematic Content Analysis*

This study applies systematic content analysis to identify the modalities of balancing competition and non-competition interests in public enforcement actions of Article 101 TFEU. One of the unique characteristics of content analysis, which distinguishes it from other more qualitative or interpretative methodologies, is its attempt to meet the standards of scientific research methods. Systematic content analysis offers a scientific understanding of the balancing practices themselves by way of generating falsifiable and reproducible knowledge about the competition enforcers' practices.[57] It provides a tool for testing hypotheses on the basis of theory, ensuring the reliability, validity, and generalisability of the results. In this book, it assists in identifying previously unnoticed balancing patterns, which are further interpreted using doctrinal and normative methodologies. Moreover, it is used to verify or refute theories on balancing that have been based on anecdotal or subjective studies.

Systematic content analysis provides an analytical method for understanding large numbers of public enforcement actions. It is based on the assumption that each of the enforcement actions has roughly the same value. It therefore represents a departure from traditional legal analysis, which tends to focus on leading cases or precedent. This methodology views the decisional practices of competition enforcers as not only a reflection of the law *but rather as the law itself*.[58] This book asserts that this is predominantly true with respect to the enforcement of EU competition law. As detailed in Chapter 2, the wording of the Treaty tells us little about the particularities of balancing, and the EU Courts have not yet supplied an overall balancing framework. Similarly, the non-binding Commission's guidelines and notices outline only a general normative perspective. In the absence of a designated balancing framework, the balancing rules are substantially reflected by case law. Especially under Regulation 1/2003's self-assessment regime, undertakings evaluate their compliance with EU competition rules essentially pursuant to Commission, NCA, and court practices.[59]

[56] Kort (1963, 134), Tyree (1981), and Hall and Wright (2008, 64). More generally on the method of systematic content analysis, see Neuendorf (2017).
[57] Hall and Wright (2008, 64) and Neuendorf (2017, 16–17).
[58] Hall and Wright (2008, 78, 84–86).
[59] GCLC Annual Conference (2010, 19, 58–76).

At the same time, it is important to acknowledge the limitations inherent to content analysis and hence of this study. First, content analysis is not designed to predict or explain the outcomes of proceedings. It does not study causality. It uses the details gleaned from decisional practices to *understand* the body of case law.[60] This research method is also known as *descriptive statistics*.[61]

Second, content analysis is restricted to the endogenic information extracted from the examined proceedings, without reference to exogenous data. In other words, the empirical findings do not contain considerations that are not reflected within the wording of the cases. Admittedly, this is an important limitation of this study. Yet, as already mentioned, analysis of the cases merits an important study; they represent the law in practice and are the main source of information directing undertakings' conduct. The cases demonstrate the factual and analytical richness of questions that come before competition enforcers and courts, how undertakings structure their arguments, and how the enforcers reason their decisions.[62]

Third, another limitation of any content analysis of case law relates to the fact that not all infringements result in a reasoned administrative act. While the database of cases purports to cover all public enforcement of Article 101 TFEU,[63] aspiring to encompass all consideration of non-competition interests, it cannot fully code infringements that did not end with a reasoned decision.[64] There are several types of Article 101 TFEU infringement that have not been recorded in the database: The database does not include information on undetected infringements, which are estimated to be the vast majority of anti-competitive agreements;[65] the database does not record detected infringements if no administrative procedure was initiated or if the investigation was dropped without publication; finally, the database holds only partial information on cases in which competition enforcers did not issue an Article 101 TFEU decision on the merits. Balancing by alternative instruments (e.g. sector regulation, markets-work) or implicit-procedural balancing tools (e.g. priority setting and commitments) is not fully reflected in the database.[66]

Consequently, it must be acknowledged that there is a large body of unidentified 'dark matter' of Article 101 TFEU infringements. This caveat applies to the use of the database and what can be learned from it.[67] This dark matter, referred to by Davies and Ormosi as the 'known unknowns'[68] and summarised in Figure 1.3, may certainly

[60] Hall (2011, 12). For a critique of the use of content analysis to predict outcomes, see Tyree (1981).
[61] Neuendorf (2017, 244–245).
[62] Lawlor (1968, 107) and Hall (2011, 3–4).
[63] The composition of the database of cases is elaborated in Section 1.3.2.
[64] Davies and Ormosi (2010, 34–35).
[65] For example, Combe, Monnier, and Legal (2008) estimated detection chance between 12.9% and 13.2%. See also Davies and Ormosi (2010, 43) and Davies and Ormosi (2013).
[66] Those balancing tools are discussed in Chapter 2.
[67] Carree et al. (2010, 98).
[68] Davies and Ormosi (2013, 4).

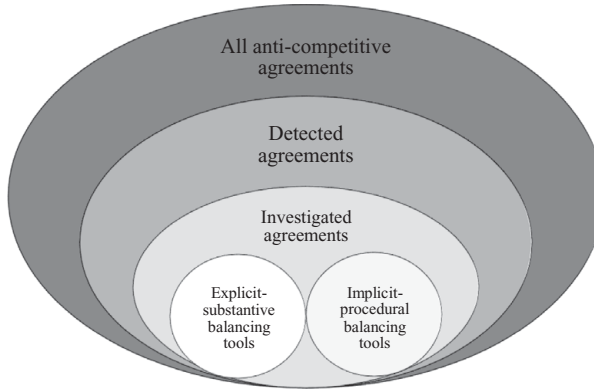

FIGURE 1.3. The 'dark matter' of balancing[69]

involve balancing. Of the totality of anti-competitive agreements in the EU market, only agreements handled by the explicit-substantive balancing tools in reasoned and published decisions are fully represented in the database.

Despite this limitation, the dark matter is a noteworthy subject of study in itself. As demonstrated in Chapter 7, the choices competition enforcers make, when devising detection policies, setting enforcement targets, choosing which legal instrument to apply to a case, and shaping the outcomes, are an independent form of balancing. This type of balancing tool is particularly significant since it is often implicit and overlooked.

Like the dark matter in the universe, the dark matter of enforcement cannot be directly observed. Yet, by identifying the entire scope of enforcement activities, the empirical exercise in this study yields important conclusions also on the areas that have remained untouched by EU competition enforcement and in which anti-competitive agreements are *de facto* tolerated. The database thus allows evaluation of the balancing practices not only on the basis of observed cases but also on the basis of unobserved cases.[70]

1.3.2 *The Database: Case Selection and Definitions*

The empirical study is based on a unique database including all public enforcement actions of Article 101 TFEU rendered by

(i) The Commission, since the establishment of the EEC in 1957 until 2017.

[69] Figure 1.3 was originally published in Brook (2020). Reproduced by permission of Oxford University Press. The proportions depicted for the various types of agreements are merely for purposes of illustration.

[70] Davies and Ormosi (2013, 4).

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(ii) The CJEU and GC, since the establishment of the EEC in 1957 until 2017 (the 'EU Courts'). It includes appeals on the Commission's decisions as well as the CJEU's preliminary rulings.
(iii) The Five NCAs, since the entry into force of Regulation 1/2003 decentralising the enforcement in May 2004 until 2017. In addition to Article 101 TFEU, the database includes the public enforcement of the national equivalent provisions.
(iv) The national courts of the five representative Member States, since the entry into force of Regulation 1/2003 decentralising the enforcement in May 2004 and until 2017 in appeals on the abovementioned NCAs' proceedings.

The cut-off date of this database is 31 May 2018. Therefore, it includes only decisions that were rendered before 31 December 2017 and published by 31 May 2018.

The cases in the database reflect the entire population of published Article 101 TFEU public enforcement actions in the relevant jurisdictions, yielding a sufficiently large and representative sample of over 3,100 cases. As demonstrated below, the proceedings are essentially homogeneous; they involve the public enforcement of Article 101 TFEU or closely related national equivalents. Differences that potentially impede uniformity are controlled (e.g. between the Commission's and NCAs' institutional and procedural set-up; differences in enforcement before and after entry into force of Regulation 1/2003; differences between by-object and by-effect infringements).

The following sub-sections outline these selection criteria and clarify some of the definitions used throughout the study. The latter are also summarised in the Table of Definitions found at the beginning of this book.

1.3.2.1 Legal Provisions

The database comprises all public enforcement actions involving Article 101 TFEU. It also covers the identical versions of the Article in previous European Treaties (Articles 81 EC and 85 EEC) and in the Agreement on European Economic Area (Article 53 EEA). Unless explicitly stated otherwise, references to Article 101 TFEU should be understood as references to those other identical provisions. Proceedings involving the enforcement of Article 101 TFEU and those identical provisions are labelled collectively as *EU cases*.

In addition, the database encompasses public enforcement actions of the national prohibitions equivalent to Article 101 TFEU.[71] It includes cases in which both

[71] French Commercial Code, Articles L420–1, L420–3, L420–4; German Competition Act, Sections 1–3; Hungarian Competition Act, Articles 11–13; Dutch Competition Act, Articles 6–10; UK Competition Act, Sections 2–4.

Article 101 TFEU and the national equivalent were applied and cases where only the national provision was applied. Those proceedings are referred to as *mixed cases* and *purely national cases*, respectively.

EU cases, mixed cases, and purely national cases are labelled collectively as *Article 101 TFEU enforcement actions*. This terminology is used as shorthand to refer to the enforcement of both the EU and the national equivalent provisions.

The inclusion of purely national cases in the database has a three-fold aim. First, NCAs and EU and national courts have mostly ascribed virtually identical meaning to the EU and national prohibitions. They apply them interchangeably or without clearly distinguishing between the two, even when the wording of a national prohibition differs from its EU counterpart.[72] This has led the CJEU to declare that it is competent to issue preliminary rulings on the interpretation of the national equivalent prohibitions even in purely national cases.[73] Therefore, the balancing principles that have been developed in national cases also inform the balancing applicable to Article 101 TFEU. Second, the inclusion of purely national cases is required to account for cases that gave no indication of whether they were based on the EU or the national provisions.[74] Finally, as elaborated in Section 7.5.4, purely national cases provide insight into the application of the effect on trade criterion and the extent to which it has been used for balancing purposes.

1.3.2.2 Jurisdiction Selection

The database comprises all of the enforcement actions taken by the Commission and the NCAs of France, Germany, Hungary, the Netherlands, and the UK. In addition, it includes the decisions of the EU Courts in actions for annulment of the Commission's decisions, preliminary rulings of the CJEU, and national courts in appeals. The Commission, NCAs, and EU and national courts are collectively referred to in this book as the *competition enforcers*.

The five Member States studied were chosen from among the EU twenty-eight Member States by employing a purposive-heterogeneous selection method. In other words, the selection aimed to capture a wide range of approaches to the balancing of competition and non-competition interests.[75] The five Member States represent a wide spectrum of legal and economic structures, traditions, and approaches to competition policy and balancing. The heterogeneous sample demonstrates how the consideration of non-competition interests differs across jurisdictions and highlights the difficulties of balancing in the EU multi-governance enforcement system.

[72] This is further discussed in Sections 2.6 and 3.6.4.
[73] C-32/11 Allianz (2013, para 20–23) and C-413/13 FNV Kunsten Informatie en Media (2014, para 17–20).
[74] See Table 1.1 and Section 2.5.4.
[75] Ritchie et al. (2013, 113–114).

France, Germany,[76] and the UK[77] were selected since they are the Member States that have exercised the greatest influence on the substantive and procedural development of EU competition law and balancing. As detailed in Chapter 2, each of those Member States has advocated for a distinct balancing regime stemming from their domestic competition law traditions. To a large extent, EU competition law could be understood as representing a compromise between those varying approaches.[78]

It should be noted that at the time of finalising this study, there is not yet a clear prediction on the future of UK competition law following Brexit or its relationship with EU competition law. Nevertheless, since the study focuses on past practice, the UK is simply regarded as one of the EU Member States in this context. Moreover, studying the UK's approach to balancing may help predict the future of EU competition law balancing following the diminish of the UK's influence.

The Netherlands was chosen in light of its vibrant national debate on the role of non-competition interests under EU and national competition laws. The Netherlands generally supports the consideration of broad, non-economic benefits in competition law enforcement, especially in the field of sustainability. The Dutch legislator has specifically acknowledged that non-competition interests should play a role in EU and national competition law enforcement.[79]

Hungary was selected to include the balancing challenges encountered by the eastern and central European Member States that have joined the EU since 2004. As elaborated in Section 2.6.5, upon accession to the EU, those new Member States had to transform from centrally planned to market economies and, within a short period of time, enact new competition laws and develop new cultures.[80] Moreover, as transitional economies, they had to overcome structural weaknesses to ensure effective competition law enforcement.[81] Particularly due to the fact that those significant legal and economic changes were a result of external forces rather than organic-internal competition culture, they raised questions about the appropriate balance of competition and other public policy considerations and the treatment of

[76] In Germany, only federal cases handled by the Bundeskartellamt are included in the database. Cases of the Supreme Land Authorities dealing with cartels in which the effect of the restrictive conduct does not extend beyond the territory of a Land (in the meaning of Article 48 of the German Competition Act) are not included.

[77] The UK follows a concurrency model, which prescribes different authorities and procedural and substantive rules according to the sector examined (UK Competition Act, Section 54(1)). Therefore, in addition to the OFT/CMA cases, the database includes Article 101 TFEU enforcement actions of the Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Northern Ireland Authority for Utility Regulation, the Civil Aviation Authority, and the health care sector regulator for England (NHS Improvement, formerly Monitor). On the UK concurrency model, see Section 2.6.4.3.

[78] Van Rompuy (2012, 134), Kuenzler and Warlouzet (2013, 91), and Talbot (2016, 269).

[79] See Section 2.6.2.2.

[80] Geradin and Henry (2004, 2) and Pittman (2004).

[81] Geradin and Henry (2004, 25) and Tóth (2004).

newly liberalised sectors.[82] Finally, Hungary provides an example of balancing against a backdrop of strong, politically inflected government influence over the administrative discretion of the NCA. This trend became evident following the 2010 national elections, at which time the newly elected right-wing government passed a series of laws that have been criticised as undermining the rule of law, at both the domestic and EU levels.[83]

1.3.2.3 Sources of Information

The database includes all public enforcement actions of Article 101 TFEU, published in the form of a decision, formal or informal opinion, press release available on the competition enforcers' websites, or reference in an annual report. Both formal and informal proceedings are included. The database covers proceedings related to infringements,[84] findings of inapplicability,[85] settlements,[86] formal or informal commitments,[87] decisions not to investigate or to terminate investigations,[88] and *ex-ante* informal opinions on the conduct of a specific undertaking (as opposed to general or sectoral guidelines or advocacy).[89]

The database also includes limited, aggregate data on the Commission's comfort letters.[90] While comfort letters go largely unpublished, aggregate data indicating the date, name of the case, and the result of the Commission's preliminary assessment is available going back to 1990.[91]

The inclusion of all types of Article 101 TFEU public enforcement actions is warranted by the functional approach of comparative law.[92] This is based on the assumption that rules that have the same function or effect may take different forms in various jurisdictions. In the context of EU competition law, it must be considered that EU and national competition enforcers are subject to different procedural rules and follow different practices (different forms) when enforcing the same legal provision of Article 101 TFEU (same function).[93] A comparative overview of

[82] Cseres (2007a, 465–467) and Kovács and Reindl (2013, 38).
[83] Ziegler and Horváthy (2017, 33–37).
[84] Regulation 1/2003, Article 7; Regulation 17/62, Article 3.
[85] Regulation 1/2003, Article 10; Regulation 17/62, Article 2. See Section 2.6.3.
[86] Commission's Settlement Notice (2008). See Section 2.3.3.
[87] Formal commitments refer to proceedings pursuant to Article 9 of Regulation 1/2003. Informal commitments refer to cases in which after undertakings have agreed to voluntarily end the infringement, the competition enforcer decided that there were no grounds to continue the proceedings. See Section 2.6.2.1.
[88] See Section 2.4.
[89] See Section 2.5.3.
[90] On comfort letters, see Sections 2.3.2 and 7.5.3.
[91] The data are available on the Commission's website: http://ec.europa.eu/competition/antitrust/cases/comfort_letter.html.
[92] Zweigert and Kötz (1992, 32–47).
[93] On the functional comparative law approach in EU competition law, see Larouche (2013, 158) and Cseres (2014, 41).

Article 101 TFEU enforcement, therefore, must take into account all the forms in which public enforcement actions have been issued.

1.3.2.4 Types of Proceedings

The database includes public enforcement actions, as well as appeals and actions for annulment of those decisions. In addition, it covers CJEU preliminary rulings that specify Article 101 TFEU in the questions referred to the Court. Criminal, civil, procedural, and interim procedures are excluded from the database. Those proceedings are governed by procedural rules that significantly vary across the Member States. In those cases, differences in balancing may be associated with procedural aspects rather than disparate enforcement of Article 101 TFEU.

Table 1.1 summarises the number of Article 101 TFEU enforcement actions included in the database, according to their enforcement period,[94] competition enforcer, and legal provision.

1.3.3 *Coding Book*

The study employs classic content analysis[95] to record both the quantitative and qualitative aspects of the cases included in the database. The coding is based on a designated *coding book* developed for the purpose of this study on the basis of an extensive literature review.[96] The coding book offers a systematic and reproducible method for reducing the text of the cases to pre-determined codes representing the various balancing aspects.

The coding book defines 41 variables. Each variable describes a feature of the case or of the balancing. The variables include details of case identification (date, case number, competition enforcer), the undertakings, substantive aspects of balancing (the non-competition interest examined, its normative legal source, the types of benefits, and the balancing method), the proceeding (leniency, settlement, commitments), and on the outcome and remedy imposed. Each variable has been assigned with a pre-determined closed list of value labels that represent possible variations of each variable. As is customary in legal systematic content analysis, the coding has been restricted to the legal assessment part of the proceedings. Consequently, in the event a competition enforcer failed to address an argument presented by an undertaking, it was not recorded.

The coding book ensures the validity of the coding as a reliable basis for drawing normative conclusions about the enforcement of EU competition law. The validity and reliability of the coding are inherently linked to the type of content that has been coded. Most of the variables defined by the coding book provide a quantitative

[94] As mentioned, the four enforcement periods are defined in Section 2.5.
[95] Webley (2010, 12).
[96] The coding book is available upon request from the author.

TABLE 1.1. *Database of cases*

Enforcement period/ competition enforcer	Total	Commission/NCA: EU and mixed cases	Commission/NCA: Purely national cases	Commission/NCA: Legal provision not mentioned	Courts
		EU level			
First enforcement period (1962–1977)	108				49
Second enforcement period (1978–1987)	127				75
Third enforcement period (1988–April 2004)	331				306
Fourth enforcement period (May 2004–2017)	170				570
		National level			
France	357	156	177	24	185
Germany	170	57	19	94	40
Hungary	174	56	117	1	134
The Netherlands	192[a,b]	67	88	37	102
UK	70	33	30	7	24

[a] This figure includes reassessment proceedings of the Dutch NCA's decisions by an advisory committee. This procedure is detailed in Section 2.6.3.3.

[b] For methodological reasons, a special coding protocol was applied to coding 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 Gerbrandy and Lachnit (2013). 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 eleven independent cases. This categorisation was based on the case identification number allocated by the Dutch NCA, which identified eleven sectors in the construction industry in which the infringements took place.

description of *manifest content*,[97] namely of content that is on the surface, and hence is easily observable and countable without need for interpretation (e.g. the number of cases that invoked Article 101(3) TFEU, or the number of cases that were concluded by way of settlement). Because this type of coding essentially comprises clerical recording, it is the most reliable and valid type of content analysis.

[97] Potter and Levine-Donnerstein (1999, 259–261) and Neuendorf (2017, 31–33, 170–171).

A smaller number of variables involve *latent pattern content*.[98] These variables are more qualitative in nature, focusing on patterns identified in the text itself. As such, this coding left some room for the coders' judgement. The coding of the application of certain legal doctrines, such as the proportionality tests of Article 101(1) and (3) TFEU, merited such a value judgement. Yet, the coding book has strived to limit the value judgement inherent to such interpretations, and hence to increase the reliability of the coding, by providing detailed and unequivocal criteria for coding on the basis of a detailed literature overview.

The validity and reliability of the coding were also ensured by the use of *overlapping coding*. Accordingly, two independent coders separately and simultaneously coded 10% of the cases in the database to ensure the coding replicability.[99]

Before moving ahead to discuss the empirical findings and their implications, the next chapter places the debate on balancing in an appropriate historical EU context by providing a historical overview of the development of balancing under Article 101 TFEU.

[98] *Ibid.*

[99] On overlapping coding as a measure for ensuring the validity and reliability of content analysis, see Neuendorf (2017, 41–42).