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THE DISAPPEARANCE OF ARTICLE 101(3) IN THE REALM OF REGULATION 1/2003: AN EMPIRICAL CODING

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1. Introduction

The debate on the scope of Article 101(3) and the room that it leaves for the consideration of non-competition interests is as old as the Article itself. From the very beginning of the EEC project, the protection of competition interests had to be balanced against the protection other non-competition interests,[1] such as efficiencies, innovation, public health, culture, and education. From the time of the drafting of the Treaty of Rome the Member States have not reached a consensus about the role non-competition interests should have under the Article. Such role directly affects the characteristics and limits of EU competition law, and as such reflects a balance between various political, economic and social interests. Yet today, some sixty years after its instatement, there is still no clear legal or economic framework guiding the scope of application of Article 101(3).

In the past, the lack of a clear framework had rather limited consequences. The Commission had a monopoly to grant exemptions under Article 101(3) in

* PhD candidate, University of Amsterdam, Faculty of Law, Amsterdam Centre for European Law and Governance (ACELG). Comments gratefully received at o.brook@uva.nl. This paper is part of a broader ongoing Ph.D. study, which maps the role of public policy considerations in the enforcement of EU competition law. The study codes all Article 101 TFEU decisions rendered by the Commission, EU Courts, and NCAs and national Courts of five Member States. I would like to Tihamer Toth, Rebecca L. Zampieri, Kati Cseres and the participants of the Public Interest Considerations in Competition Law Workshop in the Competition Law Research Centre, Budapest for their valuable comments; any errors are mine.

1 In this paper the term "competition interests" refers to the protection of the competitive process and competitive structure as such. All other interests are referred to as "non-competition interests" (including, economic and non-economic values, such as consumer welfare, economic efficiency, industrial policy, growth, market and social stability, market integration, environmental and cultural considerations).

public enforcement proceedings. The enforcement was based on a notification and authorization system, where potential anti-competitive agreements required an *ex-ante* Commission approval in order to benefit from an Article 101(3) exemption. Hence, the institutional setup allowed the Commission to apply Article 101(3) on a case-by-case basis in a centralized and fairly unbiased manner.

The 2004 reform of the enforcement of EU competition law has changed this institutional setup. The new enforcement regime enacted by Regulation 1/2003 is based on a self-assessment and decentralized system. Undertakings must evaluate the applicability of Article 101(3) independently, and the Commission and NCAs only assess the Article *ex-post*. Therefore, achieving the aims of the enforcement regime of Regulation 1/2003 – namely, an effective, uniform and clear application – merits a clear framework defining the scope of Article 101(3).

This paper exhibits, on the basis of a comprehensive set of empirical findings, that the Commission's practice has failed to achieve this goal. In fact, the comprehensive and empirical "coding" of the more than 800 Commission decisions applying Article 101 TFEU between 1958–2016 reveals the "disappearance" of Article 101(3) under the enforcement regime of Regulation 1/2003. The empirical findings demonstrate that in the period from 1958 through April 2004, Article 101(3) exemptions were the heart of many Commission decisions. Exemptions were granted in 48% of the proceedings in which they were requested equating to 28% of all Commission Article 101 TFEU proceedings during that time. Nevertheless, following the entering into force of Regulation 1/2003 in May 2004, the Commission never accepted Article 101(3) as a defense from the application of Article 101 TFEU.[2]

Remarkably, the empirical findings indicate that not only had the Commission never accepted an Article 101(3) exception after 2004, but that the undertakings also stopped invoking it. There is a significant drop in the reference to Article 101(3) in the Commission's decisions after May 2004, from 60% to a mere 22% of the proceedings.

Consequently, the discussion of the much-debated scope of Article 101(3) and the role it leaves for non-competition interests has nearly disappeared from the Commission's post-2004 decisional practice.

This paper argues that this outcome is regrettable. As part of modernizing EU competition law, the Commission has advocated a new, narrower interpretation to Article 101(3). Whereas past practice of the Commission and EU Courts considered broad non-competition interests when applying Article 101(3), today the Commission declares in its policy papers that application of Article 101(3) is confined to the consumer welfare standard. Nevertheless, this paper maintains that the boundaries of Article 101(3) remain ill-defined since the Commission has yet to demonstrate how the new interpretation of Article 101(3) ought to be applied in practice and the EU Courts have not fully endorsed the Commission's new approach. As a result, the disappearance of Article 101(3) from the Commission's decisional practice actually

[2] A so-called "positive decision" pursuant to Article 10 of the Regulation.

contradicts the Commission's own policy. Unfortunately, the debate on Article 101(3) disappeared at the time when the Commission's guidance on the issue was perhaps needed the most.

2. Empirical methodology and structure

The application of Article 101(3) and the role of non-competition interests within this Article have already been the subject to an extensive debate. Previous studies were predominantly based on analyses of selected case studies or policy papers.[3] In addition, they were mostly confined to a limited period of time without addressing the challenges emanating from the 2004 reform.[4]

This paper is based on a comprehensive empirical analysis aimed to describe the enforcement of Article 101(3) in practice. It applies a systematic content analysis ("coding") of all of the Commission's Article 101 TFEU proceedings[5] from the establishment of the EEC in 1958 to 2016. Covering more than 800 proceedings, the

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[3] See, C. Semmelmann: The future role of the non-competition goals in the interpretation of Article 81 EC. *Global Antitrust Review*, 2008.; B. Van Rompuy: *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations Under Article 101 TFEU, 51.* 2012., http://scholar.google.com/scholar?hl=en&btnG=Search&q=intitle:Economic+Efficiency+:+The+Sole+Concern+of+Modern+Antitrust+Policy?+Non-efficiency+Considerations+under+Article+101+TFEU#0; G. Monti: Article 81 EC and public policy. *Common Market Law Review*, 127(2), 2002., http://www.kluwerlawonline.com/document.php?id=5103811; A. C. Witt: Public Policy Goals Under EU Competition Law – Now is the Time to Set the House in Order. *European Competition Journal*, 8(3) 2012. 443–471., http://doi.org/10.5235/ECJ.8.3.443; S. Lavrijssen: What role for national competition authorities in protecting non-competition interests after Lisbon? *European Law Review*, Vol. 35., N. 5., 2010.http://dialnet.unirioja.es/servlet/articulo?codigo=3324846; L. Gyselen: The emerging interface between Competition Policy and Environmental Policy in the EC. In: J. Cameron – P. Demaret – D. Geradin (eds.): *Trade and the Environment: The search for balance.* Vol. I. 1994.; R. Nazzini: Article 81 EC between time present and time past: A normative critique of "restriction of competition" in EU law. *Common Market Law Review*, 81(1), 2006.; H. H. Schweitzer: *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81.* 2007., http://cadmus.eui.eu/handle/1814/7623.; P. Nicolaides: The balancing myth: The economics of article 81 (1) & (3). *Legal Issues of Economic Integration*, Vol. 32., N. 2., 2005. 123–145., http://www.kluwerlawonline.com/document.php?id=LEIE2005017.; GCLC Annual Conference. (2010a) M. Merola – D. F. Waelbroeck (eds.): *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* Groupe de Boeck, 2010.; C. Townley: *Article 81 EC and public policy.* http://cadmus.eui.eu/handle/1814/23975. including an annex with a review of some Article 101 TFEU formal decisions granted between 1993–2004.

[4] See S. W. Davies – P. L. Ormosi: *Assessing competition policy: Methodologies, gaps and agenda for future research.* 2010. 48. noting the general lack of long-term studies evaluating EU competition policy in general.

[5] In this paper the term "Article 101 TFEU proceedings" covers all public enforcement actions of the article published in any form (decision, opinion, press release or reference in an annual report) and using any regulatory instrument (decisions on infringements, inapplicability, settlements, formal or informal commitments, decisions not to investigate or to terminate investigations, and formal or informal opinions on conduct of a specific undertaking). In addition, it includes proceedings involving the enforcement of the national cartel equivalent.

content analysis is based on the assumption that each proceeding has roughly the same value. Therefore, it departs from the focus of previous scholars on leading cases and precedence, and reflects the position that case law is not simply a reflection of the law but it is the law itself.[6]

This is predominantly true with regard to the debate on the role of non-competition interests within Article 101(3). As elaborated in the following sections, the wording of the Treaties tells us little about the scope of the respective Article, and the Commission and EU Courts have yet to supply a clear framework defining application of Article 101(3). In the absence of such a framework, under the self-assessment regime of Regulation 1/2003, undertakings must evaluate their compliance with EU competition rules essentially pursuant to the practices of Commissions, NCAs and Courts.[7]

The paper is structured as follows: Section 3 begins with a historical overview of the drafting of Article 101(3) and the development of the EU Court and the Commission interpretations of the Article. It shows that the uncertainty about the role of non-competition interests in Article 101(3) dates back to disagreements among the Member States on the wording and structure of Article 101 TFEU and the procedural enforcement rules of Regulation 17/62. While the issue remained unresolved, until 2003 the Commission and EU Courts have interpreted Article 101(3) in a way which allows to consider a broad array of non-competition interests. Yet since they have followed a case-by-case approach to the balance between competition and non-competition interests they have not established clear legal and economic principles for applying the Article.

Section 4 describes the changes introduced by Regulation 1/2003 and the Commission's policy papers. It shows that while the Commission advocated a new, narrow interpretation of the Article, the EU Courts have not seemed to accept this change. Section 5 discusses the empirical findings on the application of Article 101(3) prior to, and following, the reform. It demonstrates the disappearance of the debate on the scope of the Article from the Commission's practice since 2004. Finally, section 6 concludes with a plea for "positive" Commission decisions illustrating the application of Article 101(3) in practice.

3. The debate on the scope of Article 101(3) prior to 2004

The uncertainty of Article 101(3)'s scope derives from the wording and structure of Article 101 TFEU and the procedural enforcement rules of Regulation 17/62. These were the result of negotiations and compromises among the Member States having substantively different economic policies and traditions at the time of drafting

[6] M. Hall – R. Wright: Systematic content analysis of judicial opinions. *California Law Review*, 2008. 78, 84–86., http://www.jstor.org/stable/20439171.

[7] GCLC Annual Conference. (2010b). M. Merola – D. F. Waelbroeck (eds.): *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* Groupe de Boeck, 2010. 19., 58–76.

the Treaty of Rome.[8] Favoring consensus over clarity, EU primary and secondary competition rules have not explained how Article 101(3) should be applied.

This section describes how in the absence of such an interpretive framework, the substantive scope of Article 101(3) was developed on a case-by-case basis by the decisional practice of the Commission and the jurisprudence of the EU Courts. However, prior to the 2004 this practice had not produced a set of well-defined legal or economic tools explaining what non-competition interests can be examined under Article 101(3) and how.

3.1. The origins of Article 101(3) and the enforcement regime of Regulation 17/62

The EU prohibition against anti-competitive agreements, laid down in Article 101 TFEU, is based on a bifurcated structure. Article 101(1) identifies competition restraints. It is drafted in broad terms to cover *"all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."*

In its place, Article 101(3) sets an exception to the general prohibition. It states that Article 101(1) may be declared inapplicable in the case of any agreement *"which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."* Thus, Article 101(3) provides a structured framework to balance anti-competitive effects, primarily the harm to competition interests, against possible benefits arising from an agreement.[9]

This distinctive feature of Article 101 TFEU is linked to the political process preceding its adoption. The wording and the bifurcated structure of Article 101 TFEU were strongly influenced by French competition rules. During the negotiations of the EEC Treaty, France was the only Member State with an existing competition law.[10] French Decree of 9 August 1953 on the maintenance and re-establishment of free competition,[11] and the Draft Law 9951 of July 1952 that preceded it, initiated a two-step mechanism to assess anti-competitive agreements. *Article 59 bis* prohibits

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[8] K. Seidel – L. Federico Pace: The drafting and the role of regulation 17: a hard-fought compromise. In: K. Klaus Patel – H. Schweitzer (eds.): *The Historical Foundations of EU Competition Law.* Oxford, OUP, 2013. 55.; A. Kuenzler – L. Warlouzet: National Traditions of Competition Law: A Belated Europeanization through Convergence? In: Patel–Schweitzer (eds.) op. cit. 103–109.

[9] J. Faull – A. Nikpay: *The EC law of competition.* Oxford University Press, 2014. 310., http://scholar.google.nl/scholar?q=Faull+and+Nikpay+%282014%29&btnG=&hl=en&as_sdt=0%2C5#5.

[10] Seidel–Pace (2013) op. cit. 59–62.

[11] Decree No. 53–704 of 1953.

anti-competitive agreements, while Article *59 ter* exempts agreements having a beneficial effect.

The bifurcated structure of the French competition law reflected the French view on restrictions to competition. It aimed to control anti-competitive agreements rather than outright prohibit them. The French law assumed that an anti-competitive agreement in not necessarily harmful. Rather, a distinction should be made between a "bad" agreement that is prohibited under *Article 59 bis*, and a "good" agreement that could be exempted under *Article 59 ter*.[12] Under the French system of that time, such distinction was made *ex-post*, on a case-by-case basis.

This French principle aiming to "control" anti-competitive agreements stood in contrast with the German concept of competition law. During negotiations on the Treaty of Rome, Germany had not yet finalized its national competition law. However, the German vision of competition law advocated a principle of prohibition, barring any horizontal agreement between undertakings. Based on this policy choice, the German representatives proposed a rule during the negotiations on the Treaty that applied a total prohibition on anti-competitive agreements, allowing for no exceptions.[13]

The clash between the French and German approaches was resolved by a compromise. Although the wording of Article 101 TFEU closely followed the French law and tolerated some anti-competitive agreements [Article 101(3))], it was inspired by the German approach by declaring that anti-competitive agreements are in principle prohibited [(Article 101(1)] and automatically void [Article 101(2)]. As part of this compromise, the controversial decision on how the exception provided in Article 101(3) should apply was postponed. Article 101(3) remained silent as to the procedural and substantive criteria guiding the declaration of inapplicability.[14]

The procedural criterion for applying Article 101(3) was clarified only in 1962, when the procedural enforcement rules embodied in Regulation 17/62 came into force. During the negotiations on Regulation 17/62, the French delegation proposed that a declaration of applicability would be based on a self-assessment with an *ex-post* control, corresponding to the French law. However, the German delegation rejected the French proposal as being incompatible with the wording and structure of Article 101 TFEU. They noted that the phrasing of Article 101(3) that the provisions of Article 101(1) "*may, however, be declared inapplicable*", requires a constitutive decision by the Commission in order to exempt an agreement from the cartel prohibition.[15]

The German proposal, which was finally accepted, gave the Commission a monopoly for granting exemptions under Article 101(3) in public enforcement proceedings. The application of the Article was based on a notification and authorization system where

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[12] Seidel–Pace (2013) op. cit. 59., 62.; Kuenzler–Warlouzet (2013) op. cit. 100., 103–104.

[13] Seidel–Pace (2013) op. cit. 60–62.; Kuenzler–Warlouzet (2013) op. cit. 96–98., 103–104.

[14] Seidel–Pace (2013) op. cit. 63.; Kuenzler–Warlouzet (2013) op. cit. 110–111.; *Commission Modernization White Paper* para 12, 18.

[15] Seidel–Pace (2013) op. cit. 70.; B. Sufrin: The Evolution of Article 81 (3) of the EC Treaty. *The Antitrust Bull*, 51. 2006. 923.

potentially anti-competitive agreements needed to be notified and approved *ex-ante* by the Commission in order to benefit from Article 101(3). Indeed, while the wording of Article 101 TFEU reflected a strong French influence, the procedural enforcement rules adopted by Regulation 17/62 were influenced by the German approach opposing the creation of anti-competitive agreements.

3.2. The practice of the Commission and EU Courts prior to 2004

Even after the adoption of the procedural enforcement rules, the substantive aspect of the application of Article 101 remained unclear. The general and vague wording of Article 101(3) did not clearly indicate: what type of "*improvements*" can justify the disapplication of Article 101(1); how to measure the "*fair share*" of such improvements; "*indispensability*"; or when the competition on the market is "*eliminated*."

Moreover, questions were raised regarding the possibility of considering non-competition interests when applying the four conditions of Article 101(3). Unlike the free movement rules, the EU Treaties do not contain any explicit *ipso facto* exception for non-competition goals.[16] Therefore, the possibility of considering those types of interests within competition law had to be resolved with case law of the Commission and Courts.

As early as the 1966 *Grundig-Consten*[17] ruling, the EUCJ recognized that the application of Article 101(3) may entail balancing certain benefits and harms to competition.[18] The Court explained that an anti-competitive agreement could only be exempted under Article 101(3) when it generates benefits that are large enough to compensate for the distortion of competition. It noted that "*the very fact that the Treaty provides that the restriction of competition must be 'indispensable' to the improvement in question, clearly indicates the importance which the latter must have. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition*."[19]

The possibility to consider certain types of non-competition interests was explicitly formulated by the EUCJ in 1977 in its landmark decision of *Metro I.*[20] According to the teleological interpretation adopted by the Court, Article 101 TFEU read in conjunction with Article 3 EEC, the appropriate standard for applying Article 101(3) is not necessary one of *perfect* competition. Rather, the Court adopted a notion of *workable competition* in which the degree of competition protected under Article

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16 Semmelmann (2008) op. cit. 20.; Sufrin (2006) op. cit. 925–926.; *GCLC Annual Conference* (2010a) op. cit. 82–92.

17 Joint Cases C-56/64 C-58/64 Grundig-Consten

18 Nicolaides (2005) op. cit. 134.

19 Joint Cases C-56/64 C-58/64 Grundig-Consten, 348.

20 C-26/76 Saba.

101 TFEU is that required for the attainment of Treaty objectives, particularly the creation of a single market.[21]

The need to balance competition and non-competition interests within the application of Article 101(3) was further formalized with the introduction of what was referred to as "cross-sectional" or "policy-linking" clauses by the Single European Act of 1986 (SEA).[22] Those clauses required that EU institutions consider certain public policy interests within the enforcement of other EU policies. The first three cross-sectional clauses of the SEA included industrial policy, cohesion and environmental policy.[23] The Maastricht Treaty of 1992[24] expanded upon the SEU by including health, culture, consumer protection, development cooperation, education, employment and equality between men and women.[25]

While the cross-sectional clauses require that, as EU institutions, the Commission and EU Courts consider certain social policies within the application of Article 101 TFEU as an EU policy, they have not explained *how* such consideration should take place. Regrettably, case law has not resolved this question. Rather, as Sufrin described it, both the Commission and the EU Court decisions were "*neatly side-stepping*" the issue.[26]

In *Ford/Volkswagen,*[27] for example, the Commission mentioned the cross-sectional clauses as a source for justifying an exemption under Article 101(3). The Commission explained that it considered the contribution of the examined joint ventures to two interests that are protected by the EU Treaties: the creation of jobs and reduction of regional disparities. Yet, the Commission ambiguously added that, "*this would not be enough to make an exemption possible unless the conditions of Article 85 (3) were fulfilled, but it is an element which the Commission has taken into account.*"[28]

The GC upheld the Commission's reasoning. It added that, while the Commission was right to consider the interests protected by the cross sectional clauses, they did not serve as the basis for the Commission's exemption.[29] By simply affirming

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21 The notion of "workable competition" was derived from the work of an American scholar J. M. Clark: *Competition as a dinamic process*. 1961. For more information, see R. Wesseling: *The Modernisation of EC Competition Law*. 2000. 35. http://scholar.google.nl/scholar?q=competition+wesseling&hl=en&as_sdt=0,5&as_ylo=2000&as_yhi=2000#2.; Rompuy (2012b) op. cit. 151.

22 D. J. Gerber: *Law and Competition in Twentieth Century Europe: Protecting Prometheus.* Oxford University Press, 1998. 371.

23 Articles 130, 130a, 130r.

24 Articles 3, 126–130.

25 Article 2 of the Agreement on social policy concluded between the Member States of the European Community, with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 91), annexed to Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community.

26 Sufrin (2006) op. cit. 959–960.

27 33814 Ford v.Volkswagen.

28 33814 Ford v.Volkswagen, para 36.

29 T-17/93 Ford v.Volkswagen, para 96.

the Commission's decision, the Court did not explain what the result would be if the Commission had not explicitly recognized the supererogatory nature of the exceptional circumstances.[30] In other words, could the creation of jobs or the reduction of regional disparities in and of themselves justify an anti-competitive agreement?

Subsequently, even during the mid-1990s when the GC's decision in *Ford/ Volkswagen* was rendered, the scope of Article 101(3) remained unclear almost 40 years after its drafting.

3.3. The lack of a clear framework detailing the boundaries of Article 101(3) in a centralized enforcement system

The cases presented above demonstrate that, while the EU Courts and the Commission have regularly emphasized the possibility, if not duty, to balance competition against a variety of social and political interests when applying Article 101(3),[31] they have not established a clear framework for applying Article 101(3). They followed a case-by-case approach, tailoring the application to the specific circumstances of the case, economic and social situations, and to the concept of competition applicable at the relevant time.[32] The scope of Article 101(3) was based on the discretionary powers of the Commission. It was founded on a set of well-defined legal or economic tools explaining what non-competition interests can be examined under Article 101(3) and how.

Up to the mid-1990s, the need to employ discretionary powers and assess various objectives when applying Article 101(3) was actually viewed as one of the justifications for the EU centralized enforcement system. For instance, in its 1993 policy report the Commission explained, "*the grant of a derogation from the ban on restrictive agreements requires assessment of complex economic situations and the exercise of considerable discretionary power, particularly where different objectives of the EC Treaty are involved. This task can only be performed by the Commission*".[33] Along the same lines, in the "Modernization" White Paper of 1999, the Commission emphasized that the centralized enforcement system was seen in past as the "*only appropriate system*" to ensure a uniform application of Article 101 TFEU throughout the EU and to allow a sufficient degree of legal certainty for undertakings.[34]

Consequently, the lack of a clear framework for applying Article 101(3) had rather limited consequences under the enforcement regime of Regulation 17/62. The institutional setup of the old enforcement regime meant that conflicts between

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30 Sufrin (2006) op. cit. 959–960.

31 See Townley (2009a) op. cit. 102.; Faull–Nikpay (2014) op. cit. 311–312.; C. D. Ehlermann: The modernization of EC antitrust policy a legal and cultural revolution. *Common Market Law Review*, 37/2000. 549.

32 Wesseling (2000) op. cit. 36–41.; Rompuy (2012b) op. cit. 153.

33 *Policy report 1993.* 107. Also see *Commission Modernization White Paper*, para. 4.

34 *Commission Modernization White Paper*, para 4, 6, 24.

competition and non-competition interests were balanced *ex-ante* and resolved in a centralized and fairly independent manner by the Commission.

As the next section demonstrates, this situation had dramatically changed with the introduction of Regulation 1/2003 that replaced the old procedural enforcement regime of Regulation 17/62.

4. The scope of Article 101(3) following 2004

4.1. Regulation 1/2003 merits a clear definition of the scope of Article 101(3)

The 2004 reform in the enforcement of EU competition law, brought about by Regulation 1/2003, introduced two main changes. First, the enforcement regime was decentralized, entrusting the NCAs with application of Article 101(3) in parallel to the Commission. Second, agreements could be declared inapplicable even without notification. Rather, similar to the original French proposal for Regulation 17/62,[35] the assessment of Article 101(3) ought to be independently preformed *ex-ante* by undertakings and is only reviewed *ex-post* by the competition enforcers.

Just six years after the Commission argued that the balancing within Article 101(3) "*can only be performed by the Commission",* it had completely revised this statement in Modernization White Paper of 1999. According to the Commission's new approach, the switch to a self-assessment system was now possible since, "*after 35 years of application, the law has been clarified and thus become more predictable for undertakings*."[36] This statement was perhaps true with respect to EU competition law in general but did not reflect the legal situation with respect to the boundaries of Article 101(3). As discussed above, prior to the modernization of EU competition law, the EU had no clear legal and economic rules defining the boundaries and rules for applying Article 101(3).

The need for case law clarifying the boundaries of Article 101(3) became even more pressing due to the substantive modernization of the EU competition rules. In parallel with the procedural reform announced by the enforcement system of Regulation 1/2003, the Commission advocated for a narrow consumer welfare approach as the basis for Article 101(3). It called for a narrow and rigorous application of the four conditions leaving little room for non-competition interests.

This section begins with setting out the Commission's new approach to the application of Article 101 (3). Next, it shows that such approach had deviated from the Commission's and EU Courts' previous case law.

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35 See section 3.1

36 *Commission Modernization White Paper*, para 48.

4.2. The Commission's approach in its policy papers since 2004: narrowing the scope of Article 101(3)

From the very inception of the Modernization White Paper, the Commission was concerned that the decentralized enforcement of Article 101 TFEU would result in the incorporation of national-political non-competition interests in the application of Article 101(3). While the Directorate-General for Competition of the European Commission (DG Competition) is generally free from political interference in the enforcement of individual cases, not all NCAs are equally independent authorities.[37] Although some NCAs are institutionally and politically independent of their governments, others are not.[38] For example, in some Member States the selection of cases is based on the influence, direct or indirect, of national political institutions.[39] Moreover, even in the NCAs that are relatively independent from the influence of private undertakings and political pressure, the Member States have found ways to direct NCAs to protect specific national interests, for example by adopting legislation that interprets EU law.[40]

In order to avoid such influences, the Modernization White Paper reframed Article 101(3) as a tool facilitating economic assessment that is devoid of political considerations.[41] It explained that Article 101(3) is intended "*to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations*."[42] The Commission limited the discretion required in its application by transforming Article 101(3) into a pure economic efficiency norm.[43]

Commentators quickly pointed out that the new interpretation of Article 101(3) was incompatible with Commission and EU Court case law that reserved significant

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[37] Riley (2003) op. cit. 659.; FIDE Congress: *General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities*. 1998. 17; I. Maher: Networking competition authorities in the European Union: Diversity and change. *European Competition Law Annual*, 2002. 223–236; https://scholar.google.nl/scholar?q=Maher+%22Networking+Competition+Authorities+in+the+EU%3A+Diversity+and+Change%22&btnG=&hl=en&as_sdt=0%2C5. 224.

[38] Riley (2003) op. cit. 659.; FIDE Congress (1998) op. cit. 17.

[39] M Guidi: *Competition Policy Enforcement in EU Member States*. Springer, 2016.; N. Petit: How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment. *Concurrences: Revue Des Droits de La Concurrence*, 2010.

[40] Riley (2003) op. cit. 659.; Maher (2002) op. cit. 225.

[41] Petit (2009) op. cit. 6.; Rompuy (2012a) op. cit. 257.; Sufrin (2006) op. cit. 96.; Townley (2009b) op. cit. 80.; Monti (2002) op. cit. 1092.; G. Monti: *EC competition law.* 2007. 21., http://books.google.nl/books?hl=en&lr=&id=hHe2PklOqPUC&oi=fnd&pg=PA1&dq=%22EC+competition+law%22+%22monti%22&ots=hLTMi7ED-Q&sig=jOFJm-G9-Fcha04UoSXwUZZrh4g.; Cseres (2007) op. cit. 169.; Komninos (2005) op. cit. 17.; GCLC Annual Conference (2010a) 82.

[42] *Commission Modernization White Paper*, para 57. Also see para 72.

[43] K. Cseres: *The controversies of the consumer welfare standard.* 2007., https://papers.ssrn.com/sol3/papers.c–fm?abstract_id=1015292.

room for non-competition interests under that provision. Former Director General of DG Competition Ehlermann acknowledged that a literal reading of the above White Paper provision conflicted with case law. Instead, he suggested a restrictive interpretation of the Modernization White Paper, explaining: *"[i]t would probably be an exaggeration to assume that, according to the Commission, non-economic considerations are to be totally excluded from the balancing test required by Article 81(3). Such an interpretation would hardly be compatible with the Treaty, the Court of Justice's case law, and the Commission's own practice."* [44] Rather, Ehlermann believed that the Modernization White Paper was only an indication that non-competition-oriented political considerations should not determine the application of Article 101(3).[45]

Similarly, the German *Monopolkommission* was critical of the Commission's approach. It stated that, "*in the White Paper the Commission attempts to tone down the significance of a discretionary process of weighing up in the frame of exemption decisions [...] No matter how much such a viewpoint should be welcomed the Commission is neither empowered nor able to issue a binding interpretation of the EC Treaty.*"[46] In other words, while the *Monopolkommission* seemed to agree with the substantive merits, it considered the Commission's approach to be incompatible with EU law.

The new narrow interpretation of Article 101(3) was reinforced by the adoption of Article 101(3) Guidelines in 2004.[47] The Guidelines limited the *"improvements"* mentioned in Article 101(3) to only *"objective economic efficiencies"*,[48] stating that the aim of Article 101(3) analysis *"is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies."*[49] The Guidelines further concluded that, *"goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)"*.[50] This, in conjunction with the general spirit of the Guidelines, suggests that non-competition interests could only be considered under Article 101(3) if viewed as economic efficiency gains. A similar approach was followed in new versions of the vertical Guidelines adopted in 2010 and the horizontal Guidelines of 2011.[51]

Moreover, as part of the more economic approach, Article 101(3) Guidelines also introduced the notion of consumer welfare as the sole aim of EU competition policy, particularly with Article 101(3). They declared *"the aim of the Community competition rules is to protect competition on the market as a means of enhancing*

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44 Ehlermann (2000) op. cit. 549. Also see Rompuy (2012b) op. cit. 255–256.

45 Ibid.

46 German Monopolies Commission (2000) para 52.

47 Guidelines on the application of Article 81(3) of the Treaty (2004).

48 Commission Article 101(3) Guidelines para 59.

49 Commission Article 101(3) Guidelines para 50.

50 Commission Article 101(3) Guidelines para 42.

51 Vertical Guidelines (2010) 6, 19, 60, 96, 122–127.; Horizontal Guidelines (2011) para 29, 49, 95-100, 141, 183, 217, 246.

consumer welfare and of ensuring an efficient allocation of resources consumer welfare and of ensuring an efficient allocation of resources."[52]

The new interpretation of the "improvements" that can be examined under Article 101(3) and the focus on consumer welfare marked a clear deviation from case law of the Commission and EU Court. Many non-competition interests considered until the end of April 2004 were no longer applicable in the Commission's view.[53]

This new approach increased the uncertainty with respect to the scope of Article 101(3) following the 2004 reform. As soft-law instruments, the Commission's Modernization White Paper and Guidelines cannot contradict EUCJ case law which has supremacy. On the other hand, in contrast with EUCJ judgments, the Commission Guidelines offered a rather detailed framework for the application of Article 101(3). As we discuss in the next section, the confusion on the scope of Article 101(3) grows when examining the EU Court decisions after 2004.

4.3. The EU Courts have not fully endorsed the Commission's narrow approach after 2004

The EU Courts have yet to fully endorse the Commission's new interpretation of Article 101(3).[54] As demonstrated below, while the EU Courts have refrained from stating so explicitly, various indications suggest that they have not embraced either the consumer welfare standard and or the limited non-competition interests that can be examined under Article 101(3).

In 2009, first in *T-Mobile*[55] and later in *GlaxoSmithKline,*[56] the EUCJ rejected, at least in part, the consumer welfare standard as the sole aim of Article 101 TFEU. It declared that, *"Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or*

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[52] Commission Article 101(3) Guidelines para. 33. In parallel, the Guidelines also declare that the protection of the competitive process, not consumer welfare, is the "*ultimate*" role of Article 101 TFEU. The Guidelines contain a rare statement by the Commission on the goal of the article by declaring "*ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process" (*Commission Article 101(3) Guidelines para 105). Also see D. Gerard: The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself? In: J. Bourgeois – D. Waelbroeck (eds.): *Ten Years of Effects-Based Approach in EU Competition Law Enforcement*. Brussels, Bruylant, 2012. 29–30.

[53] Witt (2016) op. cit. 166.

[54] Also see Townley (2009a) op. cit. 178–181.; A. Witt: T*he More Economic Approach to EU Antitrust Law*. 2016. 261–295., https://books.google.nl/books?hl=en&lr=&id=j3dDDQAAQBAJ&oi=fnd&pg=PR5&dq=witt+the+more+economic+approach+to+eu+antitrust&ots=wcN176fpnm&sig=t-fTRYK_7F6laLkPZWH_bR6BwXE. 6).; Gerard (2012) op. cit. 36–38.; GCLC Annual Conference (2010a) op. cit. 84–85.

[55] C C-08/08 T-Mobile.

[56] C-501-06P C-513-06P C-515-06P C-519-06P GlaxoSmithKline.

consumers but also to protect the structure of the market and thus competition as such."[57] This definition has since been repeated in other cases discussing the objectives of EU competition law.[58]

Notably, the EUCJ opted for a softer formulation in *T-Mobile* compared to the one suggested by the Advocate General. AG Kokott stated that Article 101 TFEU is not designed *"only or primarily"* to protect competitors or consumers but is mainly to *"protect the structure of the market and thus competition as such (as an institution)."* She argued that consumer welfare is only a secondary effect of competition policy as "*consumers are also indirectly protected."*[59] Unfortunately, unlike the Advocate General, the Court has not adopted a clear legal position on the role of consumer welfare.

Seemingly, EU Courts have not accepted the Commission's narrow reading of the "improvements" that can be examined under Article 101(3). First, the EUCJ recognized in its preliminary rulings that the protection of non-competition interests related to financial services,[60] IPRs,[61] sport,[62] and regulated professions[63] could justify exemptions. The EUCJ also made a parallel between the justifications under Article 101(3) and the free movement rules that have broad public policy considerations to justify an exemption.[64]

Second, the GC held that cross-sectional clauses require the consideration of non-competition interests in the application of Article 101(3). In *CISAC*, it noted that Article 151(4) EC on the protection of culture implies, "*that it is necessary to bear in mind the requirements relating to the respect for and promotion of cultural diversity when considering the four conditions for the application of Article 81(3) EC, in particular as regards the condition relating to the indispensable nature of the restriction*."[65] While the Court does not specify how culture should be considered within Article 101(3), it is clear that such interests are relevant.

Finally, following Regulation 1/2003's effective date, the EU Courts upheld the Commission's decisions prior to 2004 exempting agreements on the basis of non-

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57 C-08/08 T-Mobile para 38. Also see C-501-06P C-513-06P C-515-06P C-519-06P GlaxoSmithKline para 62.

58 T-357/06 Bitumen para 11; T-461/07 Visa para 126. Also see A. Witt (2016) 266.

59 Opinion of AG Kokott in C-08/08 T-Mobile para 58: *"Article 81 EC forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution). In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared."*

60 C-238/05 Asnef-Equifax para 67.

61 C-403/08 C-429/08 Football Association Premier League para 145–146.

62 C-403/08 C-429/08 Football Association Premier League para 145–146.

63 C-1/12 Ordem dos Técnicos Oficiais de Contas para 100–101.

64 C-403/08 C-429/08 Football Association Premier League para 145–146.

65 T-451/08 CISAC para 103.

competition interests. Accordingly, they confirmed that non-competition interests relating to sport,[66] the environment,[67] and financial services[68] justify declaring exemptions under Article 101(3). In addition, they confirmed that at least in theory, that protection against free riding,[69] and the promotion of R&D[70] and culture[71] could also justify an exemption.

The above indicates that the EU Courts seemed to object, at least in part, to the Commission's new interpretation of Article 101(3). EU Courts continued to follow the case law prior to 2004, leaving significant room for consideration of non-competition interests within Article 101(3). Nevertheless, EU Courts did so in an indeterminate manner. They were unclear on the role of consumer welfare and non-competition interests in application of the Article, and the substantive criteria for declaring inapplicability.

The remainder of the paper explores how the uncertainty regarding the scope of Article 101(3) is especially apparent given the very limited Commission cases applying Article 101(3) since 2004. The Commission has yet to explain how the narrow interpretation of the scope of Article 101(3), which was declared in its policy paper, aligns with the broad interpretation by the Courts.

5. Empirical findings: the "disappearance" of Article 101(3)

Table 1 summarizes the application of Article 101(3) by the Commission. It presents the percentage of proceedings in which Article 101(3) was mentioned (left column). In addition, the table includes the percentages of Article 101 TFEU proceedings (right column) and Article 101 TFEU proceedings wherein Article 101(3) was argued (middle column) in which Article 101(3) was accepted.

Table 1. application of Article 101(3) by Commission

	% of cases in which Article 101(3) was argued from total Article 101 TFEU proceedings	% of cases in which Article 101(3) was accepted from cases in which it was argued	% of cases in which Article 101(3) was accepted from total Article 101 TFEU proceedings
1958–2004	60%	48%	28%
2005–2016	22%	0%	0%

The empirical findings support the following conclusions. First, Article 101(3) had great importance in the enforcement of Article 101 TFEU until the effective date of

66 T-193/02 FIFA rules on player agents; C-171/05P FIFA rules on player agents.

67 T-289-01 DSD para 38; T-419/03 Austrian system for the disposal of packaging waste para 23.

68 T-259-02 T-260-02 T-261-02 T-262-02 T-263-02 T-264-02 T-271-02 Austrian banks – 'Lombard Club.

69 T-491/07 Groupement des cartes bancaires para 77, 259.

70 T-168/01 GlaxoSmithKline para 268.

71 T-451/08 CISAC para 103.

Regulation 1/2003 in 2004. The Article was discussed in 60% of Commission Article 101 TFEU proceedings, and accepted in 48% of the proceedings in which it was discussed, equating to 28% of total Article 101 TFEU proceedings.

The role of Article 101(3) was marginalized after May 2004. Article 101(3) was never accepted as a basis for disapplication of Article 101 TFEU under the realm of Regulation 1/2003. Since the effective date of Regulation 1/2003, the Commission has not rendered any "positive decision" in the meaning of Article 10 of the Regulation.[72]

Second, the empirical findings record a significant drop in the percentage of Article 101 TFEU proceedings in which Article 101(3) was discussed, from 60% of the proceedings prior 2004 to only 22%. The drop can perhaps be attributed to the new priority setting powers granted to the Commission by Regulation 1/2003.[73] Whereas the Commission was required to examine all notified agreements under the old notification regime, the Commission can allocate its own enforcement efforts under the new self-assessment regime.

The Commission had declared that it would focus on hard-core cartels involving naked restrictions of competition.[74] This focus is compatible with Recital 3 of Regulation 1/2003, which explains that the abolishment of the notification procedure was justified since it prevented the Commission from concentrating its resources on curbing the most serious infringements. The coding indicates that the Commission followed this approach in practice. After 2004, the application of Article 101(3) was mainly examined in cases involving price fixing, market sharing and restrictions having equivalent effects.[75]

Notably, the Commission declared with its Article 101(3) Guidelines that although Article 101(3) does not exclude *a priori* certain types of agreements from its scope, hardcore restrictions are unlikely to fulfill the conditions of Article 101(3).[76] Arguably, the undertakings would not have attempted to invoke Article 101(3) since it is unlikely to apply to those hardcore, anti-competitive agreements.

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[72] Article 10 of Regulation 1/2003 provides, "[*w*]*here the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied*."

[73] Regulation 1/2003, preamble 18; *Modernisation White Paper* para 45.

[74] Policy report 2004. 36.; Policy report 2006. 11.

[75] 37750 French beer market para 75; 38456 Bitumen Nederland para 162–168; 39181 Candle waxes para 317; 39188 Bananas para 339–343; 39125 Carglass para 529–532; 39633 Shrimps para 438–440; 39510 Ordre National des Pharmaciens en France (ONP) para 703–706; 38549 Barême d'honoraires de l'Ordre des Architectes belges para 104–110; 38662 GDF-ENEL para 143–145; 38662 GDF-ENI para 120–122; 39736 SIEMENS/AREVA para 82–83; 39596 BA-AA-IB para 77–80; 39258 Airfreight para 1040–1045; 39839 Telefónica and Portugal Telecom para 439–446; 37214 DFB (Joint selling of the media rights to the German Bundesliga) para 24; 38173 The Football Association Premier League Limited para 30.

[76] Commission Article 101(3) Guidelines para 46.

Third, the coding demonstrates that the Commission has not detailed the substantive scope of Article 101(3) in the few proceedings following 2004 in which the Article was mentioned. In most of those proceedings, Article 101(3) was outright rejected because the agreement failed to meet the first condition, declaring that no relevant benefit was identified.[77] In others, such as the pay-for-delay settlement proceedings, the Commission held that the efficiency gains claimed were not sufficiently substantiated.[78] Consequently, the Commission has not taken the opportunity to detail the possible scope of Article 101(3), even in the few cases involving the Article.

Finally, the empirical findings might explain the scarcity of EU Court decisions after 2004 detailing the role of non-competition interests under Article 101(3). The Courts have not had the opportunity to scrutinize its application in appeals since the Commission has not discussed Article 101(3) in its decisions.

6. Conclusions – a plea for "positive decisions"

The disappearance of the debate on the scope of Article 101(3) following 2004 is unfortunate. The combination of a lack of clear framework to apply Article 101(3) in the practice of the Commission and Courts prior to 2004, together with the Commission's new interpretation of the Article since modernization and the case law of EU Courts that have not endorsed the Commission's new approach, created uncertainty in a period when certainty was needed the most.

This uncertainty hinders attaining the aims of Regulation 1/2003, specifically the effective, uniform and clear enforcement of Article 101 TFEU.[79] On the one hand, there is a risk that undertakings will refrain from concluding agreements that are good for undertakings, markets and the society due to the narrow interpretation given to Article 101(3) in the Commission's policy papers. An incorrect interpretation of Article 101(3) could thus impede the effectiveness of the Article. On the other hand, the Commission's policy papers serve an important role in ensuring a uniform and clear application of the Article. Ignoring them and relying solely on the EUCJ's case law may hinder attainment of the latter two aims.[80]

Against this backdrop, it is argued that the Commission was wrong to conclude that a positive decision detailing the scope of Article 101(3) was "*unnecessary to date*" in its Report on the Functioning of Regulation 1/2003.[81] This paper makes

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77 37980 Souris para 143–158; 38456 Bitumen Nederland para 162–168; 37750 French beer market para 75; 39181 Candle waxes para 317; 39188 Bananas para 340; 39633 Shrimps para 438; 39510 Ordre National des Pharmaciens en France (ONP) para 703–706; 38549 Barême d'honoraires de l'Ordre des Architectes belges para 104–110; 38698 CISAC para 231–237.

78 39226 Lundbeck para 1221–1231; 39685 Fentanyl para 406–439; 39612 Perindopril (Servier) para 2074–2122.

79 Regulation 1/2003, preamble 1; *Modernisation White Paper* para 11., 43–47.

80 GCLC Annual Conference (2010a) 63

81 "Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 [2009] (COM(2009) 206).," n.d para 15. Also see Commission

a plea for formal Commission decisions demonstrating how an exception from the prohibition of Article 101(1) can be successfully obtained. Such decisions are essential in order to define the scope of Article 101(3) under the already aging realm of Regulation 1/2003.

(2009) para 114; GCLC Annual Conference (2010a) 63.