Legal Studies (2023), **43**, 562–566
doi:10.1017/lst.2023.16

S·L·S
The Society of Legal Scholars

CURRENT DEVELOPMENTS: BOOK REVIEW

Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU

by Or Brook. Cambridge: Cambridge University Press, 2022, 548 pp (£120 hardback) ISBN: 978-1-108-83760-6

Emanuela Lecchi

University of Dundee, Dundee, UK
Email: elecchi001@dundee.ac.uk

Every so often, a book can jolt us out of the way in which we have been used to thinking about our own discipline. As Or Brook[1] herself recognises, an 'impressive array of legal scholarship'[2] has debated the objectives of EU competition policy, the impact of the so-called 'more economic approach', and the role of sustainability and other non-market related factors,[3] in the application of competition law generally and Article 101 TFEU specifically.

However, starting from a relatively narrow (if ambitious) set of research questions, Brook prompts the reader to consider the very essence of administrative action. Especially after Regulation 1/2003 (the Modernisation Regulation), and the adoption of the so-called 'more economic approach' to competition law enforcement, competition enforcers have opted for administrative discretion (to set their priorities, or to open and close cases) over the transparent enforcement of the rules. This has serious consequences for predictability and legal certainty.

As the title makes clear, the focus of the investigation is Article 101 TFEU (specifically Article 101 (1) and Article 101(3)). Chapter 1 sets the scene, laying out the research questions, the methodology and the definitions used. The research questions aim to assess the evolution of 'the rationale, method and limits for balancing competition and non-competition interests in the enforcement of Article 101 TFEU'.[4]

Brook takes a narrow approach to the term 'competition interests', defined as the 'core value protected by Article 101 TFEU, namely the promotion of *competition process and structure*'.[5] This definition is in line with previous academic works,[6] as well as the European Commission (the

[1]Dr Or Brook is Associate Professor of Competition Law and Policy at Leeds University.

[2]O Brook *Non-Competition Interests in EU Antitrust Law, An Empirical Study of Article 101 TFEU* (Cambridge: Cambridge University Press, 2022) para 1.1.2 and the literature quoted in fn 9.

[3]See also N Dunne 'Fairness and the challenge of making markets work better' (2021) 84 Modern Law Review 230; A Ezrachi 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49; S Holmes 'Climate change, sustainability, and competition law' (2020) 8(2) Journal of Antitrust Enforcement 354; S Kingston *Greening EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2011); I Lianos 'Polycentric competition law' (2018) Current Legal Problems; G Monti 'Four options for a greener competition law' (2020) 11 Journal of European Competition Law & Practice 124; S Marco Colino 'The antitrust F word: fairness considerations in competition law' (2019) Journal of Business Law 329; J Nowag 'Competition law's sustainability gap? Tools for an examination and a brief overview' (2019) Lund University Legal Research Paper Series 3/2019; H Vedder *Competition Law and Environmental Protection in Europe: Towards Sustainability*, vol 3 (Europa Law Publishing, 2003) p 229.

[4]Brook, above n 2, para 1.1.1, p 4.

[5]Ibid, para 1.2.1.2, p 15, emphasis added.

[6]O Andriychuck 'Dialectical antitrust: an alternative insight into the methodology of the EC competition law analysis' (2010) European Competition Law Review 155; G Monti *EC Competition Law* (Cambridge: Cambridge University Press, 2007); R Nazzini *The Foundations of European Union Competition Law: The Objectives and Principles of Article 102* (Oxford: Oxford University Press, 2011) p 15 (quoted in Brook, above n 2, ch 1, fn 18).

Commission)'s position in its Article 101(3) Guidelines: 'the ultimate aim of Article [101] is to protect the competitive process'.[7] This narrow definition is *not normative*,[8] and crucially does not mean that protecting the competitive structure and process is 'an end in itself'.[9] Rather it is *the beginning* of the process of balancing.[10] In other words, in order for Article 101 to be relevant, a competition enforcer needs to start from the harm that the particular behaviour has on the competitive structure and process (the 'prevention, restriction or distortion of competition within the internal market', as per Article 101(1)). Having acknowledged this, the enforcer can then 'decide to give preference' to the protection of one or more non-competition interests.[11] Brook's approach is therefore agnostic as to outcomes. It seeks to identify the approach taken by enforcers towards the 'non-competition interests' that they deem worthy of protection.

'Non-competition interests' describe 'the type of policy promoted by an agreement'.[12] They include 'economic and non-economic values such as consumer welfare, economic efficiency, industrial policy, growth, market and social stability, market integration, environment, and culture'.[13]

The promotion of any one of these non-competition interests may lead to economic and non-economic benefits.[14] For example, an agreement in pursuit of environmental policy may lead to benefits enjoyed by society as a whole, such as the reduction of pollution (a non-economic benefit). Or, an agreement could lead to economic benefits. Direct economic benefits relate directly to the products or services covered by the agreement, whether they accrue to direct or indirect users. An example would be benefits in the form of lower prices, or 'new products, better quality or variety'.[15] Indirect economic benefits do not arise in the market directly impacted by the agreement in question. An example is two-sided markets: an agreement on one side can give indirect benefits to users on the other side.[16]

The methodology is a combination of the historical, empirical, evaluative and normative approaches.[17] Empirically, the findings are based on a systematic content analysis (coding) of (i) *all public enforcement actions applying Article 101 TFEU*; (ii) from the creation of the EEC in 1957, to 2017; (iii) at the European and (iv) at the national level (in selected jurisdictions). At the European level, the database includes all actions taken by the Commission and the EU Courts. At the national level, it includes all actions taken by the national competition authorities (NCAs) and the courts of five countries, as a representative sample of the Member States of the EU. The countries are France, Germany, Hungary, the Netherlands, and the UK (pre-Brexit). The database includes more than 3100 cases, analysed based on 41 identified variables.[18] This is research on an epic scale. Brook has explained both the drudgery of the task, and the excitement of unearthing new insights through the results.[19] The resulting tables and figures are priceless. If there is one aspect that could perhaps be improved upon, the findings (in black and white and sometimes in small print) can be difficult

[7]Commission Notice, 'Guidelines on the application of Article [101](3) of the Treaty (Art 101(3) Guidelines) [2004] OJ C101/97, para 105.

[8]Brook, above n 2, para 1.2.1.1, p 13.

[9]Ibid.

[10]Ibid.

[11]Ibid.

[12]Ibid, para 2.2.3.1, p 42.

[13]Ibid, para 1.2.1.1, p 12.

[14]OFT 'Article 101(3) – a discussion of narrow versus broad definition of benefits' (30 November 2010), available at (Wayback Machine) https://web.archive.org/web/20101130003207/http://oft.gov.uk/shared_oft/events/Article101(3)-discussionnote.pdf (accessed 18 April 2023).

[15]Brook, above n 2, para 2.2.3.1, p 41.

[16]Ibid.

[17]Ibid, p 5.

[18]These are collected into a coding-book, available on request from the author. I acknowledge (with thanks) receipt of the coding book.

[19]Interview 'Or Brook on a novel approach to EU Competition Law' (ACELG, 2019), available at https://acelg.uva.nl/content/news/2019/10/or-brook-on-a-novel-approach-to-eu-competition-law.html (accessed 18 April 2023).

https://doi.org/10.1017/lst.2023.16 Published online by Cambridge University Press

to read. This is unavoidable in a printed book. This reviewer would have liked access to an accompanying website, where the findings could be presented in larger and colour-coded diagrams and tables.

The empirical findings are presented in Chapters 3–7, after a chapter (Chapter 2) dedicated to the background and the history of the balancing principles in Article 101 TFEU, looking at the case law of the Commission and the NCAs. Briefly, Brook notes that there is no clear definition of the objectives of EU competition policy in the EU Treaties generally.[20] Article 101(1) imposes a general ban on anti-competitive agreements affecting trade between Member States and Article 101(3) sets an exception to the general prohibition.[21]

Substantively, Article 101(3) creates a mechanism whereby otherwise anti-competitive agreements can be accepted if four cumulative conditions are met. The wording of the conditions is not clearly defined, leading to possible divergent outcomes. If, for example, it is accepted that, under the *benefit* condition (the agreement must contribute to improving the production or distribution of goods or to promoting technical of economic progress) a broad definition of benefits accruing to a wide group of beneficiaries can offset harm to competition interests, non-competition interests would have a greater role. Conversely, if only economic benefits were considered, and only those that accrue to direct beneficiaries, non-competition interests would have a much more limited impact on enforcement.

Unsurprisingly, the empirical analysis detailed in Chapter 3 shows that different benefits and different balancing methods were used by the Commission in applying Article 101(3), at different times. Following the categorisation used in other academic works,[22] Brook identifies four broad periods. During the first period (foundation, 1962–77) Article 101(3) was essentially a tool for the Commission to balance competition market integration and EU industrial policy. During the second period (workable competition, 1978–1987), remarkably the European Court of Justice declared in *Metro I*[23] that the appropriate standard for an exemption under Article 101(3) was that of 'workable competition'. An agreement that contributes to objectives in the EU interest could be exempted under Article 101(3). The Commission took wide categories of benefits into account. The cases often quoted in support of, broadly, sustainability as a benefit that can justify an exemption under Article 101(3), such as *CECED* (1999) date from this period. Non-economic benefits to society could justify anti-competitive outcomes such as an increase in prices.[24]

During the third period (economic, social and political EU, 1988–April 2004), the Commission seems to have used non-economic benefits as *additional justification* for decisions to grant an exemption. Environmental, employment, and industrial policy were the main non-competition interests invoked.[25]

The fourth period (post-modernisation, May 2004–2017) is characterised by the Commission seeking to limit both the non-competition benefits that can be taken into account when balancing (limited to 'objective economic efficiencies'),[26] and the beneficiaries. This is referred to as the 'more economic approach' and is partly justified by the need to ensure uniformity in the decentralised system of the Modernisation Regulation. Whereas in the earlier periods the benefits considered included collective benefits to society, now the benefits include only direct economic benefits.[27] Brook shows how the European Courts have not fully embraced this approach,[28] but 'regrettably, [they] have done so in

[20]Brook, above n 2, para 2.2.1.

[21]Ibid, para 2.2.2.

[22]DJ Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 1998) pp 335–369; R Wesseling *The Modernisation of EC Competition Law* (Oxford: Hart Publishing, 2000) p 9; B Van Rompuy *Economic Efficiency: the Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Wolters Kluwer, 2012) p 122: and SM Ramírez Pérez and S van de Scheur 'The evolution of the law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU] ordoliberalism and its Keynesian challenge' in KK Patel and H Schweitzer (eds) *The Historical Foundations of EU Competition Law* (Oxford: Oxford University Press, 2013).

[23]Case 26-76, *Metro SB-Großmärkte GmbH & Co KG v Commission of the European Communities*.

[24]Brook, above n 2, para 3.3.3.4.

[25]Ibid, para 3.3.3.5.

[26]Article 101(3) Guidelines, above n 7, para 59.

[27]Ibid, para 84.

[28]Brook, above n 2, para 3.5.

https://doi.org/10.1017/lst.2023.16 Published online by Cambridge University Press

an indeterminate manner',[29] meaning that the case law does not show the hoped-for clarity over the application of the more economic approach. After modernisation, both the invocation by the parties of Article 101(3) and the Commission's acceptance of it have decreased dramatically.[30] Some commentators[31] tend to see this as proof that non-competition interests no longer play a key role in the enforcement of Article 101(3) TFEU. Brook argues, however, that modernisation has given the Commission and the NCAs wide discretion to use priority setting powers to 'simply not bring a case or close a case that had already been opened',[32] when they believe that the agreement could fall under Article 101(3). Consideration of non-competition interest has effectively been driven underground.

Although Article 101(3) has often been seen as the main balancing tool for non-competition interests, Brook notes that it is in fact only one of five tools, alongside: (ii) block exemption regulations (BERs), considered in Chapter 4;[33] (iii) Article 101(1) TFEU exceptions; (iv) national balancing tools originating in the Member States; and, crucially (v) the enforcement discretion and priority-setting choices of the competition enforcers.[34]

The first four balancing tools require an overt consideration of non-competition interests. Brook calls these *explicit-substantive balancing tools*. Chapter 5 is dedicated to the role of Article 101(1) as a balancing tool. An agreement which does not fall under Article 101(1) will escape the prohibition even though it may not meet the cumulative conditions in Article 101(3). The Court of Justice of the European Union was instrumental to the development of Article 101(1) as an explicit substantive balancing tool. The database allows Brook to identify two main categories of cases where Article 101(1) had a balancing function.[35] However, 'because balancing is not guided by clear and predictable criteria, the outcome of applying them to a specific case is highly uncertain and leaves ample discretion to competition authorities'.[36]

Statistically, since the entry into force of Regulation 1/2003, about 90% of Article 101 TFEU enforcement actions have taken place before NCAs.[37] This changes what Brook calls *the locus of the balancing* tools, from the EU to the Member States.[38] Post-modernisation, national balancing tools give national authorities or political actors the discretion to exempt agreements based on broad types of benefits. Broadly, in Chapter 6 Brook identifies three different approaches: the UK and Hungary have largely followed the Commission's interpretation.[39] Germany and the Netherlands have at times openly deviated. France also deviated, but 'with more subtlety'.[40] National balancing tools limit the enforcement of Article 101. This prompts Brook to ask whether they may be deemed an infringement of the duty of sincere cooperation for Member States, in violation of Article 4(3) TFEU.[41]

There is a more insidious way in which the effectiveness of enforcement of Article 101 can be hampered both at the European and at the national level. Brooks calls this the *implicit-procedural balancing tool*, the fifth identified tool, that depends on the exercise of the authorities' discretion. This is

[29]Ibid, para 3.5.4.

[30]See the findings presented in Brook, above n 2, Fig 3.2.

[31]Brook specifically refers to L Kjolbye 'The new commission guidelines on the application of Article 81(3): an economic approach to Article 81' (2004) European Competition Law Review 566 at 573; and J Faull and A Nickpay *The EC Law of Competition* (Oxford: Oxford University Press, 2014): see Brook, above n 2, para 3.4.4.4, fnn 194 and 195.

[32]OECD *Role of Efficiency Claims in Antitrust Proceedings* (2012), Commission's answers to questionnaire.

[33]The role of the BERs will not be considered further in this review.

[34]This fundamental point is repeated throughout the book. For a short overview, see Brook, above n 2, para 1.1.2.

[35]These are: cases aimed at balancing competition interests with 'state or public interests'; and cases where the balancing happened between 'competition and commercial interests'.

[36]Brook, above n 2, para 5.5, p 292.

[37]Ibid, p 294.

[38]Ibid, para 8.2.2.

[39]Ibid, Chapter 6. See also para 8.2.2.

[40]Ibid, p 409.

[41]Ibid, para 6.4, p 308.

https://doi.org/10.1017/lst.2023.16 Published online by Cambridge University Press

considered throughout the book and analysed in detail in Chapter 7. Whenever a competition authority decides not to open an investigation or closes it by means alternative to a published decision and remedies (be it by negotiated remedies, informal opinions, or regulatory action), balancing happens in a way that is far less transparent. Brook calls this the *dark matter* of balancing, or *invisible balancing*, 'triggered by the institutional set-up and the specific enforcement procedures of the Commission and the NCAs'.[42] Drawing attention to this dark matter of balancing is one of the most important contributions of Brook's work to the study of competition law.

Post-modernisation, the Commission and the NCAs have focused enforcement actions on cartels and other clear-cut infringements of Article 101 TFEU. Cases requiring balancing of competition and non-competition interests are either disregarded or solved by the exercise of the NCAs' discretion to close a case, or to accept a negotiated remedy. As Brook points out, however, 'effective enforcement cannot exclusively focus on cartels'.[43] The shift from explicit-substantive to implicit-procedural balancing tools has rendered balancing less transparent, less predictable and has increased legal uncertainty.[44]

Brook concludes with an invitation to research further the topic of empirical mapping of competition law enforcement, especially at the national level. She is one of the main researchers involved in a comprehensive mapping of judicial review of competition law enforcement at the national and at the EU level.[45] Further, the book concludes with three policy recommendations. First, it calls for competition enforcers to recalibrate their enforcement efforts towards the explicit-substantive balancing tools (specifically, Article 101(3)).[46] Secondly, enforcers should build a diverse and balanced portfolio of cases, beyond cartel deterrence.[47] Finally, Brook argues for a substantive harmonisation of balancing in secondary law, perhaps in the form of a Regulation, or maybe a Directive. The EU Courts should also focus on the compatibility of national exceptions with Article 101 TFEU, with a view to clarifying the principle of primacy of EU competition law.

The book does not consider whether private enforcement of the competition rules could also have a role in addressing the issues identified. Increased private enforcement could lead to an enhanced judicial model system, where the courts take part in the enforcement alongside the competition authorities.

It is important (and unsettling) to see an empirical analysis on this scale showing that, after more than half a century, enforcement of the EU competition rules leads to conflicting decisions, multiple balancing standards and, ultimately, fragmentation of that common market whose integration was one of the guiding lights for enforcement of EU competition law, from the very start.

[42]Ibid, para 1.1.2, p 6.

[43]Ibid, para 8.3.1, p 415.

[44]Ibid, para 8.3.3.

[45]Blog, B Rodger and O Brook 'The first comprehensive empirical mapping of judicial review of competition law enforcement in the EU and the UK raises warning signs' *EULAW's Competition Corner* (21 September 2022), available at https://eulawlive.com/competition-corner/the-first-comprehensive-empirical-mapping-of-judicial-review-of-competition-law-enforcement-in-the-eu-and-uk-raises-warning-signs/# (accessed 18 April 2023); V Robertson 'The judicial review of national competition law decisions in Austria' (2004-2021) (2022) Graz Law Working Paper No 15-2022.

[46]Brook, above n 2, para 8.4.1.

[47]Ibid, para 8.4.2.

https://doi.org/10.1017/lst.2023.16 Published online by Cambridge University Press