



# The Evolution of EU Antitrust Policy: 1966–2017

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This article describes, and puts in context, the evolution of the enforcement practice of the European Commission in the area of EU antitrust law (Articles 101 and 102 TFEU). It considers all formal decisions adopted in the period between 1966 – when the European Court of Justice delivered the two seminal rulings that marked the discipline – and the end of 2017. The article classifies Commission decisions in accordance with four enforcement paradigms. The descriptive statistics show that the cases that the Commission chooses to prioritise have changed over the years. First, enforcement has progressively moved towards the core and the outer boundaries of the system. Second, it has become policy-driven rather than law-driven. Third, the nature of the cases chosen by the Commission is consistent with its commitment to a ‘more economics-based approach’ to enforcement. Finally, these cases signal a move towards a more ambitious stage in the process of the integration of Member States’ economies.

## INTRODUCTION

Competition law provisions – irrespective of the jurisdiction – are typically drafted as general and abstract prohibitions. Article 101(1) TFEU, for instance, bans agreements that have as their object or effect the restriction of competition.<sup>1</sup> Similarly, Article 102 TFEU prohibits the abuse by dominant firms of their position.<sup>2</sup> The core concepts of the provisions (‘restriction of competition’, ‘abuse’, ‘dominant position’) are not defined. Sections 1 and 2 of the US Sherman Act do not differ from their EU counterparts in this regard.<sup>3</sup> Moreover, these provisions do not specify the sectors and/or activities to which they

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- 1 Article 101(1) TFEU reads as follows: ‘The following shall be prohibited as incompatible with the internal market: 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 ...’
- 2 Article 102 TFEU reads as follows: ‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States ...’
- 3 In accordance with the Sherman Act, s 1: ‘Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. ...’; and s 2: ‘Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

apply<sup>4</sup> nor do they lay down an exhaustive list of the practices that are deemed anticompetitive.<sup>5</sup> The scope and shape of the discipline is thus not established *ex ante*. It is instead defined on an incremental, *ex post* basis.

A first practical consequence of this feature of competition law is that it can take many forms and can evolve in ways that were not necessarily anticipated at the time of the enactment of the provisions. The letter of Articles 101 and 102 TFEU supports more or less ambitious, more or less far-reaching enforcement. At one end of the spectrum, these provisions can be conceived and applied as modest tools aimed at fighting the most blatant and socially harmful violations. At the other end of the spectrum, they can be construed as a form of meta-regulation addressing a wide range of market and/or government failures. A second practical consequence of this feature is that competition law is a discipline that can undergo fundamental changes in a seamless way – that is, without any legislative amendments of the substantive provisions.<sup>6</sup>

The malleability of competition law provisions provides fertile ground for legal research. If a given discipline can be shaped in virtually limitless ways, what explains that it follows one path and not another? How do the institutional arrangements in place influence the substantive evolution of competition law? If the substance of competition law provisions is virtually identical around the world, what accounts for variations across jurisdictions?

The article focuses on the application of competition law provisions by public authorities, and, more precisely, on how enforcement priorities evolve over time. Administrative agencies entrusted with investigative and decision-making powers dominate the institutional landscape in a majority of systems around the world.<sup>7</sup> The EU and its Member States are not exceptions in this regard.<sup>8</sup> Where this institutional arrangement is in place, the choices made by the public authority have a significant impact on the shape and evolution of the law. Unlike courts, administrative agencies generally enjoy discretion to

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any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .’

4 Competition law provisions are designed to apply across the board. As a result, the economic sectors to which they do not apply are typically subject to an express exemption. For instance, Article 42 TFEU limits the application of competition law provisions to the agricultural sector. In the US, there are legislative exemptions applying to particular sectors.

5 Articles 101 and 102 TFEU refer to some examples that amount, ‘in particular’ to a restriction of competition and/or to an abuse of a dominant position. The European Court of Justice (the Court) has explicitly ruled that the lists provided for in these two provisions are not exhaustive. See, in this regard, Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* EU:C:1973:22 at [26].

6 For an overview of the transformation that US antitrust has undergone, see, for instance, H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, MA: Harvard University Press, 2005).

7 See E. Fox and M. Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford: OUP, 2012).

8 For an overview, see I. Lianos and D. Geradin (eds), *Handbook on European Competition Law: Enforcement and Procedure* (Cheltenham: Edward Elgar, 2013); F. Cenzig, ‘An Academic View on the Role and Powers of National Competition Authorities’ Study for the ECON Committee 2016, IP/A/ECON/2016-06 at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578971/IPOL\\_STU\(2016\)578971\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578971/IPOL_STU(2016)578971_EN.pdf).

prioritise the cases to which they devote their limited resources.<sup>9</sup> The policy stance of the authority determines the cases they choose to investigate. Policy positions, in turn, are informed by several factors. The economic structure of the jurisdiction may be one of them.<sup>10</sup> The desire to focus on the most serious infringements is another. Often, the political agenda of the government in power – driven by an aspiration to, *inter alia*, foster innovation, to fight inequality or to promote fairness – may also influence, directly or indirectly, the nature and scope of enforcement.

This article provides a positive analysis of the evolution of EU competition policy across a period of over 50 years (from 1966 to the end of 2017). From an institutional standpoint, it presents, with the support of descriptive statistics, the policy choices made by the European Commission (the Commission), which was responsible for the thrust of enforcement for more than 25 years and remains a *primus inter pares* among entities in charge of the application of EU competition law. From a substantive standpoint, it examines the policy aspects relating to the interpretation and enforcement of Articles 101 and 102 TFEU. This area of enforcement is often labelled ‘antitrust’ – including by the Commission itself.<sup>11</sup> Accordingly, merger control and state aid, which are two key aspects of competition policy, are not considered.<sup>12</sup> The analysis is based on a comprehensive database of all formal decisions through which the Commission has expressed its policy positions.

To a significant extent, the interest of the analysis lies in the two major policy shifts that EU competition policy underwent during the 1990s. First, the Commission committed to following mainstream economic principles when enforcing EU antitrust provisions and when formulating its policy positions. This shift led to an overhaul of its approach to the legal treatment of, *inter alia*, vertical restraints,<sup>13</sup> horizontal co-operation agreements<sup>14</sup> and unilateral conduct by dominant firms,<sup>15</sup> and it is often known as the ‘more economics-based approach’ or the ‘more economic approach’.<sup>16</sup> Second, the Commission

9 For a focus on the EU from a comparative perspective, see J. Mendes, ‘Administrative Discretion in the EU: Comparative Perspectives’ in S. Rose-Ackerman, P. Lindseth and B. Emerson (eds), *Comparative Administrative Law* (Cheltenham: Edward Elgar, 2<sup>nd</sup> ed, 2017).

10 For a discussion of this question, see M. Gal, ‘Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions’ (2009) 33 *Fordham International Law Journal* 101.

11 See for instance, the Commission Staff Working Document accompanying the Report on Competition Policy 2016 SWD(2017) 175 final.

12 Mergers in the EU are regulated by means of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1. State aid, in turn, is regulated by Articles 107 and 108 TFEU.

13 The concept of vertical restraints refers to the clauses imposed in the context of agreements for the distribution of goods and/or services. The Commission reconsidered its approach to vertical restraints in its Green Paper on Vertical Restraints in EC Competition Policy COM(96) 721 final.

14 The approach advocated in the Green Paper on vertical restraints was extended to co-operation agreements between competitors in the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/1.

15 See, in particular, European Commission, DG Competition, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Brussels, December 2005).

16 See J. Gual and others, ‘An Economic Approach to Article 82’ July 2005 at [https://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf); A. Witt, *The More Economic Approach to*

progressively moved away from a centralised model of enforcement, under which it enjoyed exclusive powers to apply Article 101(3) TFEU, to a decentralised system that relies, on the one hand, on the self-assessment by firms of their practices and, on the other hand, on enforcement before national courts and competition authorities. This shift was enshrined in Regulation 1/2003, which set out the system for the implementation of Articles 101 and 102 TFEU.<sup>17</sup>

There are two ways in which this article contributes to the understanding of EU antitrust law and policy. First, it develops an operational framework that makes it possible to trace the evolution of the enforcement choices made by a competition authority. The analysis that follows breaks down these choices into three main variables, which can be combined to form different enforcement paradigms. One of the advantages of this framework is that it can be easily transposed to the analysis of other systems and thus provides the basis for meaningful comparative work. Second, this article provides – as explained above – an exhaustive analysis, based on descriptive statistics, of all formal decisions adopted by the Commission. In this sense, it moves away from past research, which had a tendency to ground its conclusions on fragmentary and/or anecdotal evidence.

The remainder of the article is organised as follows. The first section presents, in general terms, what are termed the ‘varieties’ of competition enforcement, that is, the sort of cases that a competition authority can decide to investigate. The second section, in turn, focuses on the features of EU antitrust law and policy that make it stand out from other systems. The prominence of some *sui generis* enforcement paradigms in the EU regime can only be explained by such features. The third section presents the dataset, describes the methodology followed for the presentation of the results and explains the rationale for the choice of the 1966–2017 period. The results are presented and discussed in the fourth section. Finally, some conclusions and tentative explanations for the evolution of the regime are advanced in the fifth section.

## VARIETIES OF COMPETITION ENFORCEMENT

Contemporary competition law applies to a wide range of conduct. On the one hand, it is routinely enforced against cartels. On the other, it may apply to, *inter alia*, the conditions imposed by franchisees for the distribution of their goods and services, the restraints imposed by the licensors of intellectual property or the product design choices made by dominant firms. These practices differ significantly in their nature, objective purpose and effects. Some have a credible pro-competitive potential. Other practices – such as cartels – can be safely presumed to serve an anticompetitive aim. The nature of remedial action may

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*EU Antitrust Law* (Oxford: Hart Publishing, 2016); D. Waelbroeck and J. Bourgeois, *Ten Years of Effects-Based Approach in EU Competition Law* (Brussels: Bruylant, 2012).

17 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] L1/1.

also vary greatly. In some cases, firms are merely required to cease and desist a particular course of conduct. In other cases, they may be required to fulfil a detailed set of positive obligations. The purpose of this section is to trace the varieties of competition enforcement in a systematic way. First, it identifies the three main variables around which the nature of individual cases can be broken down. Second, it explains how these three variables can be combined into different enforcement paradigms. Some of these enforcement paradigms constitute the core of enforcement, while others represent its outer boundaries.

### **Enforcement variables**

When defining its enforcement priorities, a competition authority can choose to focus on ‘fact-intensive’ or on ‘law-intensive’ cases. This choice is encapsulated in Figure 1. In other words, it can choose to devote its resources either to cases where the legal characterisation of the practice is uncontroversial and which thus revolve around whether the alleged facts have been established to the requisite legal standard (‘fact-intensive’ cases) or to investigations that focus on whether the facts, as established, amount to a *prima facie* violation of the relevant provision (‘law-intensive’ cases). ‘Fact-intensive’ cases concern practices that are, absent exceptional circumstances, *prima facie* prohibited irrespective of their effects on competition. As a rule, firms are aware that they constitute an infringement of competition law that is very unlikely to be justified. Therefore, they tend to conceal these practices, as well as their involvement in them, from the authority. A cartel is the archetypal example of a ‘fact-intensive’ practice. Precisely because the detection of this conduct is so difficult, competition authorities around the world have developed a variety of mechanisms to incentivise firms to uncover their involvement in them and to settle the cases, once the infringement has been uncovered. The range of ‘fact-intensive’ cases in a competition law regime varies depending on its peculiarities and on its stage of development.

The facts underlying a ‘law-intensive’ case tend not to be contentious. As a result, they are likely to be readily established by an authority. What is more, it is not unusual that these facts are captured in a formal contract. A distribution agreement specifying the conditions for the resale of a product comes across as an obvious example of a ‘law-intensive’ case. These practices are not concealed from an authority, as they are not subject to a *prima facie* prohibition rule. In addition, they are known to serve a plausible pro-competitive rationale. In particular, they are capable of leading to efficiency gains. Their lawfulness – and thus the question of whether their anticompetitive effects outweigh any pro-competitive gain – has to be established on a case-by-case basis. This case-by-case assessment may turn out to be particularly resource-consuming and to require input from experts – in particular economists.

The second choice faced by competition authorities is captured in Figure 2 and relates to the divide between inter-brand and intra-brand competition. The notion of inter-brand competition refers to the rivalry that exists among the producers of a given good – or the providers of a given service. The notion



Figure 1: Fact-intensive versus law-intensive enforcement



Figure 2: Inter-brand versus intra-brand competition



Figure 3: Proactive versus reactive enforcement

of intra-brand competition, in turn, is used to define the rivalry that exists for the sale of a given brand of a good or service. Intra-brand competition exists, for instance, among the members of a franchising system or among the dealers selling the cars of a particular manufacturer. The lessons of experience and economic analysis suggest that inter-brand competition is more valuable and that intra-brand restrictions tend to be problematic, if at all, where there is insufficient inter-brand rivalry.<sup>18</sup>

Finally, the cases that a competition authority can choose to investigate can be differentiated based on the nature of the remedies required to put an end to the alleged infringement. In this regard, one can distinguish between reactive and proactive enforcement. Remedial intervention is said to be reactive where it takes place on a one-off basis and is negative in nature – an obligation not to do something. An archetypal example is that of a decision requiring the participants in a cartel to bring the arrangement to an end. The effectiveness of this command is self-standing in the sense that its implementation demands a single, stand-alone event. Reactive intervention can also refer to past conduct, in which case it may be confined to noting that a competition law provision has been breached and that the firm(s) must refrain from engaging in similar conduct in the future.

The essence of proactive enforcement is that intervention amounts, in practice, to the imposition of positive obligations – ending the infringement requires firms to engage in a particular course of conduct, as opposed to refraining from doing so. Due to the complexities associated with remedy design in these cases, a competition authority may leave the choice and implementation of the command to the firms. Positive obligations are often of a lasting nature or require regular monitoring. It is possible to identify three broad categories of remedies

18 V. Verouden, ‘Vertical Agreements and Article 81(1) EC: The Evolving Role of Economic Analysis’ (2003) 71 *Antitrust Law Journal* 525.

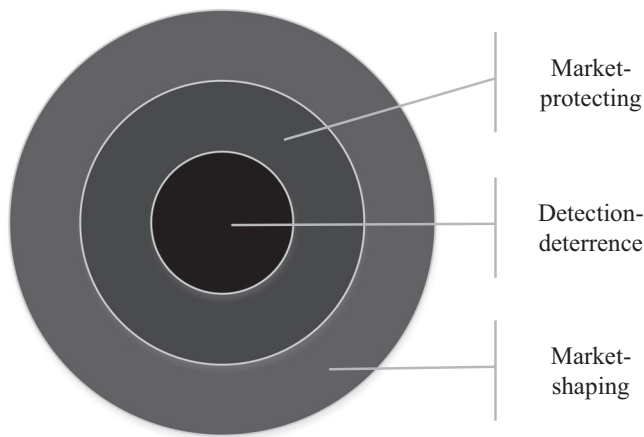


Figure 4: Layers of competition enforcement

that are proactive in nature. One can think, first, of intervention that defines the conditions under which a product or service must be sold. For instance, a firm,<sup>19</sup> or a group of firms<sup>20</sup> may be subject to a duty to deal with customers and/or rivals on non-discriminatory terms and conditions. Second, proactive remedies may require firms to alter the design of their products (or their business models). For instance, a dominant company may commit to altering the range of applications available in an operating system.<sup>21</sup> Finally, remedial action along proactive lines may alter the structure of the market by forcing a divestiture.

### Enforcement paradigms

There are various ways in which the abovementioned variables can be combined. A case can, for instance, be law-intensive, relate to intra-brand competition and lead to the imposition of proactive remedies. Each combination – or groups of combinations – forms a paradigm. The policy choices of an authority revolve around these paradigms. The relative importance of one over the other is a function of the priorities at a given point in time and of the peculiarities of the competition law system in that jurisdiction. This said, it is possible to identify some enforcement paradigms that are common to most, if not all, regimes, and that give an idea of how expansive – or, instead, how modest – enforcement can be. In this sense, it is useful to think of competition law as having a core and a series of successive layers. As enforcement moves away from the core, consensus around it becomes less likely. Figure 4 seeks to capture the main layers of enforcement.

19 Case C-163/99 *Portugal v Commission* EU:C:2001:189.

20 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 285.

21 Case T-201/04 *Microsoft v Commission* EU:T:2007:289 (*Microsoft*).



The core of competition enforcement is made of cases that are fact-intensive and in which enforcement is reactive in nature. These are cases, in other words, in which there is no controversy around the nature of the infringement and in which remedial action can take place on a negative, one-off basis. For the reasons outlined above, this core will generally be confined, in most jurisdictions, to inter-brand competition. The challenge for authorities in these cases does not relate to the design of the remedy or the articulation of a theory of harm. The challenge lies instead in detecting the infringement – firms typically conceal ‘fact-intensive’ conduct – and in deterring similar conduct – by means of high fines and/or criminal and civil sanctions.<sup>22</sup> For these reasons, this paradigm will be referred to as ‘detection-deterrence’. As is true of ‘fact-intensive’ enforcement, cartels are the prime example of this enforcement paradigm.

A middle layer that is common to all regimes around the world is made up of cases that are law-intensive and relate to reactive enforcement that pertains primarily – if not exclusively – to inter-brand competition. Generally speaking, competition authorities around the world include these cases in their policy mix. If they are more controversial than detection-deterrence, this is because ‘law-intensive’ enforcement relates to practices that have ambivalent effects on competition. As a result, concerns about enforcement errors – that is, about whether the pro-competitive effects weigh more than the anticompetitive impact of practices – can be expected to feature prominently in the context of individual cases. On the other hand, remedial action is less likely to prove controversial. Since intervention is reactive under this paradigm, it does not go beyond preserving the structure of the markets in which the practice is implemented. For the same reason, this paradigm will be referred to as ‘market-protecting’.

The third layer typically relates to inter-brand competition but may well relate to intra-brand rivalry, too. Enforcement in this case is controversial not only because it is ‘law-intensive’ in nature, but also because remedial action is proactive. Whenever intervention takes a proactive turn, questions are raised about the ability of competition authorities to craft an appropriate remedy and/or to monitor its implementation. For instance, it is widely accepted that authorities are not optimally equipped to define the price at which goods and services may be supplied.<sup>23</sup> Even when the remedy is appropriately crafted, however, it may fail. A competition authority may order a re-design of a product, but demand for it may not exist.<sup>24</sup>

22 In the UK, for instance, the Enterprise Act 2002 introduced the cartel offence (recently revised by the Enterprise and Regulatory Reform Act 2013, s 47), which provides that a person who has agreed with one or more other persons that two or more undertakings will engage in prohibited cartel arrangements may be imprisoned for up to five years, whereas they may also be forced to pay an unlimited fine. Other sanctions against individuals may include so-called disqualification orders, whereby directors of companies which have breached the competition rules and whose conduct makes them unfit to be concerned in the management of a company may be banned from acting as directors for up to fifteen years (Company Directors Disqualification Act 1986, ss 9A–9E).

23 P. Areeda, ‘Essential Facilities: An Epithet in Need of Limiting Principles’ (1990) 58 *Antitrust Law Journal* 841.

24 ‘EU ruling on Microsoft “flawed”’ *BBC News* 24 April 2006.



Controversies around proactive enforcement do not relate only to the design and/or implementation of the remedy. They are often more fundamental. As the examples discussed above show, a proactive remedy goes beyond reactive enforcement in that it does not merely seek to preserve the conditions of competition prevailing on the relevant market but to alter them. Put differently, it represents a move towards ‘market-shaping’ enforcement. In such circumstances, there is a greater risk of intervention having unintended effects. For instance, an obligation to supply may have a negative effect on the overall incentives to invest and to innovate on the relevant market. In other words, it may harm long-term competition at the expense of short-run rivalry. What is more, a competition authority may not be in a position to adequately weigh such considerations against the expected benefits of intervention.

## COMPETITION ENFORCEMENT IN THE EU SYSTEM

### Competition policy, enforcement and discretion

The Commission has been the central body around which enforcement has revolved since the inception of the EU system. It enjoys decision-making and rule-making powers. In addition, it is entrusted with the power to monitor the interpretation and enforcement of Articles 101 and 102 TFEU by national courts and authorities across the EU. The Commission can spell out its policy positions in several ways. First, it can do so through enforcement in individual cases. The choice of cases by an authority reflects the paradigm(s) that it chooses to prioritise. The ability of the Commission to formulate policy in this way is facilitated by the case law, which has always recognised that, as an administrative agency, it enjoys discretion when deciding which cases to pursue. Accordingly, the Commission may reject complaints that are not deemed of sufficient interest.<sup>25</sup> The rejection of complaints is subject to limited review by the EU courts.<sup>26</sup>

The decisions through which the Commission formulates policy can be divided between prohibition and non-prohibition decisions. In the case of the former, it declares an infringement of Article 101 TFEU and/or Article 102 TFEU. It may also require that the infringement be brought to an end and impose remedies to this effect and/or a fine. In the current enforcement landscape, the Commission adopts prohibition decisions pursuant to Article 7 of Regulation 1/2003.<sup>27</sup> The Commission may also adopt a broad range of non-prohibition decisions. Among these, one can identify what can be called

25 See Article 7 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.

26 Case T-24/90 *Automec Srl v Commission* EU:T:1992:97.

27 In accordance with Regulation 1/2003, Art 7(1): ‘Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary

Table 1. Non-prohibition decisions in EU antitrust

	Old regime (cross-sectoral)	Current regime
<i>‘No grounds for action’ decisions</i>	Negative clearance – Article 2 of Regulation 17	‘Finding of inapplicability’ – Article 10 of Regulation 1/2003
<i>Exemption decisions</i>	Exemption decisions – Article 9 of Regulation 17	‘Finding of inapplicability’ – Article 10 of Regulation 1/2003
<i>‘Negotiated outcome’ decisions</i>	Comfort letter – informal decision with no legal basis	‘Commitment decisions’ – Article 9 of Regulation 1/2003

‘no grounds for action’ decisions, which formally declare that the practice under examination falls outside the scope of the prohibition laid down in Article 101(1) TFEU and/or Article 102 TFEU. The Commission may adopt a decision of this nature in accordance with Article 10 of Regulation 1/2003.<sup>28</sup> Under the former cross-sectoral regime, established by virtue of Regulation 17, the Commission could formally adopt a ‘negative clearance’ decision.<sup>29</sup>

The Commission may also decide – in accordance with Article 10 of Regulation 1/2003 – that a practice satisfies the conditions laid down in Article 101(3) TFEU. Article 101(1) TFEU is declared inapplicable as a result. A decision of this kind may be termed an ‘exemption decision’. Under the old regime, there was a specific legal basis for the adoption of such decisions, which constituted a major pillar of its policy-making activity.<sup>30</sup> As explained below, the role played by exemptions is now fulfilled by the so-called ‘commitment decisions’, adopted under Article 9 of Regulation 1/2003.<sup>31</sup> Commitment decisions differ from the above in that they do not formally declare whether the practice amounts to an infringement. They provide that, following the commitments offered by the firms involved, there are no longer grounds for the Commission to continue with the investigation. In addition, they make the commitments binding upon the parties.

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to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past’.

28 In accordance with Regulation 1/2003, Art 10: ‘Where 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. The Commission may likewise make such a finding with reference to Article 82 of the Treaty’.

29 See Regulation 17, Art 2.

30 See Regulation 17, Arts 6, 8 and 9.

31 In accordance with Regulation 1/2003, Art 9(1): ‘1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission’.

Policy positions may also be expressed by means of legislative and soft law instruments. As far as the former are concerned, the Commission has the power to adopt, upon delegation from the Council, block exemption regulations. Pursuant to a block exemption, Article 101 TFEU is declared inapplicable to a whole category of agreements.<sup>32</sup> Regulations are often accompanied by a set of guidelines which fulfil two main functions. First, they explain in detail the concepts and wording used in hard law instruments. Second, they provide indications about the approach that the Commission intends to take in cases falling outside of their scope. Guidelines can be adopted even in the absence of a block exemption regulation. For instance, the Commission has published a Guidance Paper in which it explains how it intends to prioritise cases relating to the application of Article 102 TFEU.<sup>33</sup>

The Commission can also advance its policy positions in the context of a sector inquiry, which can be conducted pursuant to Article 17 of Regulation 1/2003.<sup>34</sup> An inquiry does not relate to a particular practice or firm but to the functioning of a sector. The very decision to investigate in depth a sector is in itself a powerful signal of the policy priorities of the Commission. These priorities can be spelled out more clearly in the documents that are issued in the context of the inquiry. The Commission, in its practice, releases an ‘issues paper’<sup>35</sup> (at the beginning of the inquiry) and a final report.<sup>36</sup> In these, the Commission identifies the practices which, in its view, amount to a violation of Articles 101 and/or 102 TFEU. In addition, it can provide indications about potential remedies. The final report of the sector inquiry into the energy sector provides a valuable example in this regard.<sup>37</sup>

### Market integration as an overarching goal

It is not easy to make sense of EU competition law without considering the context in which it was introduced. The fundamental goal of the EEC Treaty was to integrate Member States’ economies. Thus, competition law is best understood as an instrument that is subordinate to the achievement of this overarching ambition. The concrete consequence is that market integration is an explicit and autonomous objective of EU competition law. Obstacles to

32 See Article 103(2)(b) TFEU.

33 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

34 Pursuant to Regulation 1/2003, Art 17(1): ‘Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose’.

35 Energy Sector Inquiry – Issues Paper at [https://ec.europa.eu/competition/sectors/energy/2005\\_inquiry/index\\_en.html](https://ec.europa.eu/competition/sectors/energy/2005_inquiry/index_en.html).

36 Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors COM(2006)851 final.

37 *ibid.*, paras 40–72.

cross-border trade are problematic in and of themselves. The European Court of Justice (the Court) clarified this point in the early days. In *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*<sup>38</sup> (*Consten-Grundig*), it held that an agreement giving absolute protection from intra-brand competition is in principle contrary to Article 101(1) TFEU by its very nature – and thus without any need to consider its effects on competition. What is more, an agreement of this kind is unlikely to fulfil the conditions set out in Article 101(3) TFEU.<sup>39</sup>

Because market integration is an objective of EU competition law, there are practices that would otherwise be deemed unproblematic, but that are considered to be serious breaches of Articles 101 and/or 102 TFEU. The practice at stake in *Consten-Grundig* – an agreement giving absolute territorial protection to the reseller of a product – is one example. Agreements prohibiting<sup>40</sup> or disincentivising<sup>41</sup> distributors from selling across borders is another. The Court justifies these decisions by the need to ensure that the very barriers to trade that the EEC Treaty sought to bring down are not re-erected by firms.<sup>42</sup> Unilateral behaviour that has the same objective purpose and/or effect is also prohibited under Article 102 TFEU. It would be abusive, for instance, for a dominant firm to take measures to prevent parallel trade.<sup>43</sup> More generally, it would seem that any practice that discriminates on the basis of nationality or place of establishment is in principle prohibited by its very nature.<sup>44</sup>

The fact that market integration is an autonomous objective does not place EU competition law fundamentally at odds with other systems around the world. The integration of Member States' economies is compatible with the protection of the competitive process. By bringing down barriers to trade, moreover, the internal market leads to gains in allocative and productive efficiency. As a result, there will often be a significant overlap between the creation of a system of undistorted competition and the integration of Member States' economies. It is only in relation to relatively small subsets of practices that the two may be in seeming conflict. The restrictions of intra-brand competition considered by the Court in *Consten-Grundig* are the single most significant subset in this sense. These practices form a paradigm of their own, which, as explained below, is added to the three main enforcement paradigms already described.

38 Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* EU:C:1966:41.

39 *ibid*, 347–350. See also Guidelines on Vertical Restraints [2010] OJ C 130/1, para 47.

40 Case 19/77 *Miller International Schallplatten GmbH v Commission* EU:C:1978:19.

41 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited and others v Commission* EU:C:2009:610.

42 *Consten-Grundig* n 38 above, 340: 'The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [101(1)] is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process'.

43 Joined Cases C-468/06 to C-478/06 *Sot Lélös kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton* EU:C:2008:504.

44 See Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* EU:C:1978:22.

## Landmarks in the evolution of EU competition policy

### *From Centralised Enforcement to Decentralisation and Self-assessment*

In 1962, the legislature opted for a centralised enforcement model. Regulation 17 introduced a principle whereby firms were required to notify agreements falling under Article 101(1) TFEU.<sup>45</sup> In addition, it granted the Commission the exclusive power to adopt exemptions under Article 101(3) TFEU. This model gave the authority significant leeway to formulate policy and exercise influence over the interpretation and enforcement of the EU antitrust provisions. At the same time, the model came with substantial costs. It did not take long before the notification requirement enshrined in Regulation 17 became a burden. The system could not be implemented in the way it was originally conceived. As a result, the Commission needed to resort to some adjustments in order to make it manageable.

Some of the adjustments to the model were enshrined in the Treaty. This is the case, in particular, of block exemptions, which played an increasingly prominent role in the system. The Commission also resorted, from the outset, to soft law instruments allowing firms to self-assess the compatibility of their practices with Article 101(1) TFEU.<sup>46</sup> Other adjustments were informal in nature. Due to the impossibility of adopting exemptions for every notified agreement, the Commission issued ‘comfort letters’ declaring that, according to the information available to it, the agreement either was not caught by Article 101(1) TFEU or fulfilled the conditions of Article 101(3) TFEU.<sup>47</sup> While not binding on national courts, ‘comfort letters’ allowed the Commission to manage the volume of notifications.

Over the years, the Commission increasingly encouraged the enforcement of EU antitrust law at the national level and the self-assessment of practices by firms. In 1999, the authority proposed a move away from this incremental approach by advocating a new decentralised model in its Modernisation White Paper.<sup>48</sup> This model would be enshrined in Regulation 1/2003. As a result, the Commission no longer has the exclusive power to evaluate whether the conditions set out in Article 101(3) TFEU are satisfied.<sup>49</sup> On the other hand, the new system was designed to ensure that the Commission would enjoy discretion about whether to adopt a formal decision and thus leeway to manage its caseload. Firms are not entitled to a ‘finding of inapplicability’. Similarly, it is for the authority to decide whether to close an investigation by means of a ‘commitment decision’ within the meaning of Article 9 of the Regulation.

45 Regulation 17 provided for some exceptions to the principle. See Art 4(2).

46 See Notice on patent licensing agreements [1962] OJ 139/2922; Notice on exclusive dealing contracts with commercial agents [1962] OJ 139/2921; Notice on cooperation agreements [1968] OJ C75/3.

47 For a discussion, see D. Waelbroeck, ‘New Forms of Settlement of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?’ (1986) 11 *European Law Review* 263.

48 European Commission, *White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty* (Brussels, 28 April 1999).

49 For an empirical overview of the question, see European Commission, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* COM(2014) 453 and W. Wils, ‘Ten Years of Regulation 1/2003 – A Retrospective’ (2013) 4 *Journal of European Competition Law & Practice* 293.

*Towards a 'More Economics-based' Approach*

If the system introduced by Regulation 17 became difficult to manage, this is in part because the Commission favoured a relatively expansive interpretation of the scope of Article 101(1) TFEU. Under its traditional understanding, virtually all agreements were deemed to restrict competition. In many decisions, the Commission displayed a tendency to equate a restriction in the freedom of action with a breach of Article 101(1) TFEU.<sup>50</sup> This interpretation has obvious advantages for the authority. First, it expands the range of practices which it may potentially oversee. Second, once it is established that an agreement falls within the scope of Article 101(1) TFEU, it is for the parties to bring forward evidence showing that the conditions set out in Article 101(3) TFEU are satisfied.<sup>51</sup> Reversing the burden of proof gives the Commission greater leeway to define whether, and under what conditions, practices are compatible with the system.

The Commission's traditional interpretation was frequently criticised not only for the burden it put on companies (and the system), but because it was at odds with mainstream economics. In particular, it was noted that the authority's analysis was formalistic and ignored the economic and legal context of which the conduct was part. Typically, administrative action during these early years failed to consider the conditions of competition that would have existed in the absence of the practice. Economic analysis suggests that, if a course of conduct is objectively necessary to achieve a pro-competitive aim, this practice creates – rather than restricts – competition. Second, the Commission typically failed to consider the conditions of competition prevailing on the relevant market. Accordingly, the fact that the parties to an agreement faced strong competitors or customers did not alter the conclusions of the analysis.<sup>52</sup>

It was frequently argued, in particular by economists, that the alleged failure to incorporate mainstream economics led to over-inclusive and under-inclusive enforcement. Enforcement was arguably over-inclusive in that it imposed strict conditions on – or even banned – certain practices that were innocuous or positive from an economic perspective. It was claimed to be under-inclusive in the sense that it sometimes allowed practices that were likely to harm competition. A second consequence of this approach is that the Commission did not prioritise the cases in accordance with their anticompetitive potential. Thus,

50 This aspect was widely discussed in the literature from the 1960s. See for instance R. Joliet, *The Rule of Reason in Antitrust Law American, German and Common Market Laws in Comparative Perspective* (The Hague: Martinus Nijhoff, 1967); V. Korah, 'EEC Competition Policy – Legal Form or Economic Efficiency' (1986) 39 *Current Legal Problems* 85; and B. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973.

51 According to settled case law, it was for undertakings 'to submit all evidence necessary to substantiate the economic justification for an exemption and to prove that it satisfies each of the four conditions', Case T-67/01 *JCB Service v Commission* EU:T:2004:3 at [162]. Following the adoption of Regulation 1/2003, this is now enshrined in Article 2, which provides that 'The undertaking or association of undertakings claiming the benefit of Article [101(3)] of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.'

52 See, for instance, *Henkel/Colgate* (Case IV/26917) Commission Decision 72/41/CEE [1972] L14/14.



it devoted a considerable fraction of its resources to relatively unproblematic arrangements and failed to take decisive action against cartels.<sup>53</sup>

In reaction to these criticisms, the Commission overhauled its policy approach to Article 101 TFEU. The shift is known as the ‘more economics-based’ or ‘more economic’ approach.<sup>54</sup> The term ‘effects-based’ is also used.<sup>55</sup> One of the key underlying ideas is that the legal status of a practice should not be based on its form but on its nature, objective purpose and its actual or potential effects on competition. First, this approach represents an acknowledgement that, more often than not, business behaviour has ambivalent effects on competition and that meaningful enforcement requires an evaluation of the conditions of rivalry on the relevant market. A second fundamental idea is that like practices should be treated alike. Thus, firms should not be able to circumvent competition law by formally changing their conduct.

In relation to Article 101 TFEU, the Commission adopted a new block exemption applying to vertical restraints in 1999. Unlike its predecessors, Regulation 2790/1999 was crafted around a key economic insight, which is that distribution agreements are unlikely to harm competition, unless there is insufficient inter-brand competition.<sup>56</sup> Accordingly, it revolved around a market share threshold, which was used as a proxy for market power.<sup>57</sup> The text represented a shift away from previous legislation, which prescribed in detail the clauses that firms were allowed to include in their agreements. The ‘more economics-based’ approach would also be taken in relation to horizontal co-operation agreements and technology licensing.<sup>58</sup> The observed shift is consistent with the data captured in Figures 5 and 6. As can be seen, the number of regulations and the overall number of pages has declined, as one would expect from an approach that takes market power – as opposed to the clauses drafted in agreements – as a proxy for their pro- and/or anticompetitive nature.

The new approach also influenced the enforcement of Article 102 TFEU. The policy in relation to abusive practices was less developed in the 1990s,<sup>59</sup> but

53 See D. Neven, P. Seabright, and P. Papandropoulos, *Trawling for Minnows: European Competition Policy and Agreements Between Firms* (London: Centre for Economic Policy Research, 1998).

54 See n 16 above.

55 See L.-H. Roeller and O. Stehmann, ‘The Year 2005 at DG Competition: The Trend towards a More Effects-Based Approach’ (2006) 29 *Review of Industrial Organization* 281; and Waelbroeck and Bourgeois, n 16 above.

56 See the original version of the Guidelines on vertical restraints [2000] OJ C291/1, para 6: ‘[f]or most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition’.

57 See Article 3 of the original Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21. See also Article 3 of the current version: Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

58 For the current version see Guidelines on horizontal co-operation agreements, n 20 above and Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/3.

59 See J. Temple Lang, ‘How Can the Problems of Exclusionary Abuses under Article 102 TFEU Be Resolved?’ (2012) 37 *European Law Review* 136, a former Commission official, who goes as



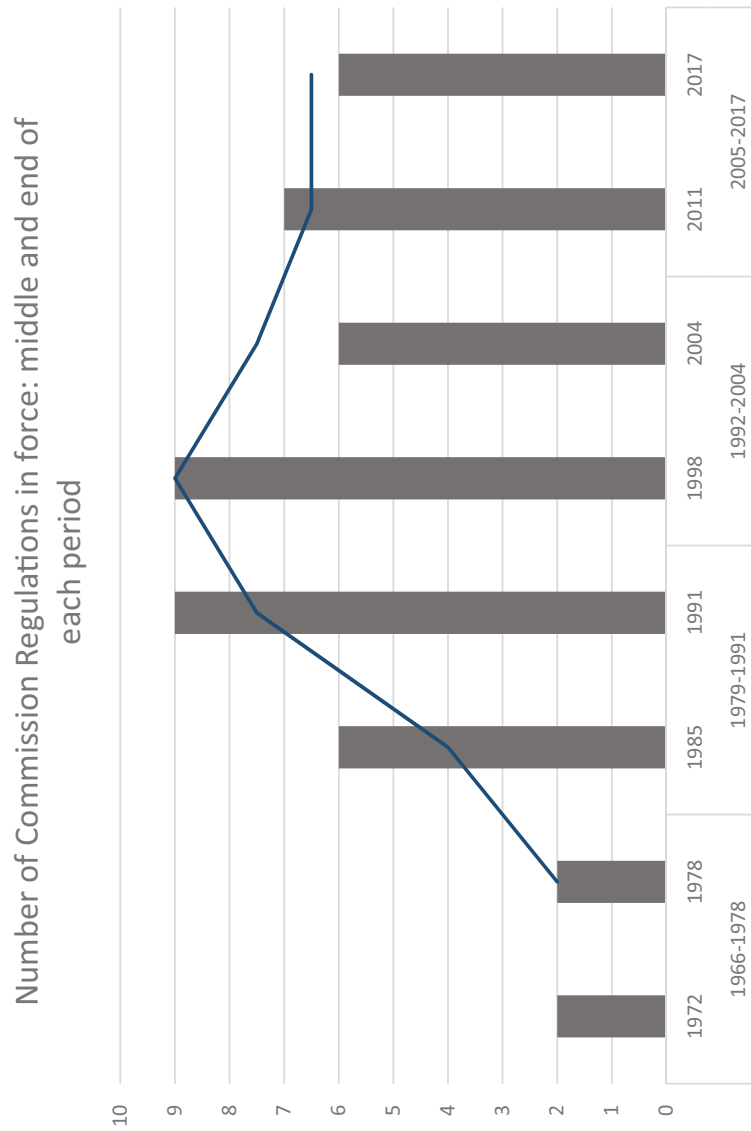


Figure 5: Number of Commission Regulations in force (middle and end of each period) [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

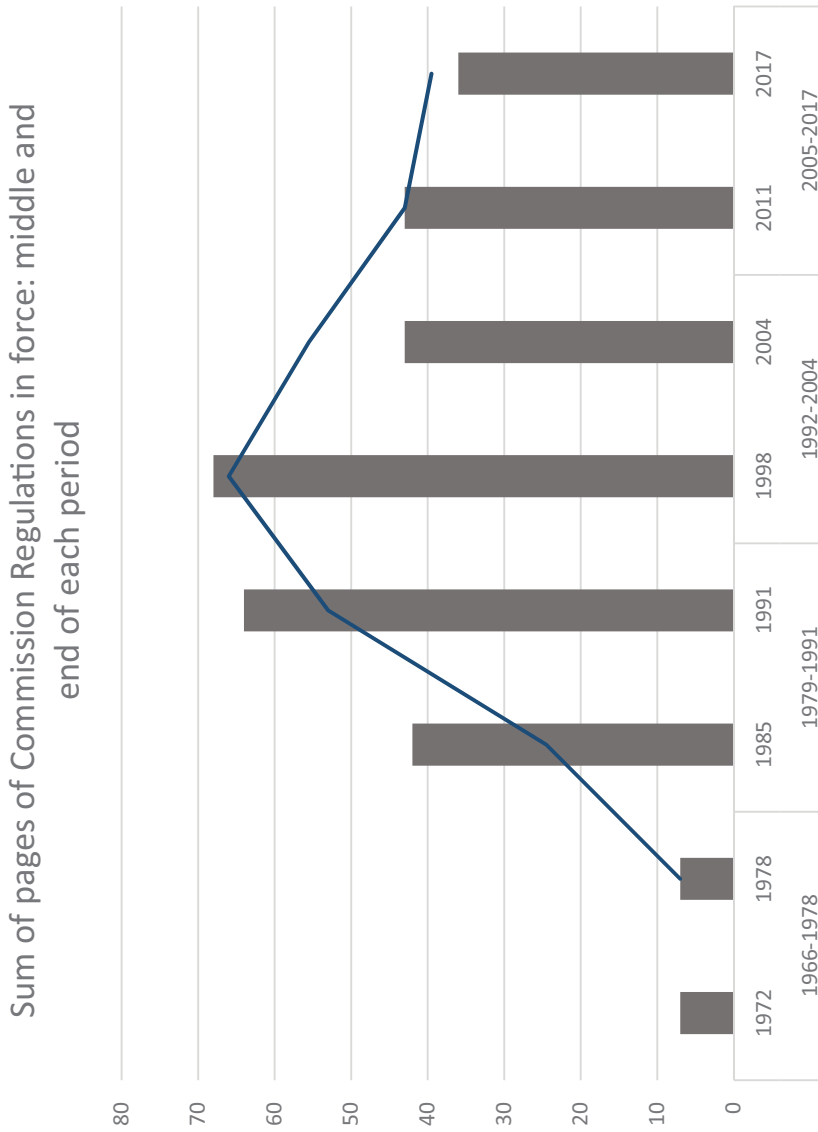


Figure 6: Sum of pages of Commission Regulations in force (middle and end of each period) [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

was subject to the same line of criticism. In particular, commentators typically claimed that the authority did not acknowledge the inherently ambivalent nature of the vast majority of potentially abusive practices and that a finding of abuse had become, in essence, a formalistic ‘pigeon-holing’ exercise.<sup>60</sup> As mentioned above, the Commission eventually adopted a Guidance Paper in which it committed to prioritising cases on the basis of the nature and expected effects of the allegedly abusive conduct. In several important respects, the Commission proposed prioritisation criteria that departed fundamentally from prior administrative practice.<sup>61</sup>

## Varieties of enforcement in the EU system

### *Defining the Enforcement Variables*

After more than five decades of active enforcement of the EU antitrust rules, it is possible to identify the practices that can be considered to be ‘fact-intensive’ under Article 101 TFEU, Article 102 TFEU or both. Cartels are the most obvious example of ‘fact-intensive’ conduct. It has never been seriously disputed that cartels are prohibited by their very nature under Article 101(1) TFEU<sup>62</sup> and firms have used a variety of devices to conceal their behaviour from the Commission.

Second, it has been clear since 1966 – that is, from the beginning of the period considered in this article – that practices aimed at restricting cross-border trade within the EU are prohibited by their very nature under both provisions. As explained above, this subset of practices comprises agreements providing for absolute territorial protection, export prohibitions and, more generally, discriminatory conduct on the basis of nationality.

Third, ‘fact-intensive’ conduct comprises vertical price-fixing. In a resale price maintenance agreement (as the practice is also known), resellers of a product are prohibited from deviating from the price set by the suppliers. It is, in other words, an agreement that eliminates intra-brand competition on the basis of price. Finally, there are two practices that are ‘fact-intensive’ only in the context of Article 102 TFEU. One of them is tying<sup>63</sup> – whereby a dominant firm conditions the acquisition of one product to the acquisition of another, related one – and other comparable practices – in particular, bundling and

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far as to argue that Article 102 TFEU was ‘neglected’ by the authority. See also C.-D. Ehlermann and I. Atanasiu, *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Oxford: Hart Publishing, 2006), which captures well the state of the debates at the time.

60 See, for instance, J. Kallaugher and B. Sher, ‘Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82’ (2004) 25 *European Competition Law Review* 263.

61 Guidance Paper, n 33 above.

62 This point was explicitly addressed by the Court in Case 57/69 *Azienda Colori Nazionali – ACNA SpA v Commission* EU:C:1972:78 at [84]–[85]. The idea that cartels are invariably caught by Article 101(1) TFEU (and give rise to ‘fact-intensive’ cases) was also apparent in the First Report on Competition Policy, April 1972.

63 *Microsoft* n 21 above, at [1054].

Table 2. 'Fact-intensive' practices in EU antitrust

Practice	'Fact-intensive' under Article 101 TFEU?	'Fact-intensive' under Article 102 TFEU?
<i>Cartels</i>	Yes	N/A
<i>Practices aimed at restricting cross-border trade within the EU</i>	Yes	Yes
<i>Vertical price-fixing (resale price maintenance)</i>	Yes	Yes
<i>Exclusive dealing and practices having an equivalent effect</i>	No	Yes
<i>Tying</i>	No	Yes
<i>Pricing below average variable cost</i>	No	Yes

mixed bundling.<sup>64</sup> The other one is exclusive dealing<sup>65</sup> and practices having the same effect – such as rebates conditional upon exclusivity<sup>66</sup> or rebates setting an individual sales target that amounts to exclusivity.<sup>67</sup>

Decades of enforcement also make it possible to provide a concrete taxonomy of proactive remedies. A proactive remedy is, first, one that amounts to a duty to deal with a rival or customer – whether this is an obligation to start dealing or one to resume supplies. The obligation may relate to an infrastructure or physical input<sup>68</sup> or to intangible property, such as a patent.<sup>69</sup> Second, the category includes remedies that prescribe, whether directly or indirectly, the conditions under which an input must be sold. More generally, this category also includes other forms of intervention that specify how a firm is to conduct its business – for instance, how to make price announcements<sup>70</sup> – or how competition is to operate on the relevant market – for example, by prescribing the share of the market to be made available to rivals. A third sort of remedy is one that requires a firm to change the design of a product – for instance, by removing<sup>71</sup> or altering<sup>72</sup> some features. Fourth, a requirement to divest some

64 'Bundling' usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price, Guidance Paper, n 33 above, para 48.

65 Case 85/76 *Hoffmann-La Roche & Co AG v Commission* EU:C:1979:36 at [89]–[90]; confirmed in Case C-413/14 P *Intel Corp v Commission* EU:C:2017:632 at [137]. Irrespective of the interpretation that is given to the latter judgment, the practice was deemed 'law-intensive' during the whole of the period considered.

66 *ibid.*

67 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* EU:C:1983:313 at [73].

68 Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* EU:C:1998:569 and Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* EU:C:1974:18.

69 *Microsoft* n 21 above, and Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* EU:C:1995:98.

70 *Container Shipping* (Case AT.39850) Commission Decision of 7 July 2016.

71 *Microsoft* n 21 above.

72 *Microsoft (tying)* (Case COMP/C-3/39.530), Commission Decision of 16 December 2009.

Table 3. Proactive remedies in EU antitrust

Remedy	Examples
<i>Obligation to supply/resume supply on regulated terms and conditions</i>	<i>CDS, Commercial Solvents, Microsoft I</i> (interoperability obligations)
<i>Direct or indirect prescription of the conditions under which an input must be sold</i>	<i>Container Shipping, Rambus, Standard &amp; Poor's</i>
<i>Obligation to change the design of a product</i>	<i>Google Search, Microsoft I</i> (media player), <i>Microsoft II</i>
<i>Divestiture obligations</i>	<i>BA/AA/IB, CEZ, German Electricity</i> <i>Balancing Market (E. On)</i>

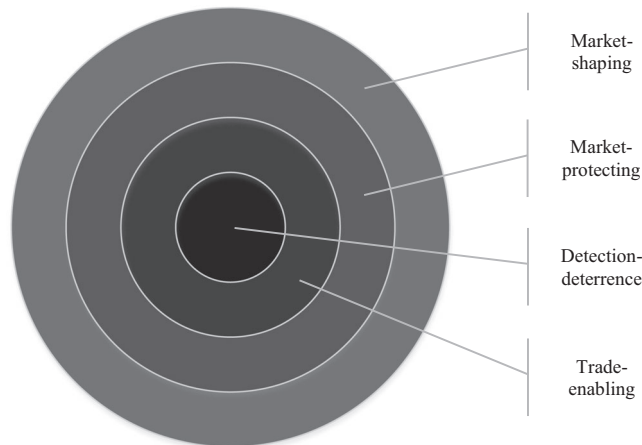


Figure 7: Enforcement paradigms in the EU

assets – and, more generally, any structural remedy – is considered to be a form of proactive enforcement. The latter is understood to include rights, such as airport slots.<sup>73</sup>

*Defining the Enforcement Paradigms*

To the enforcement paradigms identified earlier, it is necessary to add one that accounts for the importance of market integration in the EU system. As already explained, practices aimed at restricting cross-border trade are *prima facie* prohibited and, as such, give rise to ‘fact-intensive’ cases. A significant fraction of decisions involving restrictions to cross-border trade differs from the typical ‘fact-intensive’ infringement in that it relates to intra-brand competition. This is true, in particular, of distribution agreements like the one considered in *Consten-Grundig*. These cases (which are ‘fact-intensive’, relate to intra-brand competition and are reactive) form a paradigm of their own, which will be referred to as ‘trade-enabling’. They relate mostly to trade but occasionally

73 *BA/AA/IB* (Case COMP/39.596), Commission Decision of 14 July 2010.

include other ‘fact-intensive’ concerns pertaining to intra-brand competition, namely resale price maintenance.

## AIM, METHODOLOGY AND APPROACH

### Dataset

The purpose of the analysis that follows is to provide a comprehensive map, supported by descriptive statistics, of the evolution of the enforcement activity of the Commission. It is expected to contribute to knowledge in two ways. First, by systematically classifying the enforcement activity of the Commission along the paradigms described above. In this regard, the article provides, for the first time in the field (to the best of the authors’ knowledge) an operational framework to study and compare the varieties of competition enforcement. Second, by offering an exhaustive study of the decision-making practice of the Commission for a period of over 50 years. Again, no similar project has been undertaken in the field so far.

Drawing a comprehensive map along the lines described above makes it necessary to identify an appropriate reference point. In this respect, the selected unit of measurement is formal decisions which have been adopted by the Commission and reflect the authority’s enforcement choices in the area of antitrust. It has been explained above that the Commission enjoys discretion to decide which cases to pursue and it has historically made use of its discretion to issue formal decisions when the issues raised by a case are deemed important enough from a policy standpoint. Accordingly, these decisions provide the most faithful, positive depiction of its enforcement priorities at any given time and are treated in the present study as such.<sup>74</sup> From a substantive perspective, the article focuses on the formal decisions, whereby the authority enforces Articles 101 and 102 TFEU.

Accordingly, the following data were not considered in the research: first, Commission decisions in the field of merger control and State aid;<sup>75</sup> second, the research did not include decisions whereby the Commission rejected

74 Because the research is primarily focused on the Commission’s policy views on the application of Articles 101 and 102 TFEU, exemption decisions adopted on the basis of a sectoral regime (such as, for instance, Council Regulation (EEC) 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1986] OJ L 378/4), rather than Article 101(3) TFEU, were not included in the dataset. For similar reasons, amending decisions have also been excluded, since they merely modify an earlier Commission decision. Re-adoption decisions following the annulment of an earlier Commission decision on the application of Articles 101 and 102 TFEU have been included in the database.

75 Although both areas constitute key aspects of EU competition policy, they present marked differences from antitrust enforcement. Merger control was introduced in the EU only in 1989 (see Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1990] OJ L 257/13) and takes place *ex ante*, rather than *ex post*, in the context of a compulsory notification system. State aid, on the other hand, is addressed against Member States – rather than businesses – and proscribes the grant of an advantage on a selective basis to undertakings by national authorities where it may distort competition, except where justified under Articles 107(2) and (3) TFEU.

complaints about alleged violations of Articles 101 and 102 TFEU. Although the cases an authority declines to pursue might also offer potentially valuable insights into its policy views, rejections of complaints were excluded from the dataset. Complaints are often rejected on lack of Union interest grounds following a preliminary assessment of the issues raised; as such, they do not contain a definite, explicit account of the Commission's understanding of the competition rules and its underlying choices. More than offering insights into the enforcement priorities and policy stance of the Commission, they provide examples of the sort of practices that were not. Fourthly, informal decision-making instruments, namely the so-called 'comfort letters' and press releases, have likewise been excluded from the data on which the present research draws,<sup>76</sup> for the reason that the issues these cases raised – and/or the relevant factual scenarios – were not deemed important enough to justify the formulation of policy by means of a formal decision. Lastly, the research has not considered Commission decisions concerning the conduct or closure of proceedings, since they do not positively reflect the authority's position on the meaning of the antitrust rules.

For the purposes of the research, all formal decisions whereby the Commission has expressed its policy views in the field of antitrust from 1966 to 2017 were compiled in a comprehensive database. The relevant information was primarily retrieved from the website of DG Competition<sup>77</sup> and, to the extent possible, it was cross-checked against the authority's annual competition policy reports<sup>78</sup> and academic sources. The final dataset comprises 632 formal decisions featuring the Commission's position on the interpretation and enforcement of Articles 101 and 102 TFEU.

### The period under examination

The period examined in this article spans the past fifty years – from 1966 to 2017. To allow for its meaningful analysis and the identification of shifts and patterns in the Commission's enforcement activity, the data has been organised around four sub-periods of equal length – 13 years each, namely 1966–1978; 1979–1991; 1992–2004; and 2005–2017. This approach was motivated by the following reasons. As explained earlier, one of the main landmarks in the evolution of EU competition policy was the move from centralised enforcement to decentralisation and self-assessment, as implemented through the adoption of Regulation 1/2003. The latter became applicable from 1 May 2004.<sup>79</sup>

The initial impetus for the project was to find an operational framework to study and map comprehensively the Commission's activity during the 13 years

<sup>76</sup> One should note, in addition, that they have not been recorded in a detailed manner, and, as a result, it is impossible to recover reliable and sufficient information about their subject matter and content. While a list of the 'comfort letters' sent by the Commission from 1990 to 1997 is available at [http://ec.europa.eu/competition/antitrust/cases/comfort\\_letter.html](http://ec.europa.eu/competition/antitrust/cases/comfort_letter.html), there is almost no information about the subject matter of these cases.

<sup>77</sup> [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html).

<sup>78</sup> [http://ec.europa.eu/competition/publications/annual\\_report/](http://ec.europa.eu/competition/publications/annual_report/).

<sup>79</sup> According to Article 45, Regulation 1/2003 would apply from 1 May 2004.



fully subject to Regulation 1/2003 – ie 2005–2017. Comparing the choices made during this period to the enforcement priorities in the years in which Regulation 17 was – fully or partially (2004) – applicable came across as the most obvious expansion of the project. To allow for a meaningful comparison of the evolution of the policy choices made by the Commission, the 1966–2004 period was broken down into three periods of 13 years (thereby matching the 2005–2017 period). In line with what has been explained above, the expansion of the scope of the project was strictly positive in nature. Establishing a causal relationship between the adoption of Regulation 1/2003 and the changing policy choices is outside its scope and ambition. If at all, this project provides the descriptive groundwork for research of that nature.

This choice is indeed meaningful for several reasons. On the one hand, the first two sub-periods (1966–1978 and 1979–1991) broadly match the lead-up to the creation of the internal market.<sup>80</sup> As far as the competition rules are concerned, while the Treaty of Rome came into force in 1958, it took a few years before the Commission started enforcing the antitrust provisions; the first decision finding a violation was adopted only in 1964.<sup>81</sup> The starting point of the period under examination – ie 1966 – was the year when the Court ruled for the first time on the meaning of the substantive rules in the context of a preliminary reference in *Société Technique Minière v Maschinenbau Ulm*,<sup>82</sup> whereas it also published its judgment in the first action for annulment against a Commission decision in the seminal *Consten-Grundig* case.<sup>83</sup> Both rulings set the tone for the application of the EU competition rules in the following years and played a fundamental role in shaping antitrust enforcement and the Commission's policy.

On the other hand, the third sub-period – 1992–2004 – broadly corresponds to the completion of the single market. It is also the initial phase in the shift towards a 'more economics-based approach' to EU antitrust policy, on the one hand, and decentralisation and self-assessment, on the other. During this sub-period, the Commission overhauled its policy with respect to Article 101 TFEU and published various texts aligning its enforcement with mainstream economic principles in the field of vertical restraints, horizontal cooperation agreements and technology licensing.<sup>84</sup> Around the same time, the authority published its White Paper on Modernisation, which eventually led to the

80 The Treaty establishing the European Union was signed in Maastricht on 7 February 1992.

81 *Consten-Grundig* (Case IV/3344) Commission Decision 64/566/EEC [1964] OJ 161/2545. Apart from *Consten-Grundig*, in the period prior to 1966 the Commission adopted only seven decisions: four negative clearances (*Grosfillex-Fillistorf* (Case IV/61) Commission Decision 64/233/EEC [1964] OJ 58/915; *Bendix-Mertens and Straat* (Case IV/12868) Commission Decision 64/344/EEC [1964] OJ 92/1426; *Nicolas Frères -Vitapro* (Case IV/95) Commission Decision 64/502/EEC [1964] OJ 136/2287; *Deca* (Case IV/71) Commission Decision 64/599/EEC [1964] OJ 173/2761) and three exemptions (*D.R. U.-Blondel* (Case IV/2702) Commission Decision 65/366/EEC [1965] OJ 131/2194; *Hummel-Isbecque* (Case IV/2702) Commission Decision 65/426/EEC [1965] OJ 156/2581; *Maison Jalatte* (Case IV/22491) Commission Decision 66/5/EEC [1965] OJ 3/37).

82 Case 56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38.

83 *Consten-Grundig* n 38 above.

84 See above.

adoption of Regulation 1/2003, whose date of entry into force coincides with the last year of the third sub-period – that is, 2004.

## Data analysis

The data on which the research draws has been analysed in the context of a database, which was designed to contain the following information for each record: a unique ID number; the case number; the date of the adoption of the decision; the name of the case; the relevant provision; the type of decision adopted;<sup>85</sup> the outcome of the decision;<sup>86</sup> whether the case was fact-intensive or law-intensive; the manifestation of competition to which it pertains, namely inter-brand or intra-brand competition; the reactive or proactive nature of the remedial action taken by the authority – if any at all; the number of paragraphs of the decision; a brief description of the case; whether the case pertains to market integration; and a link to the text of the Commission decision. The database was then relied on to provide descriptive statistics on the following questions: (a) the levels of enforcement activity over the period under examination in terms of total number and average length of decisions adopted by the authority; (b) the evolution of competition enforcement from the perspective of each of the three variables identified above – that is, fact-intensive versus law-intensive enforcement; inter-brand versus intra-brand competition; and reactive versus proactive remedial action; and (c) the evolution of competition enforcement in view of the paradigms described earlier – namely, ‘detection-deterrence’; ‘trade-enabling’; ‘market-preserving’ and ‘market-shaping’.

Regarding the classifications of decisions, the following clarifications are in order. As far as the outcome of decisions is concerned, it should be noted that, while negative clearances always lead to a finding that there are no grounds for action under the competition rules, in several cases the Commission has adopted such decisions only after the parties informally modified their behaviour to address the authority’s concerns. Similarly, exemptions under the old regime were often granted following concessions made by the parties involved. In this light, the ‘outcome’ column of the database indicates whether a ‘no grounds for action’ or ‘inapplicability’ conclusion was reached with or without modifications in the undertakings’ arrangements. This clarification is important for the proper classification of the remedial action – if any – taken by the Commission. Where a negative clearance decision has been adopted without any changes in the parties’ conduct, there is no remedial action on part of the authority. By contrast, where the adoption of a negative clearance or exemption decision follows amendments in the undertakings’ arrangements, the case may be classified as an instance of either reactive or proactive enforcement – depending on the nature of the concessions made.

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85 Available options: ‘commitments’; ‘exemptions’; ‘infringements’; ‘interim measures’; ‘negative clearances’; ‘others (Articles 101 and 102 TFEU)’.

86 Available options: ‘fine’; ‘inapplicability’; ‘inapplicability after modifications’; ‘no grounds for action’; ‘no grounds for action after modifications’; ‘obligations’; ‘other’; ‘prohibition’.

For similar reasons, exemption decisions adopted without any modifications on the part of the undertakings and without the imposition of obligations and conditions may be either instances of no remedial action on the part of the authority or a manifestation of reactive enforcement. On the other hand, the grant of an exemption following modifications and/or subject to obligations and conditions could be a form of either reactive or proactive remedial action. In this regard, it should be noted that exemption decisions often stipulated ‘information obligations’, ie obligations on the undertakings concerned to periodically provide the Commission with specific types of information about the exempted agreement and its implementation. Since these obligations do not require the parties to modify their behaviour in any way,<sup>87</sup> exemptions subject only to ‘information obligations’ have been classed either as instances of no remedial action or as manifestations of reactive enforcement.

With respect to the fact-intensive or law-intensive nature of the cases, negative clearances and exemptions have been identified as instances of law-intensive enforcement. Indeed, in such proceedings the facts were typically volunteered by the notifying parties and were not contentious; rather, the focus of the inquiry was on whether, as a matter of law, the conduct in question fell within the prohibitive scope of the antitrust provisions. The rest of the decisions were classified as fact-intensive or law-intensive in the light of their specific characteristics.<sup>88</sup> Likewise, the manifestation of competition to which the Commission decision pertains was considered on a case-by-case basis. Predominantly, intra-brand competition is at issue in cases involving vertical restraints.<sup>89</sup> Cartels and abuse of dominance cases, on the other hand, typically (albeit not always) concern inter-brand competition.

That said, two further remarks are necessary. Cases pertaining to market integration may relate to either inter-brand or intra-brand competition; for this reason, they have been identified in the database separately. Commission decisions applying the competition rules to restrictions on parallel trade and/or to nationality-based discrimination have been invariably classified as being about market integration. Such cases include not only those falling within the ‘trade-enabling’ paradigm but also those that require proactive intervention (such as the alteration of a regulatory regime to allow for the flow of trade). Other cases have also been coded as relating to market integration. On the one hand, these involve some decisions falling within the ‘detection-deterrence’ paradigm, insofar as they concern practices for the partitioning of markets across borders (and more precisely market-sharing arrangements, as well as conduct designed to prevent market entry). On the other hand, they comprise enforcement action preceding and following the adoption of EU-wide legislation aimed at completing the internal market (and, more precisely, harmonisation measures in the areas of network industries and intellectual property).

87 See the definitions provided above.

88 *ibid.* Cases concerning cartels, parallel trade restrictions and vertical price-fixing in the context of Article 101 TFEU, and cases concerning tying and exclusive dealing or exclusivity rebates in the context of Article 102 TFEU are typically fact-intensive.

89 See above.

Finally, some cases may satisfy both options of the enforcement variable in question. In analysing the data, cases which might be both fact-intensive and law-intensive have been identified as law-intensive, in line with the focus of the research on the evolution of the Commission's views on the interpretation and enforcement of the antitrust rules. Cases pertaining to both inter-brand and intra-brand competition – invariably, cases involving vertical agreements – have been classified as being about inter-brand competition, since vertical agreements by definition affect intra-brand competition. And lastly, cases involving both reactive and proactive remedial action have been identified as proactive, given that competition law is, at its core, proscriptive, rather than prescriptive.

## RESULTS

### Levels of enforcement activity

The levels of enforcement activity, measured by the number of formal decisions adopted, have slightly increased over the years. As Figure 8 illustrates, in the first period under examination the authority adopted 116 decisions in total, whereas in the most recent one the number of formal decisions on the substantive application of Articles 101 and 102 TFEU was 140. The second phase was the most active for the Commission (182 decisions) – closely followed by the third (169 decisions).

However, while the total *number* of decisions per period has not grown substantially, there has been a clear shift in the *type* of decisions adopted by the authority. As seen in Figure 8, in the first two periods the ratio between decisions finding a prohibition of the competition rules and non-prohibition decisions was almost one to one.<sup>90</sup> By contrast, in the last two periods there has been a rise in the number of prohibition decisions and a gradual, yet steady decline in non-prohibition decisions with the ratio between the two in the last thirteen years being more than two to one.<sup>91</sup> In addition, the length of prohibition decisions has increased sharply since the second period of competition enforcement, as Figure 9 below demonstrates.<sup>92</sup> Regrettably, it was not possible to extract the average number of paragraphs per decision during the first period, because the authority started consecutively numbering the paragraphs of its decisions in the course of the second period.<sup>93</sup> Even so, the trend in the last three periods for which there is available data is unmistakable.

90 The Commission adopted 57 prohibition decisions versus 59 non-prohibition decisions during 1966–1978 and 85 prohibition decisions versus 97 non-prohibition decisions during 1979–1991.

91 During 1992–2004 the authority adopted 106 prohibition decisions versus 63 non-prohibition decisions, whereas during 2005–2017 it adopted 100 prohibition decisions versus 40 non-prohibition decisions.

92 The average number of paragraphs per decision was 34 during 1979–1991; 182 during 1992–2004; and 376 during 2005–2017.

93 It should be noted that the paragraphs of 14 decisions (out of the 182 in total) adopted during the second period are not consecutively numbered and thus these decisions were not included in the calculation.

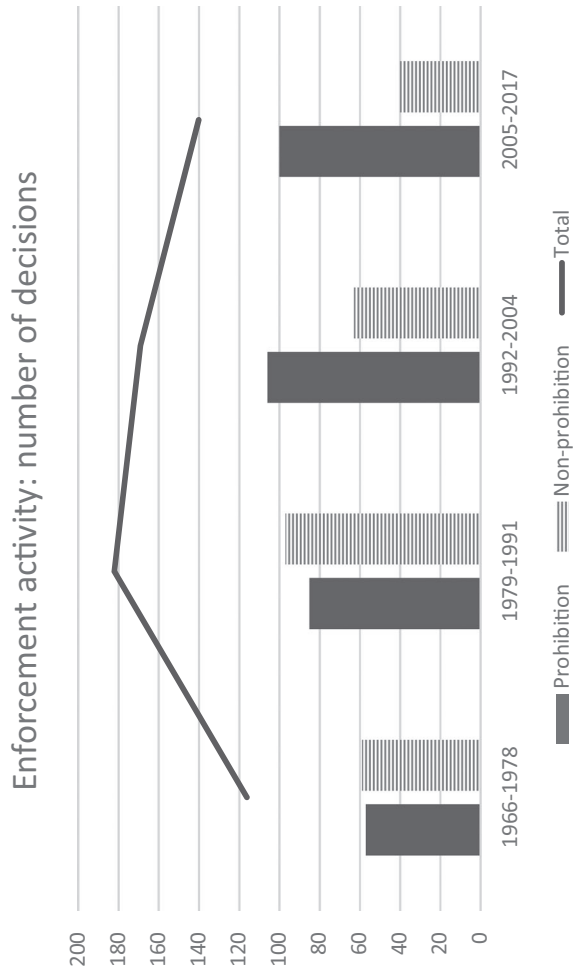
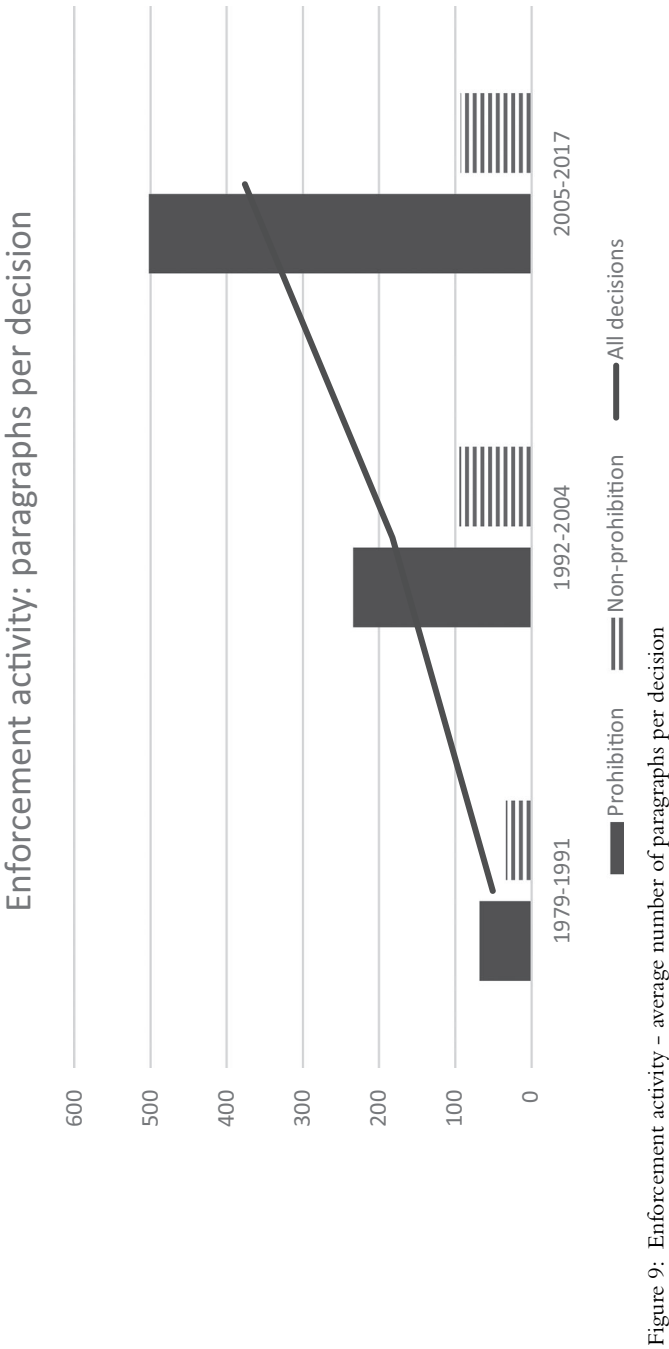


Figure 8: Enforcement activity - number of decisions



Commission decisions finding an infringement of the competition rules in the last period were on average 502 paragraphs long – more than double the average length of prohibition decisions in the third period and almost ten times lengthier than the average prohibition decision in the second period under examination.<sup>94</sup> As far as non-prohibition decisions are concerned, on the other hand, their average length has also risen since the first two periods of enforcement, but not as significantly, whereas in the past years it has steadied at nearly 100 paragraphs per decision.<sup>95</sup> As a result, the gap between the average length of prohibition and non-prohibition decisions has grown larger over the years with prohibition decisions currently being approximately five times lengthier than non-prohibition ones.

### Evolution of enforcement across the three variables

With respect to the fact-intensive or law-intensive nature of the cases which resulted in the adoption of a formal decision expressing the Commission's views on the application of Articles 101 and 102 TFEU, there has been an important shift, captured in Figures 10 and 11. While in the first two periods competition enforcement was predominantly law-intensive with fact-intensive cases representing less than 40 per cent thereof,<sup>96</sup> the ratio has been reversed in the most recent period under examination, where fact-intensive cases correspond to over 60 per cent of the total number of cases which resulted in a formal Commission decision on the application of the antitrust provisions.

Considering the manifestation of competition to which enforcement pertains, shown in Figures 12 and 13, the Commission's decision-making activity has consistently focused on inter-brand competition. The lowest number of decisions concerning inter-brand competition was recorded in the second period, but, even then, such decisions were at least three times more than those pertaining to intra-brand competition.<sup>97</sup> Quite remarkably, in the most recent period under examination the number of inter-brand competition cases corresponds to about 95 per cent of the total number of decisions adopted by the authority.<sup>98</sup>

94 The average number of paragraphs per prohibition decision was 234 during 1992–2004 and 68 during 1979–1991.

95 The average number of paragraphs per non-prohibition decision was 50 during 1979–1991; 95 during 1992–2004 and 93 during 2005–2017.

96 Fact-intensive cases corresponded to 37.07% of the total number of decisions during 1966–1978; 36.26% during 1979–1991; 46.75% during 1992–2004 and 61.43% during 2005–2017. Law-intensive cases respectively represented 62.93% of the total number of decisions during 1966–1978; 63.74% during 1979–1991; 53.25% during 1992–2004 and 38.57% during 2005–2017. In absolute numbers, during 1966–1978 the Commission adopted 43 fact-intensive decisions versus 73 law-intensive ones; during 1979–1991 it adopted 66 fact-intensive decisions versus 116 law-intensive ones; during 1992–2004 it adopted 79 fact-intensive decisions versus 90 law-intensive ones; and during 2005–2017 it adopted 86 fact-intensive decisions versus 54 law-intensive ones.

97 During 1979–1991 the authority adopted 139 decisions pertaining to inter-brand competition versus 43 decisions relating to intra-brand competition. The ratio was 91 to 25 during 1966–1978; 148 to 21 during 1992–2004; and 133 to seven during 2005–2017.

98 In percentages, inter-brand competition enforcement represented 78.44%, 76.37%, 87.57% and 95% of the total number of decisions in each of the four periods in chronological order,



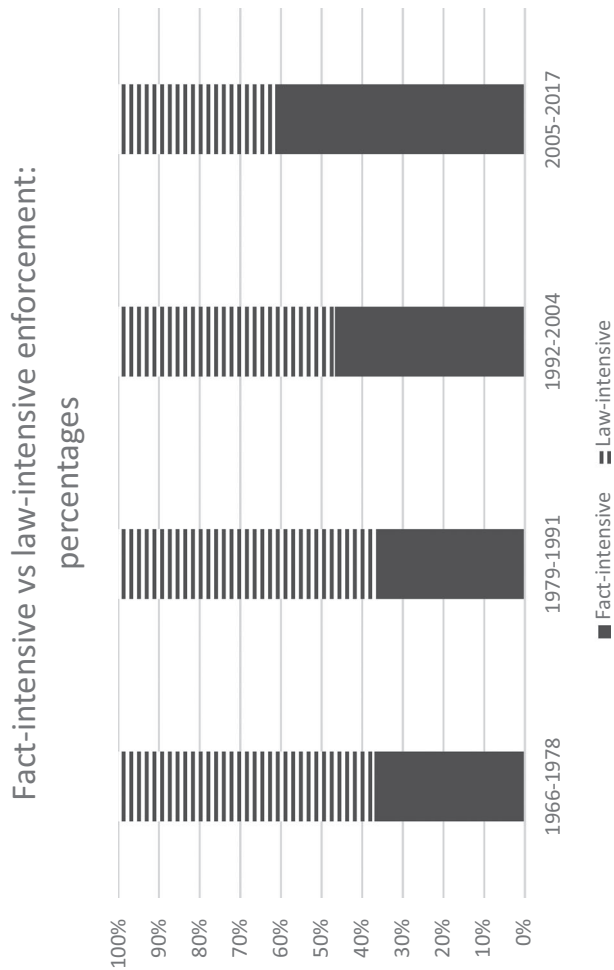


Figure 10: Fact-intensive versus law-intensive enforcement in percentages

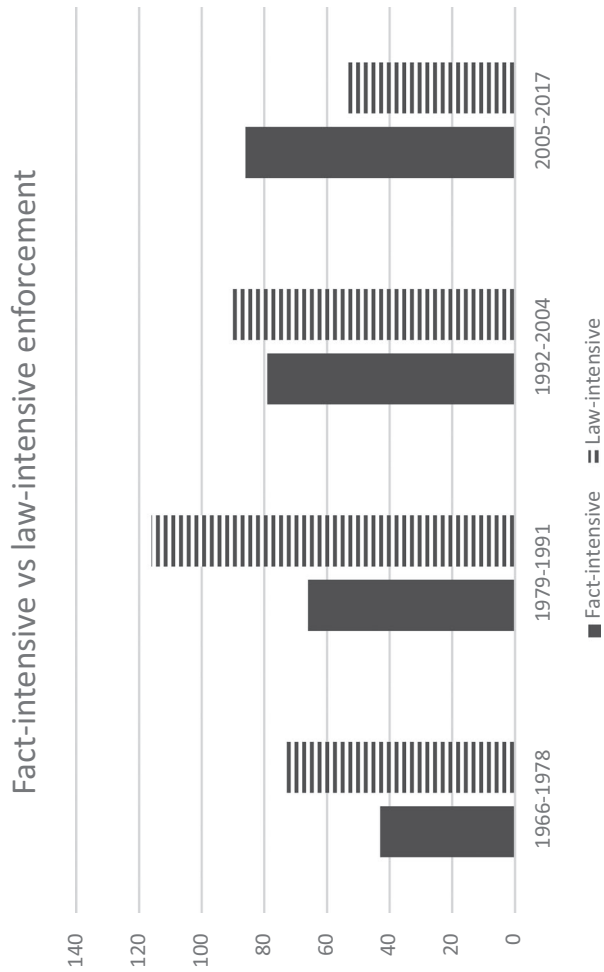


Figure 11: Fact-intensive versus law-intensive enforcement in absolute numbers

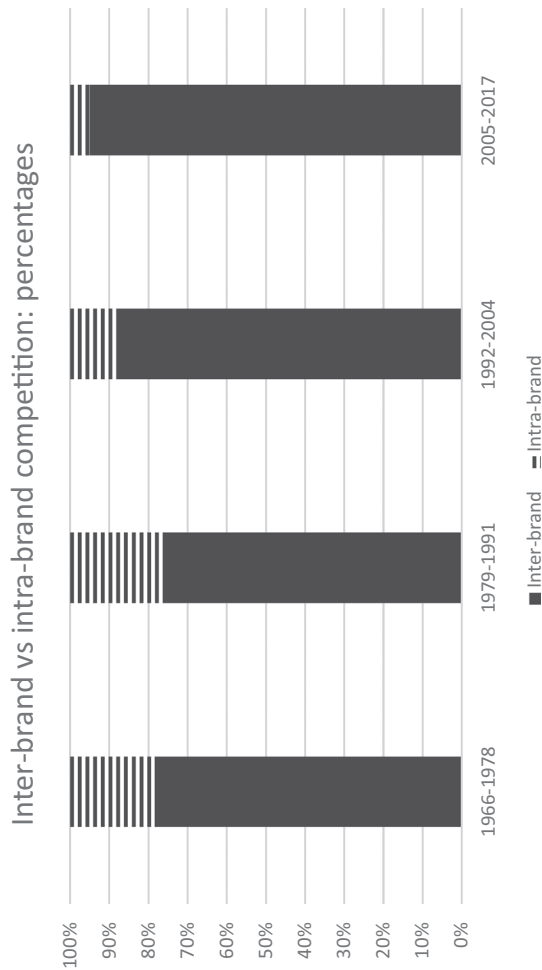


Figure 12: Inter-brand vs intra-brand competition in percentages

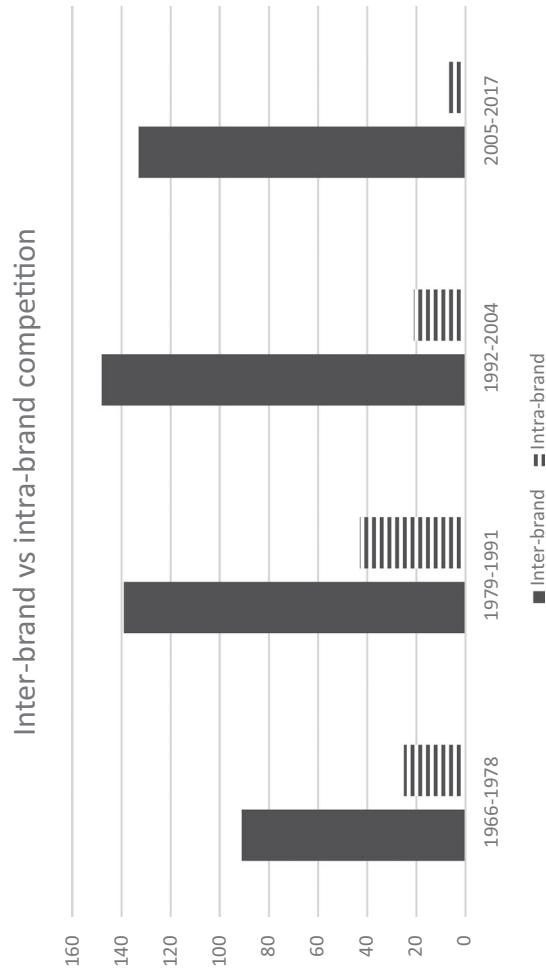


Figure 13: Inter-brand vs intra-brand competition in absolute numbers

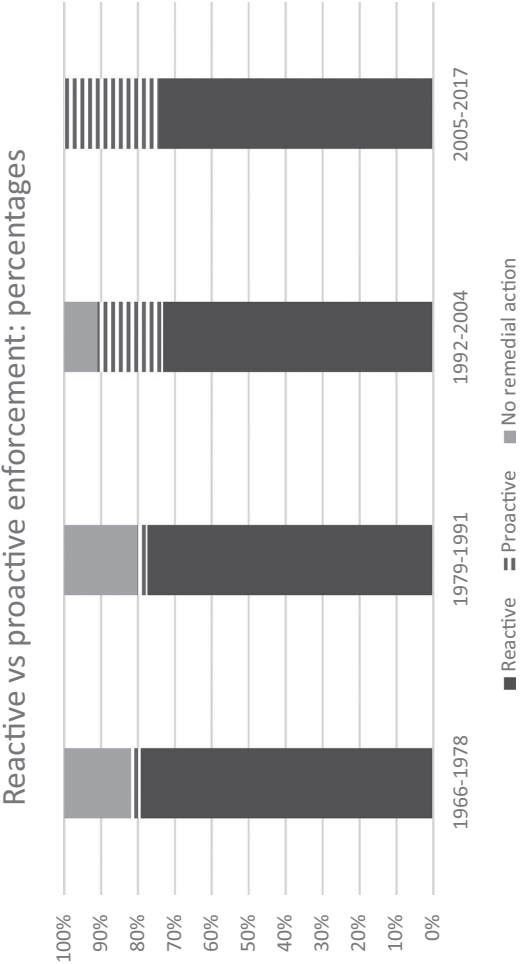


Figure 14: Reactive vs proactive enforcement in percentages

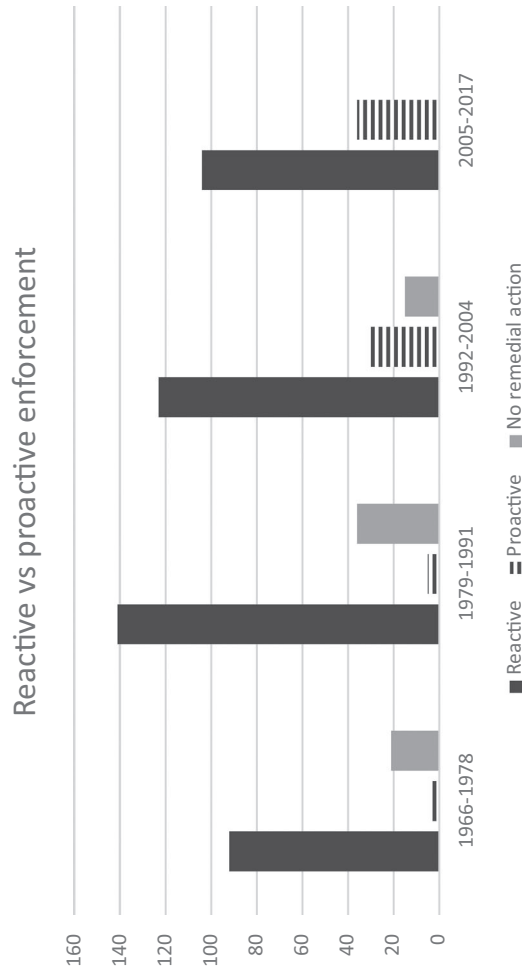


Figure 15: Reactive vs proactive enforcement in absolute numbers

Lastly, there are significant patterns in the Commission's enforcement activity when seen from the perspective of remedial action. In this respect, two findings stand out. First, cases formally closed with no remedial action have been virtually extinguished during the most recent period under consideration, ie 2005 to 2017. As seen in Figures 14 and 15, while such cases represented a small, yet non-negligible, chunk of overall enforcement in the first three periods, they have completely disappeared in the past years.<sup>99</sup> Second, one can identify a steady rise of proactive enforcement across the four periods. During 1966–1978 and 1979–1991, proactive remedial action was taken in fewer than three per cent of the total number of cases respectively. This percentage, however, increased almost six-fold during 1992–2004 and climbed up to 25 per cent in the last period under examination.<sup>100</sup>

### Evolution of enforcement paradigms

Lastly, the three variables were analysed in combinations with a view to measuring the evolution of competition enforcement in light of the different paradigms, as defined above. The results of this descriptive analysis are shown in Figures 16 and 17.<sup>101</sup> The following findings are worth highlighting. First, over the first two periods the features of the Commission's enforcement activities were very similar: 'market-protecting' enforcement represented about 40 per cent of the cases decided by the authority; approximately another 25 per cent corresponded to 'detection-deterrence' enforcement; about 10 per

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whereas intra-brand competition enforcement corresponded to 21.56%, 23.63%, 12.43% and 5% respectively.

- 99 During the first period, the Commission adopted 21 decisions which did not entail any remedial action versus 92 decisions involving reactive enforcement and three involving proactive enforcement. This number increased during the second period to 36 decisions entailing no remedial action vis-à-vis 141 instances of reactive enforcement and five manifestations of proactive enforcement. During the third period, the number of decisions without any remedial action dropped to 15 vis-à-vis 123 decisions involving reactive enforcement and 30 cases of proactive enforcement. Finally, in the last period there were 104 instances of reactive enforcement and 36 instances of proactive enforcement, but no case included in the dataset where the authority took no remedial action.
- 100 In percentages, proactive enforcement represented 2.59% of overall enforcement during the first period; 2.75% during the second period; 17.86% during the third period; and 25.72% during the fourth period.
- 101 In absolute numbers, 'detection-deterrence' enforcement represents 30 cases in the first period, 41 in the second, 61 in the third and 84 in the fourth; 'trade-enabling' enforcement corresponds to 13 cases in the first period, 23 cases in the second, 18 cases in the third, and only one case in the fourth; 'market-protecting' enforcement represents 49 cases in the first period, 77 cases in the second, 45 in the third period, and 19 cases in the fourth; and 'market-shaping' enforcement corresponds to three cases in the first period, five cases in the second, 30 cases in the third and 36 cases in the fourth. The number of cases where no remedial action was taken was 21 during the first period, 36 during the second, 15 during the third and zero during the fourth. The percentages of 'detection-deterrence', 'trade-enabling', 'market-protecting', 'market-shaping' enforcement and 'no remedial action' cases were 25.86%, 11.21%, 42.24%, 2.59% and 18.10% respectively during the first period; 22.53%, 12.64%, 42.31%, 2.75% and 19.78% respectively during the second period; 36.1%, 10.65%, 26.63%, 17.75% and 8.86% respectively during the third period; and 60%, 0.71%, 13.57%, 25.71% and 0% respectively during the fourth period.



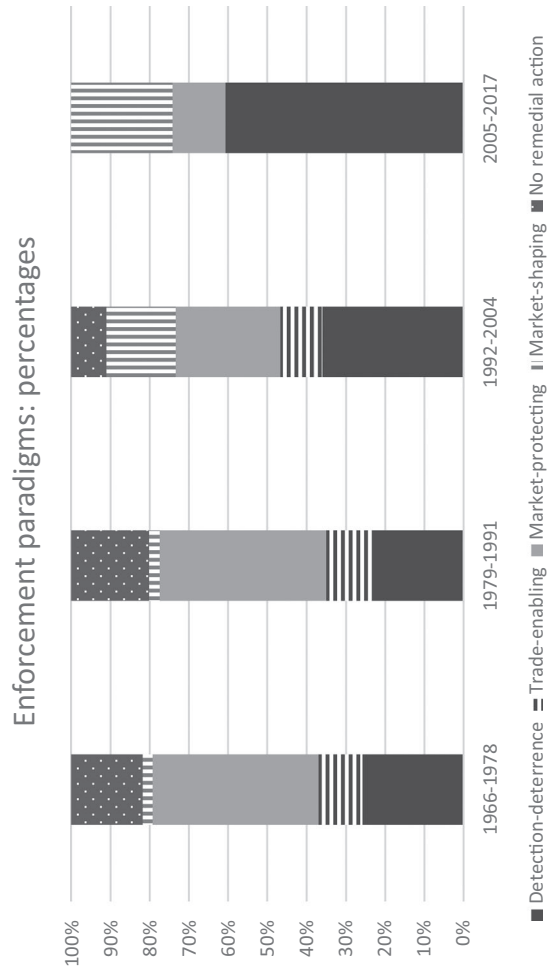


Figure 16: Enforcement paradigms in percentages

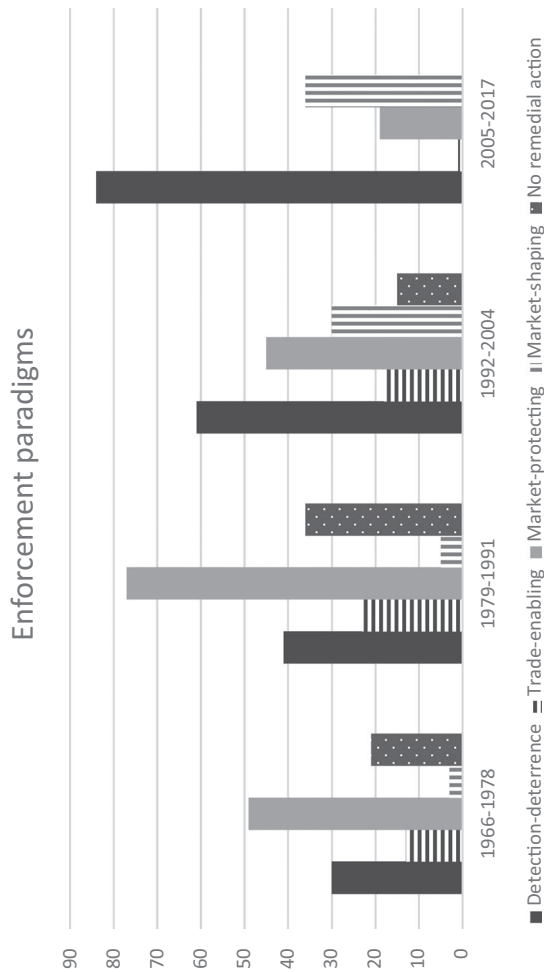


Figure 17: Enforcement paradigms in absolute numbers

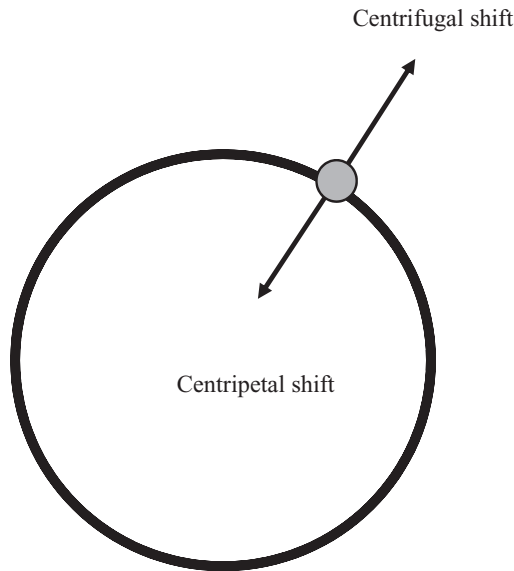


Figure 18: Centripetal and centrifugal shifts in competition enforcement

cent of the cases were manifestations of the ‘trade-enabling’ paradigm; whereas fewer than three per cent of the adopted decisions constituted instances of ‘market-shaping’ action. By contrast, the picture of enforcement is very different during the last period. ‘Market-protecting’ enforcement has shrunk to less than 14 per cent, whereas ‘trade-enabling’ enforcement has almost completely disappeared. ‘Detection-deterrence’ enforcement, on the other hand, represents about 60 per cent of the cases decided by the Commission. ‘Market-shaping’ enforcement has similarly increased significantly – already during the third period under examination, where it amounted to nearly 18 per cent of the adopted decisions – and during 2005–2015 it corresponded to one fourth of the authority’s total activity.

## DISCUSSION

### Centripetal and centrifugal shifts in enforcement

The most noticeable aspect of the evolution of EU antitrust policy in the last two periods is the shift towards the ‘detection-deterrence’ and ‘market-shaping’ paradigms. As depicted in Figure 18, enforcement activity has moved towards the core – a *centripetal shift* – and towards the edges – a *centrifugal shift*. These shifts are consistent with the view that the role of the Commission has changed following the adoption of Regulation 1/2003 – and it has changed in accordance with the vision sketched by the authority in its Modernisation White Paper. Second, they show that formal decisions are no longer the primary instrument for providing interpretations of Articles 101 and 102 TFEU. In this

sense, the observed evolution reveals that enforcement has become increasingly policy-driven, as opposed to law-driven. Third, they provide hints about the influence of economic analysis. Finally, they suggest that the demise of ‘trade-enabling’ enforcement has not led to a decline of enforcement primarily driven by market integration considerations. If anything, such cases have become more ambitious, in line with the process of European integration.

### **The dual role of the Commission under Regulation 1/2003: enforcer and guide**

According to the descriptive statistics, the ‘market-protecting’ and ‘trade-enabling’ paradigms are no longer an enforcement priority for the Commission. One can think of many reasons why an administrative authority may choose to devote its limited resources to the most egregious and socially harmful violations of EU antitrust provisions – ‘detection-deterrence’ cases – and to ‘market-shaping’ enforcement, in particular following the adoption of a new enforcement regime. Even though ‘market-shaping’ enforcement raises complex issues relating to the design and implementation of remedies, it has the potential to yield substantial gains for competition, when successful. The observed centripetal and centrifugal shifts are also interesting, in any event, in that they are consistent with the expected changes in the role and status of the Commission following the adoption of Regulation 1/2003.

As already explained, Regulation 1/2003 gave the Commission greater leeway to prioritise cases. Together with decentralised enforcement, this change allows it to deal with some categories of cases – some paradigms – in a different way. In this sense, Regulation 1/2003 has eased the ability of the Commission to adopt a dual role – as an enforcer, on the one hand, and a guide to national courts and authorities, on the other. In the new legal landscape, the need for it to formulate policy by adopting decisions in individual cases is far less pressing. In addition to prohibition and non-prohibition decisions, the Commission can also outline its stance in soft law instruments and it can become involved in proceedings at the national level. Depending on the relevance and relative novelty of an issue it can choose to enforce or steer instead. In this institutional framework, the Commission is able to deprioritise certain enforcement paradigms in its decision-making practice.

For instance, during the fourth period considered, enforcement against vertical restraints, which featured prominently in the three preceding periods, all but disappeared.<sup>102</sup> Remarkably, the focus away from these practices took place at the same time that the Internet was transforming firms’ distribution methods and strategies, some of which have given rise to novel legal issues. These legal issues have been addressed by national courts and authorities, occasionally

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102 The very few decisions on vertical issues during the last period include *eBooks* (Case AT/39847) Commission Decision of 12 December 2012; and *SEP et autres/Peugeot SA* (Cases F-2/36.623/36.820/37.275) Commission Decision of 5 October 2005.

leading to conflicting interpretations and outcomes.<sup>103</sup> Between 2005 and 2017, the Commission intervened by expressing its policy positions regarding the said issues in the Guidelines on vertical restraints and in the context of a sector inquiry into e-commerce.<sup>104</sup>

An exclusive focus on the decision-making activity of the Commission conceals the role of the authority as a guide and thus provides an incomplete picture of the various ways in which it formulates policy and expresses its choices. An indicator of the growing importance of its steering activity is the rise of soft law instruments following the adoption of Regulation 1/2003. As seen in Figure 19, the absolute number of Guidelines and other soft law instruments has progressively increased over the years, in parallel with steps towards decentralised enforcement and self-assessment. Figure 20, which looks at the total number of pages, also shows a significant increase. Similarly, the Commission's policy cannot be entirely understood without examining its submissions to national courts<sup>105</sup> or those to the Court in the context of a reference for a preliminary ruling.<sup>106</sup>

### From law-driven to policy-driven enforcement

In any competition law system, 'market-protecting' enforcement typically fulfils an important precedent-setting function. Since this paradigm relates to conduct that has an ambivalent impact on competition, enforcement in individual cases is important to identify the factors that are relevant in the evaluation of the

103 As happened, for instance, in the recent investigations by national competition authorities into the use of 'most-favoured-nation' clauses in the online hotel booking sector. For a brief overview, see M. Colangelo, 'Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking' (2017) 8 *Journal of European Competition Law & Practice* 3. The divergence in the outcomes eventually reached in the various Member States prompted the European Competition Network to organise a monitoring exercise with the participation of 11 EU competition authorities with a view to measuring the effects of the different imposed remedies on the use of parity clauses in online travel agents' contracts with hotels. The final report of this exercise was published in 2016 and is available at [http://ec.europa.eu/competition/ecn/hotel\\_monitoring\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf).

104 See [http://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e-commerce.html](http://ec.europa.eu/competition/antitrust/sector_inquiries_e-commerce.html). The launch of the sector inquiry may lead to a re-orientation of the Commission policy in the coming years. See, eg, some decisions adopted by the Commission in 2018: *Philips* (Case AT.40181) Commission Decision of 24 July 2018; *Pioneer* (Case AT.40182) Commission Decision of 24 July 2018; *Asus* (Case AT.40465) Commission Decision of 24 July 2018; *Denon & Marantz* (Case AT.40469) Commission Decision of 24 July 2018; and *Guess* (Case AT.40428) Commission Decision of 17 December 2018.

105 Pursuant to Regulation 1/2003, Art 15(3), 'Where the coherent application of Article [101] or Article [102] of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States'. The 'amicus curiae' observations that the Commission has submitted so far are available at [http://ec.europa.eu/competition/court/antitrust\\_amicus\\_curiae.html](http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html).

106 Recent examples of cases where the Commission submitted observations to the Court include, for instance, Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83; Case C-209/10 *Post Danmark* EU:C:2012:172; Case C-23/14 *Post Danmark* EU:C:2015:651; Case C-230/16 *Coty Germany* EU:C:2017:941.

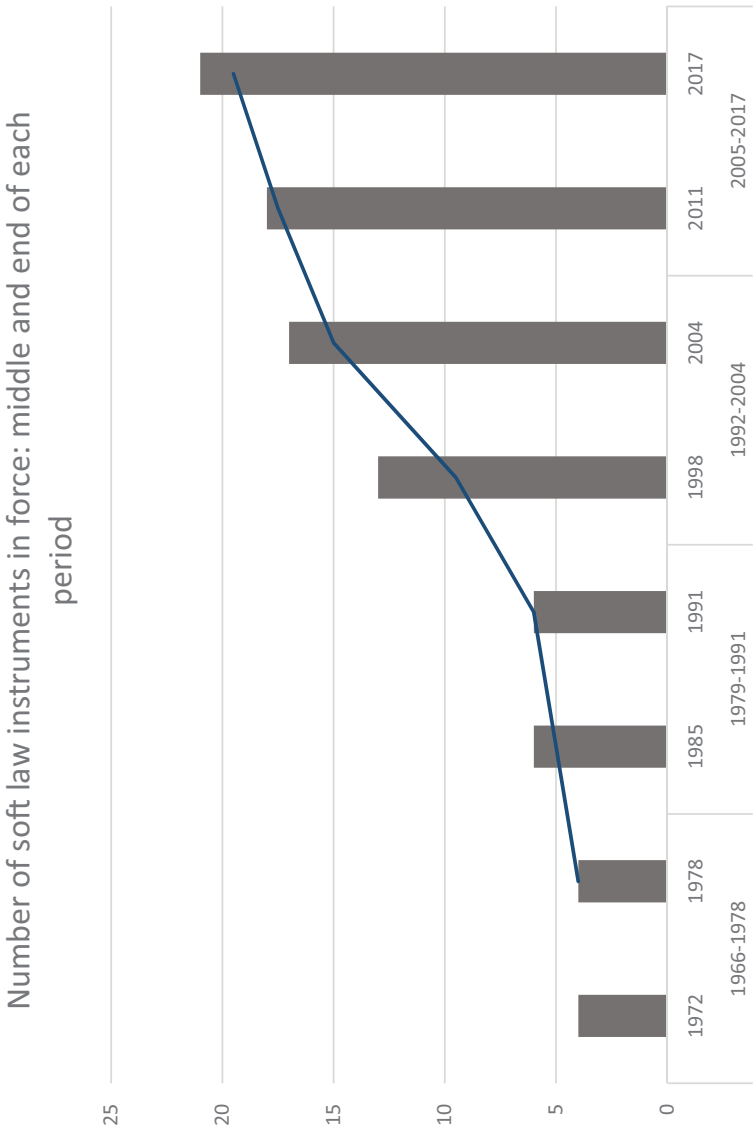


Figure 19: Number of soft law instruments in force (middle and end of each period) [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

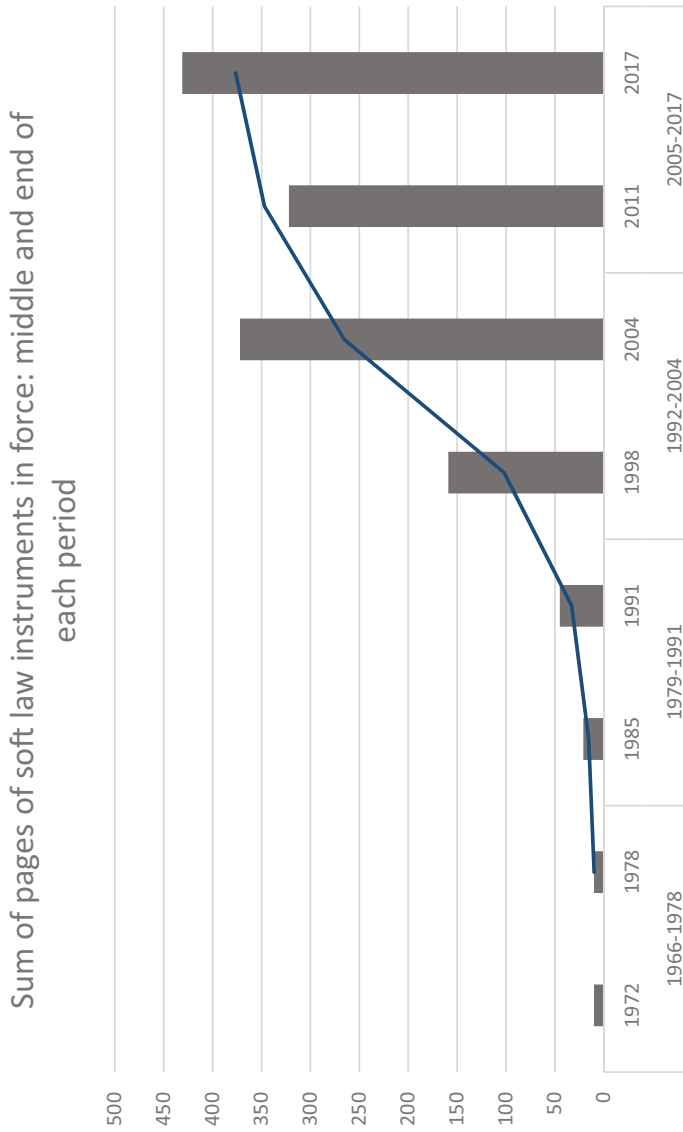


Figure 20: Sum of pages of soft law instruments in force (middle and end of each period) [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

pro- and anticompetitive effects of practices and that may make intervention more or less likely as a result. The case-by-case application of Articles 101 and 102 TFEU, in other words, is valuable to understand the boundaries of antitrust provisions and the line between pro- and anticompetitive conduct. Enforcement is said to be ‘law-driven’ when its primary – if not only – function is to offer an interpretation of the law and provide legal certainty to stakeholders. This is opposed to ‘policy-driven’ enforcement, which is primarily concerned with the outcome sought.

With the centrifugal and centripetal shifts, the precedent-setting function of individual decisions has become less important. There has been, in other words, a decline in ‘law-driven’ enforcement. Other features of the contemporary activity of the Commission are consistent with this conclusion. One of these features is captured in Figure 21. ‘No grounds’ for action decisions, which made up a significant fraction of enforcement in the first two periods, disappeared following the adoption of Regulation 1/2003. At the time of writing this article, the Commission had not yet adopted a single decision finding either that a practice does not fall within the scope of Article 101(1) TFEU or that it does not amount to an abuse of a dominant position under Article 102 TFEU.

A related factor, leading to the same conclusion, is the fact that exemption decisions have been replaced, in practice, by ‘commitment decisions’. As explained above, a key feature of the latter is that they do not state whether the EU antitrust provisions have been infringed. The legal analysis is confined to a ‘preliminary assessment’.<sup>107</sup> In this sense, it is an instrument that is appropriate for ‘policy-driven’ – and not ‘law-driven’ – enforcement. Figure 22 shows the extent to which ‘policy-driven’ enforcement appears to have dominated the practice of the Commission in the last period. First, ‘detection-deterrence’ enforcement, which is by definition ‘policy-driven’, accounts for 61 per cent of all decisions adopted during that period. Secondly, cases decided by means of ‘commitment decisions’ account for 28 per cent of all decisions. Thus, a mere 15 prohibition decisions – or 11 per cent of the total number – are potentially ‘law-driven’. Some of these decisions were adopted with the explicit purpose of clarifying a point of law. This is true, for instance, of *Motorola*, issued in 2014.<sup>108</sup> Other decisions, however, have a stronger policy-driven flavour, in that they appear to relate to the same issues in a particular sector of the economy. Thus, three of these prohibition decisions were adopted in the telecommunications

107 See the wording of Regulation 1/2003, Art 9(1), n 31 above. On commitment decisions in EU competition enforcement, see generally, F. Wagner-Von Papp, ‘Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the “Struggle for Competition Law”’ (2012) 49 *Common Market Law Review* 929; N. Dunne, ‘Commitment Decisions in EU Competition Law’ (2014) 10 *Journal of Competition Law & Economics* 399; M. Wathélet, ‘Commitment Decisions and the Paucity of Precedent’ (2015) 6 *Journal of European Competition Law & Practice* 553.

108 *Motorola - Enforcement of GPRS standard essential patents* (Case AT/39985) Commission Decision of 29 April 2014.



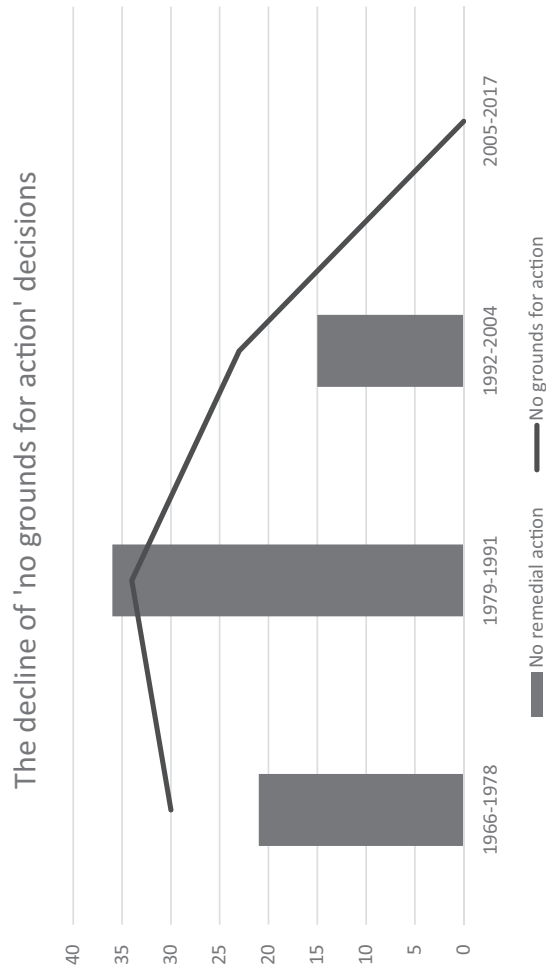


Figure 21: The decline of 'no grounds for action' decisions

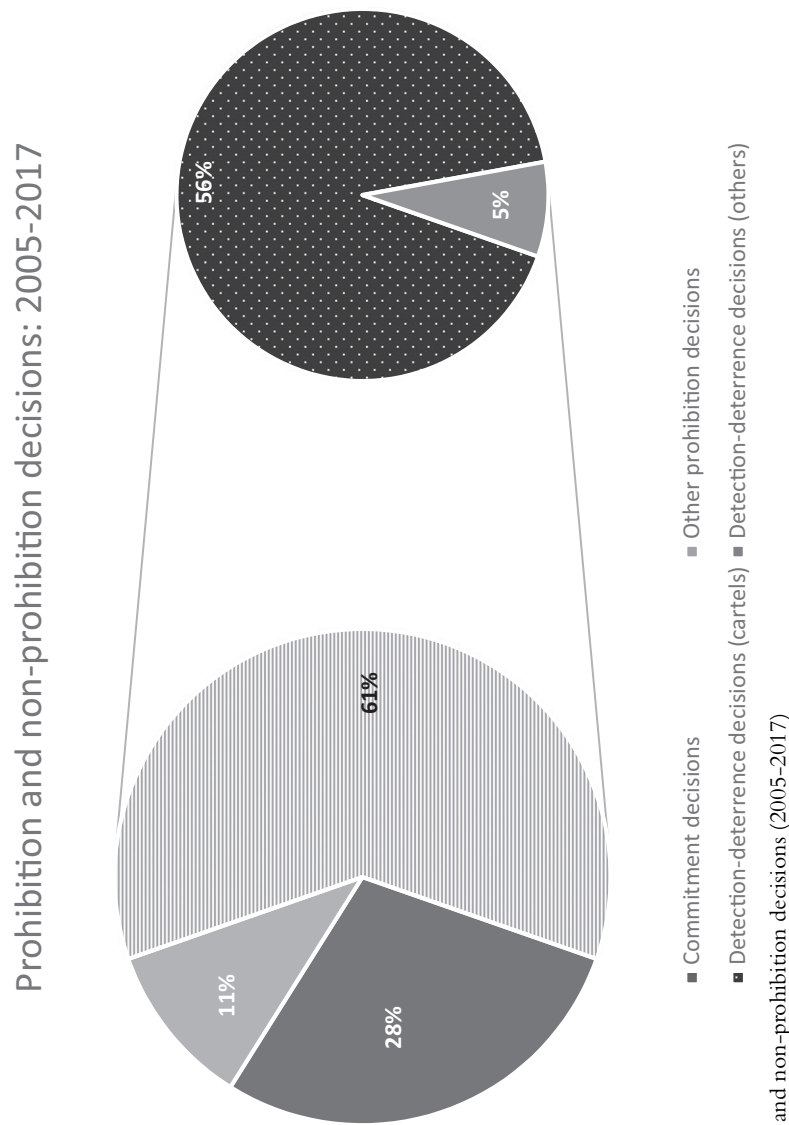


Figure 22: Prohibition and non-prohibition decisions (2005–2017)

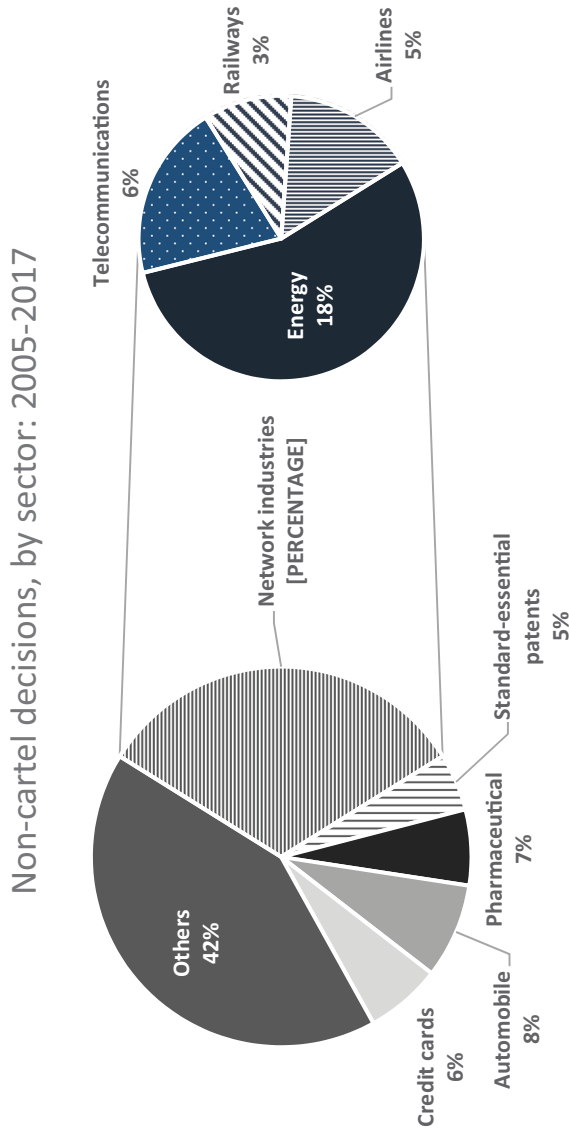


Figure 23: Non-cartel decisions by sector (2005-2017) [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

sector (and addressed the same legal questions),<sup>109</sup> four in the pharmaceutical sector<sup>110</sup> and three relate to payment services.<sup>111</sup>

In fact, the concentration of enforcement activity around certain sectors of the economy is one of the most salient aspects of the last period. As seen in Figure 23, around one third of all non-cartel decisions relate to recently liberalised network industries – the activity in the energy sector is particularly remarkable. The automobile sector and other sectors mentioned above – payment systems and pharmaceuticals – have also given rise to recurrent intervention. The clustering of policy activity around certain industries is another factor that hints at the rise of ‘policy-driven’ enforcement. What is more, antitrust enforcement in certain ‘clusters’ overlaps with EU-wide policy initiatives. The liberalisation of network industries (telecommunications, energy, transport) is an obvious example of such an overlap.<sup>112</sup> Sometimes, these EU-wide initiatives prompt the launch of a sector inquiry that eventually leads to enforcement, as is true of the inquiry into the energy sector. The promotion of the so-called Digital Single Market is another one.<sup>113</sup>

### Enforcement and the ‘more economics-based approach’

The transformation of enforcement in the last two periods is consistent with what one would expect from a competition law system informed by mainstream economics. Some conclusions can be drawn from a cursory overview of the data. The prioritisation of cartel cases during the last two periods – in particular the fourth one – is particularly eloquent. The virtual demise of ‘trade-enabling’ enforcement is also consistent with the rise of the ‘more economics-based approach’. While these cases are highly symbolic in that they reflect the commitment of the EU competition law system to the integration of Member States’ economies, they are typically innocuous

109 *Wanadoo España v Telefónica* (Case COMP/38784) Commission Decision of 4 July 2007; *Telekomunikacja Polska* (Case COMP/39525) Commission Decision of 22 June 2011; *Slovak Telekom* (Case COMP/39523) Commission Decision of 15 October 2014.

110 *AstraZeneca* (Case COMP/37507) Commission Decision of 15 June; *Lundbeck* (Case AT/39226) Commission Decision of 19 June 2013; *Perindopril (Servier)* (Case AT/39612) Commission Decision of 9 July 2014; *Fentanyl* (Case AT/39685) Commission Decision of 10 December 2013.

111 *Morgan Stanley Dean Witter/Visa* (Case COMP/37860) Commission Decision of 3 October 2007; *MasterCard, EuroCommerce, Commercial Cards* (Cases COMP/34579, COMP/36518, COMP/38580) Commission Decision of 19 December 2007; *Groupeement des cartes bancaires ‘CB’* (Case COMP/38606) Commission Decision of 17 October 2007.

112 See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94; and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

113 See ‘A Digital Single Market Strategy for Europe’ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2015/0192 final.

when considered from an economic perspective. In addition, they divert enforcement resources away from more problematic infringements.

Other aspects relating to the ‘more economics-based’ approach require a more detailed analysis of the data. One reason why the enforcement of Article 102 TFEU gave rise to considerable controversy in the 1990s and early 2000s related to the fact that the Commission prioritised borderline cases in which it was not clear that the firm was dominant in the first place. Cases like *British Airways* and *Michelin II*, which led to a review of the authority’s policy with regard to abusive conduct, were criticised not only because of the legal test endorsed, but also because the available evidence cast doubt about the firms’ ability to significantly influence the conditions of competition.<sup>114</sup> It would seem that, since 2005, the enforcement efforts have focused on cases in which the likelihood of anticompetitive harm was greater. Incumbent operators in network industries, for instance, typically enjoy very high market shares, and this on markets which feature high barriers to entry.<sup>115</sup> The Commission has also followed closely developments in high technology industries, the dynamics of which are sometimes conducive to the emergence of super-dominant positions, if not quasi-monopolies.<sup>116</sup>

### **The rise and rise of market integration as an objective of EU antitrust**

Following the adoption of Regulation 1/2003, the most EU-specific of paradigms – ‘trade-enabling’ enforcement – has virtually disappeared. This fact could be interpreted as meaning that market integration considerations no longer inform policy action. A careful analysis of the data, summarised in Figure 24, does not provide support for this conclusion. It would seem that market integration, if anything, has a more prominent role than in the past and leads to more ambitious enforcement. While it is true that ‘trade-enabling’ enforcement is no longer a policy priority, it is also true that cases that are directly driven by market integration considerations have not declined significantly. Policy activity aimed at the integration of Member States’ economies has changed to become more proactive in nature. In the energy sector, for instance, remedial action has led to divestitures aimed at addressing nationality-based discrimination.<sup>117</sup> In other cases, incumbent operators have agreed not only to give access to their infrastructure, but to invest in capacity so as to

114 See M. Motta, ‘*Michelin II: The Treatment of Rebates*’ in B. Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (Cambridge: Cambridge University Press, 2009).

115 C. Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (Cambridge: Cambridge University Press, 2014).

116 See, generally, O. Shy, *The Economics of Network Industries* (New York, NY: Cambridge University Press, 2010); Y. Bramoullé, A. Galeotti and B. Rogers (eds), *The Oxford Handbook of the Economics of Networks* (Oxford: OUP, 2016).

117 *German Electricity Wholesale Market* (Case COMP/39388) and *German Electricity Balancing Market* (Case COMP/39389), Summary of Commission Decision of 26 November 2008 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement [2009] OJ C36/8; *CEZ* (Case AT/39727) Commission Decision of 10 April 2013; *Romanian Power Exchange* (Case AT.39984) Commission Decision of 5 March 2014.

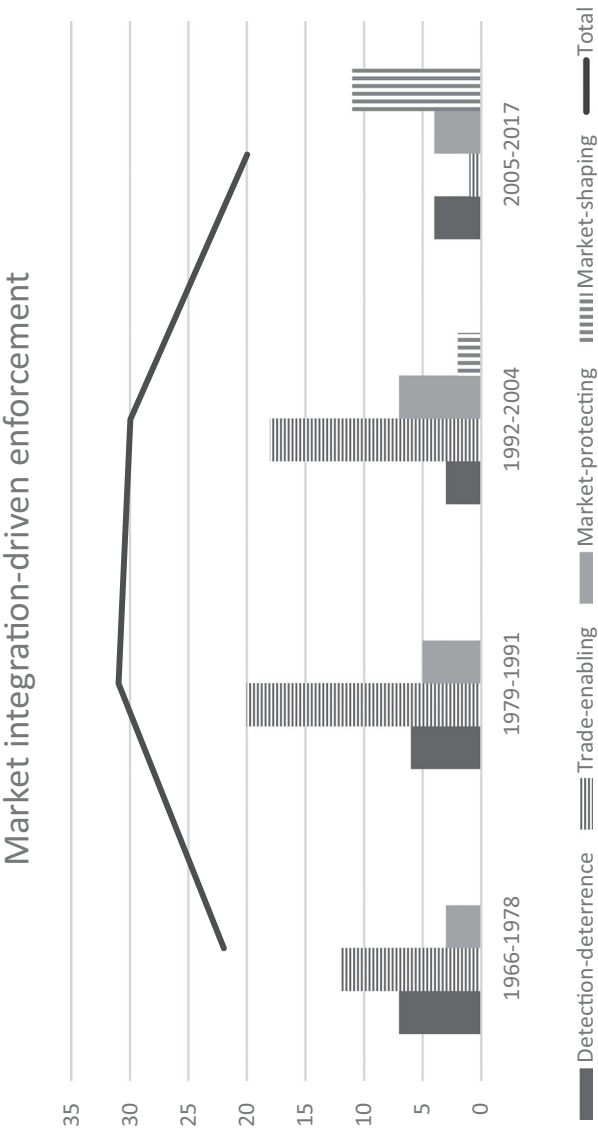


Figure 24: Market-integration driven enforcement

accommodate new entrants on formerly monopolised markets. The steps taken towards the creation of a Digital Single Market, mentioned above, only confirm this view. Intervention in some of the cases amount to the re-shaping of national copyright systems.<sup>118</sup>

The observed shift in enforcement appears to mirror the evolution that the process of European integration underwent in the late 1980s and, in particular, in the 1990s. In the preceding decades, the efforts had focused on bringing down cross-border barriers to trade. This focus is faithfully reflected in the enforcement activity of the Commission, which prioritised ‘trade-enabling’ cases. The liberalisation of network industries took the efforts aimed at building the internal market a step further. Action at the EU level was no longer confined to ensuring market access across borders. Rather, it aimed to inject competition on markets formerly protected by exclusive rights. The regulatory apparatus of the new regimes was conceived to re-shape markets by undermining the dominant positions enjoyed by these firms across the value chain. Against this background, EU antitrust law has been enforced, first, to preserve the fruits of the liberalisation process by preventing the re-monopolisation of markets;<sup>119</sup> and second, to re-shape markets so as to accommodate rivalry through proactive enforcement.<sup>120</sup>

## CONCLUSIONS

The institutional changes that the EU competition law system has undergone over the decades have progressively given the Commission increased leeway to decide how to make use of its limited resources. Under Regulation 1/2003, which captures the essence of these changes, firms are not entitled to a decision declaring that their practices are compatible with Article 101 and/or 102 TFEU. Similarly, the Commission has discretion to decide whether to close an investigation following the commitments offered by the parties or whether to adopt a prohibition decision imposing remedies upon them. Enforcement has evolved along with institutional change. The Commission’s decision-making activity has increasingly focused on the most egregious infringements (labelled ‘detection-deterrence’) and on cases leading to the re-shaping of markets through the adoption of proactive remedies. As a result, enforcement has moved towards the edges. The Commission seems to prioritise the least controversial and most socially harmful practices, on the one hand, as well as the cases which, while inherently controversial, have the greatest potential to improve the conditions of competition, on the other.

118 See in particular *Cross-border access to pay-TV* (Case AT.40023) Commission Decision of 26 July 2016.

119 *Deutsche Telekom* (Case COMP/37451, 37578, 37579) Commission Decision of 21 May 2003 [2003] OJ L263/9; *German Electricity Wholesale Market* (Case COMP/39388) and *German Electricity Balancing Market* n 117 above; *CEZ* n 117 above; *Romanian Power Exchange* n 117 above.

120 *Distrigaz* (Case COMP/37966) Commission Decision of 11 October 2007; *Swedish Interconnectors* (Case 39351), Commission Decision of 14 April 2010; *CEZ* (Case AT/39727) Commission Decision of 10 April 2013; *E.ON Gas* (Case AT/39767) Commission Decision of 26 July 2016.

The observed shift in enforcement is consistent with other mutations of the EU competition law system. Following the adoption of Regulation 1/2003, the Commission can effectively fulfil its dual role as an enforcer and a guide influencing the application of Articles 101 and 102 TFEU by national courts and authorities. As a result, some questions that were dealt with via the adoption of individual decisions can now be addressed through soft law instruments, where the Commission can express its policy positions, and through the co-operation mechanisms introduced in Regulation 1/2003. In the new institutional landscape, the law-making function of EU antitrust enforcement does not appear to have as much prominence as it used to. The activity of the Commission has become more policy-driven. This phenomenon is reflected in the dominance of cartel enforcement and the rise of ‘commitment decisions’ as the pre-eminent means through which ‘law-intensive’ cases are closed. On the other hand, institutional change has not affected the role of EU antitrust law as a primary means to achieve the objectives of the internal market. If anything, enforcement aimed at contributing to the integration of Member States’ economies has become more ambitious.

The analysis provided in this article is positive in nature. Its ambition and expected contribution to the field was, first, to develop an operational framework allowing for the systematic study of competition law enforcement – in the EU and beyond – and, second, to map comprehensively the decision-making activity of the Commission. The article did not aim at establishing causal relationships and its expected contribution was not contingent on doing so. At most, it was possible to claim that some trends in the Commission’s enforcement priorities were consistent with other developments – and in particular with the adoption of Regulation 1/2003 and the shift to a ‘more economics-based approach’. Efforts at establishing the causes behind the said trends will have to wait for future research.

### **SUPPORTING INFORMATION**

Additional supporting information may be found online in the Supporting Information section at the end of the article.

Supporting Information