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Block Exemption Regulations and Public Policy: in The Defence of BERS

Or BROOK*

Abstract
This article defends Block Exemption Regulations ('BERs') as a legitimate and effective tool for the consideration of public policy within Article 101 of the TFEU enforcement. Going against popular opinion, it argues that as the expression of a clearly defined EU-wide political consensus, BERs carry several advantages over the traditional balancing tools of Article 101(1) and (3) individual exceptions, guidelines, or balancing by the exercise of enforcement discretion. BERs offer pre-determined and transparent rules, safeguarding the independent competition authorities' political accountability and democratic legitimacy, promoting uniformity and legal certainty, reducing compliance and enforcement costs, inviting scrutiny and debate, and fostering experimentalism and flexibility.

Keywords: EU competition law, public policy considerations, block exemption regulations, BERs, non-competition interests, sustainability agreements, EU industrial policy

I. INTRODUCTION: REENVISAGING BERS AS A LEGITIMATE AND EFFECTIVE TOOL FOR PUBLIC POLICY CONSIDERATION

Block exemption regulations ('BERs')[1] automatically discharge certain categories of agreements from the EU prohibition on anti-competitive agreements, without engaging in a detailed case-by-case analysis. An agreement that satisfies the terms of a BER enjoys a safe harbour, namely a presumption that the protected categories of agreements do not restrict competition in the meaning of Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU')[2] or satisfy 'with sufficient certainty' the conditions of Article 101(3) TFEU.[3]

* Associate Professor of Competition Law and Policy, University of Leeds. The author is extremely grateful to Francisco Marcos, Albert Sanchez-Graells, and Oke Odudu for their difficult questions and great comments. All errors, as always, remain my own. Comments are welcomed at o.brook@leeds.ac.uk. Competing interests: The author declares none.

[1] BERs were also sometimes referred to as 'group exemptions', 'exemption by category', or 'en bloc exemptions'.

[2] Case 32/65, *Italy v the Commission and Council*, ECLI:EU:C:1966:42, pp 404–05.

[3] Commission Regulation (EU) No 2022/720 [2022] OJ L134 ('Vertical Agreements BER of 2022'), Preamble 16; Commission Regulation (EU) No 330/2010 [2010] OJ L102 ('Vertical Agreements BER

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BERs are commonly viewed as an administrative-procedural tool, aimed at reducing the Commission's and national competition authorities' ('NCAs') workload and at providing legal certainty for undertakings. They were originally introduced as a pragmatic device to accommodate the colossal number of notifications resulting from the old enforcement regime of Regulation 17/62, which required all undertakings to notify their agreements to the Commission before implementation for the purpose of receiving a negative clearance or an exemption.[4]

Despite their success as a bureaucratic, workload-reduction instrument, around the turn of the millennium, BERs were increasingly criticised as incompatible with the modern system of EU competition law enforcement. Regulation 1/2003, which entered into force in May 2004, abolished the old notification regime and decentralised the enforcement.[5] Shifting to an enforcement system based on self-assessment, agreements that fulfil the conditions of Article 101(3) TFEU are now automatically accepted. As the Commission is no longer faced with the burden of responding to notifications, the workload-reducing function of the BERs has mostly perished. Following the modernisation of EU competition law, there are very few enforcement actions in which the Commission and NCAs discussed the application of the BERs to a specific agreement, and even less that declared that an agreement could be saved by a BER.[6]

Moreover, since the mid-1990s, BERs were condemned as an overly formalistic enforcement device, sacrificing 'economic precision in favour of administrative efficiency', and instigating an (over)simplified economic analysis that is being 'at once

(F'note continued)

of 2010'), Preamble 5; Commission Regulation (EC) No 2790/1999 [1999] OJ L336 ('Vertical Agreements BER of 1999'), Preamble 5; Commission Regulation (EU) No 1217/2010 [2010] OJ L335 ('R&D BER of 2010'), Preamble 7; Commission Regulation (EU) No 1218/2010 [2010] OJ L335 ('Specialisation BER of 2010', and together with the R&D BER of 2010, 'Horizontal Agreements BERs of 2010'), Preamble 5; Commission Regulation (EC) No 772/2004 [2004] OJ L123 ('Technology Transfer BER of 2004'), Preamble 9; Commission Regulation (EU) No 267/2010 [2010] OJ L83 ('Insurance BER of 2010'), Preamble 8; Commission Regulation (EU) No 461/2010 [2010] OJ L129 ('Motor Vehicles BER of 2010'), Preamble 14. See also Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EU Treaty, Commission Programme No 99/207, 28 April 1999 ('Modernisation White Paper'), paras 29–33; Communication from the Commission, 'Guidelines on the application of Article 81(3) of the Treaty' OJ C101, 27 April 2004 ('Commission Article 101(3) Guidelines'), para 35.

[4] This aim is reflected in the Recital of Regulation (EEC) No 19/65 [1965] OJ36 ('Enabling Regulation on Vertical Agreements') noting that 'in view of the large number of notifications submitted in pursuance of Regulation No 17 it is desirable that in order to facilitate the task of the Commission it should be enabled to declare by way of regulation that the provisions of Article [101(1)] do not apply to certain categories of agreements and concerted practices'. A similar statement was later repeated in the Recital of Council Regulation (EEC) No 1534/91 [1991] OJ L143 ('Enabling Regulation on Insurance').

[5] 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] OJ L1/1 ('Regulation 1/2003').

[6] As shown empirically in O Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge University Press, 2022), figs 4.1, 4.5.

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over and under inclusive'.[7] They were dubbed as a 'fossilised' administrative device, '*relics* from the past' providing certain sectors or practices with a unique competition analysis in a manner that distorts consistent enforcement across all markets and sectors and does not match any proper economic justification.[8] This criticism was particularly directed at sectoral BERs, which apply to specific sectors rather than to certain types of practices. They were regularly condemned as a means of market regulation and undue protectionism, which cannot be squared with the effects-based approach of modern EU competition law enforcement.

Although BERs have lost much of their functional, constitutional, and substantive footings,[9] EU competition law has kept this instrument. Regulation 1/2003 did 'not affect the validity and legal nature' of the BERs.[10] Despite some suggestions, they were not replaced with guidelines detailing the application of Article 101 TFEU to specific circumstances, sectors, or practices, which could have provided undertakings with some legal certainty.[11]

Why do BERs still exist in EU competition law? This article proposes that BERs are not merely a procedural-administrative tool aimed at workload reduction or at increasing legal certainty. They are also the expression of a clearly defined political consensus on the appropriate balance between competition and public policy considerations.[12] The article maintains that BERs *were already used* to account for public policy. They have exempted otherwise anti-competitive agreements in favour of helping EU firms to compete internationally, levelling the playing field for small and medium enterprises ('SMEs'), mediating the effects of economic crisis, and safeguarding stability and security of supply of services in liberalised sectors. Furthermore, it suggests that BERs *should be further used* to resolve some of the pressing challenges of EU competition law, such as determining the degree and form of permitted cooperation between undertakings to achieve sustainability goals or the protection of workers' rights in the gig-economy. Notwithstanding the notorious reputation BERs have (perhaps rightly so) gained over the years, BERs *can*—and *should*—be used as an instrument to develop the EU's internal and external industrial policy and account for other public policy considerations.

This is certainly not a popular contention. In fact, it goes against the vast majority of scholarship on the matter.[13] Nevertheless, this article defends BERs by submitting

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[7] G Monti, 'New Directions in EC Competition Law' in T Tridimas and P Nebbia (eds) *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart Publishing, 2004), p 186.

[8] F Marcos and A Sanchez-Graells 'A Missing Step in the Modernisation Stairway of EU Competition Law–Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?' (2010) 6(2) *Competition Law Review* 183, pp 190, 200.

[9] This is elaborated in Section II.B below.

[10] Commission Article 101(3) Guidelines, note 3 above, para 2. See also SEC(2009) 574 final, Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, p 11.

[11] See discussion in Part V below.

[12] See discussion in Part III below.

[13] See discussion in Part II below.

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that they have the potential to function as a superior balancing instrument in comparison to the conventional tools that were used to take into account public policy consideration—including Article 101(3) TFEU individual exemptions,[14] the legal doctrines developed by the EU Courts to conclude that there is no restriction of competition under Article 101(1) TFEU (eg the *Wouters* exception),[15] soft policy instruments such as the Commission's guidelines, and decisions not to enforce Article 101 TFEU due to public policy considerations (balancing by means of enforcement discretion).[16] BERs are supported by a wide political agreement of Member States, EU institutions, businesses, and public interests groups, and offer pre-determined and transparent rules to strike a balance between values that cannot be reconciled. They can safeguard the political accountability and democratic legitimacy of the independent competition authorities, particularly when faced with sensitive legal, economic, or societal challenges; promote uniformity and legal certainty in the decentralised self-assessment enforcement setting; enhance efficiency by reducing compliance and enforcement costs; invite scrutiny and debate that will lead to the adoption of more effective rules; and foster experimentalism and flexibility.

The article is constructed as follows: Part II begins by presenting the traditional workload-reducing function and legal certainty motivation of the BERs and how they were diminished following the entry into force of Regulation 1/2003. By focusing on the text of the BERs and the description of the political and public debate surrounding their adoption, application, and amendments, it highlights the turn of the tide against the BERs since the 1990s and the growing criticism of this enforcement device.

Part III suggests that the survival of the BERs can be explained by their role as a tool to account for public policy considerations and the development of the EU industrial policy. Introducing an alternative characterisation of the BERs enforcement device, this part takes a positivist law approach. It demonstrates the balancing role of the BERs by analysing the provisions of various general and sectoral BERs, the legislative process preceding their adoption, and their interpretation in the Commission's guidelines and annual reports.

Part IV, takes a more normative stance. It defends BERs as a legitimate and effective balancing tool having significant advantages over the 'traditional' balancing

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[14] On the balancing function of Article 101(3) TFEU individual exemptions, see G Monti, 'Article 81 EC and Public Policy' (2002) 39(5) *Common Market Law Review* 1057; C Townley, *Article 81 EC and Public Policy* (Bloomsbury Publishing, 2009); B Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Wolters Kluwer, 2012), pp 253–66; O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities" (2019) 56(1) *Common Market Law Review* 121.

[15] Van Rompuy, note 14 above, pp 229–52. For an empirical account of these developments, see Brook, note 6 above, ch 5.

[16] Brook, note 6 above, ch 7; O Brook, 'Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy' (2020) 16(4) *Journal of Competition Law and Economics* 435.

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tools of Article 101(1) TFEU doctrines, Article (3) TFEU individual exemptions, and balancing by means of enforcement discretion. Part V rejects proposals to replace BERs with guidelines, arguing that guidelines do not offer similar advantages when it comes to the consideration of public policy.

Finally, Part VI concludes, calling to make greater use of BERs for balancing purposes. Such function, it is argued, may be particularly welcomed to tackle new and old challenges, such as those related to sustainability agreements, promoting the EU's internal and external industrial policy, and protecting vulnerable workers' rights.

II. THE DIMINISHING OF THE TRADITIONAL FUNCTION AND LEGITIMACY OF THE BERS

A. BERs Prior to the Modernisation of EU Competition Law

The genesis of the BERs is inherently tied to workload-reducing concerns. Article 103 TFEU, the legal basis for adopting BERs, entrusts the Council, on a proposal of the Commission after consulting the European Parliament, to lay down 'detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to *simplify administration* to the greatest possible extent on the other'.[17] By offering a clear set of (relatively) straightforward rules, BERs allowed the Commission to quickly review a large number of agreements without engaging in a case-specific analysis.

The centrality of the workload-reducing function was reflected in the design of the BERs' terms. In the past, each BER included a detailed list of restrictions that could be included in an agreement without infringing Article 101 TFEU ('white' clauses), and restrictions that would cause the agreement to lose the BER's safe harbour ('hard core restrictions' or 'black' clauses). From the mid-1980s, some BERs also included a third category of restrictions that would trigger an 'opposition procedure' ('grey' clauses). Accordingly, provisions that did not fall under either the permitted or prohibited lists had to be notified to the Commission, but were presumed to be exempted unless the Commission opposed them within six months.[18]

This design facilitated a formalistic competition law analysis. Once an agreement was notified to the Commission, the investigation was based on a 'pigeon-holing' exercise—verifying that the agreement only contained white clauses and did not include hardcore restrictions or clauses triggering the opposition procedure. Centring on determining whether an agreement contained certain provisions and omitted others, the Commission could swiftly review the notified agreements. In

[17] Article 103(b) TFEU (emphasis added).

[18] The opposition procedure was first included in Commission Regulation (EEC) No 2349/84 [1984] OJ L219 ('Patent License BER of 1984'). For an interesting discussion of this procedure, see JS Venit, 'The Commission's Opposition Procedure–between the Scylla of *Ultra Vires* and the Charybdis of Perfume: Legal Consequences and Tactical Considerations' (1985) 22(2) *Common Market Law Review* 167.

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particular, as most of the old BERs did not consider the market power held by the undertakings,[19] the analysis did not call for market definition and share calculation.

The workload-reducing function also guided a rigid interpretation of the BERs. An agreement would lose the protection of the safe harbour even when a trivial or technical detail prevented a single clause from complying with the list of white clauses.[20] Similarly, when doubts arose as to the scope of protected practices, the Commission called to rely on the 'system and aims' pursued by the BERs. A flexible interpretation of their terms, according to the Commission, 'would not be justified in an effort to avoid anticipated difficulties of a practical nature, i.e., a large number of notifications'.[21] Carrying significant administrative benefits, such a formalistic approach eased the burden of notification.

BERs have assisted to reduce the Commission's workload also by providing undertakings with strong legal certainty as to the expected fate of their notified agreements.[22] This legal certainty had two aspects.[23] First, BERs were designed to offer a clear and predictable set of rules, leaving a limited margin of discretion as to their application to a specific agreement.[24] While the Commission could withdraw the benefits of a BER when a specific agreement produced effects that were incompatible with the conditions of Article 101(3) TFEU,[25] in practice it has hardly made use of such powers.[26] Second, the legal certainty was strengthened by the Commission's statements—in a formal decision, informal comfort letter, or by lack of an objection in an opposition procedure—confirming that the agreement can benefit from the BER. The strong legal certainty offered by BERs had incentivised firms to conclude agreements that complied with the BERs' terms, which in turn, reduced the Commission's workload in assessing them.

Indeed, up until the entry into force of Regulation 1/2003, BERs primarily aimed to lessen the Commission's administrative burden of notifications. When the first BER on Distribution Agreements was adopted in 1967, the Commission was already faced with a backlog of almost 40,000 notifications. The BER had successfully removed almost three-quarters of the cases on the Commission

[19] Commission Regulation (EEC) No 417/85 [1985] OJ L53 ('Specialisation BER of 1985') and Commission Regulation (EEC) No 418/85 [1985] OJ L53 ('R&D BER of 1985'), nevertheless, have included such thresholds.

[20] C-234/89 *Stergios Delimitis v Henninger Brau AG* ECLI:EU:C:1991:91, paras 34–42.

[21] Annual Report 1991, p 89.

[22] *Italy v the Commission and Council*, ECLI:EU:C:1966:42, p 404.

[23] Marcos and Sanchez-Graells, note 8 above, p 193.

[24] Annual Report 1985, p 20; Annual Report 1990, p 44; Annual Report 2020, p 12. This was especially true with respect to the general BERs, which as elaborated in Section III.B below, leave very limited discretion when applied to a specific agreement.

[25] Prior to the entry into force of Regulation 1/2003, note 5 above, the competence to withdraw the benefits of the BERs was provided by each Enabling Regulation. See Enabling Regulation on Vertical Agreements, note 4 above, Art 7; Enabling Regulation on Insurance, note 4 above, Art 7; Council Regulation (EEC) No 2821/71 [1971] OJ L285 ('Enabling Regulation on Standardisation, R&D, and Specialisation Agreements'), Art 7.

[26] See Brook, note 6 above, fig 4.1.

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docket.[27] Similarly, in the mid-1980s, newly adopted BERs were expected to help clear around two-thirds of the Commission's backlog.[28]

The workload-reducing aim has kept its prominence throughout the 1990s and early 2000s. A review of the Commission's annual report reveals that it has become particularly vital upon the enlargement of the EU and the opening-up of new sectors to competition, leading to an increased number of agreements being caught under Article 101 TFEU.[29] The vertical and horizontal BERs adopted in the late 1990s have further lightened the Commission's workload as they no longer required notification of the agreements to benefit from their safe harbour. BERs also helped to alleviate the Commission's workload by sharing the burden of enforcement with national courts. While national courts were not competent to grant an individual exemption, they had the power to declare that an agreement was protected by a BER as a directly applicable regulation.[30]

Alongside the workload-reduction function and the legal certainty benefits, BERs have always had a secondary aim. They were not only designed to reduce the Commission's workload or provide undertakings with legal certainty, but also to harmonise business behaviour across the common market by encouraging undertakings to draft their agreements to mirror the list of white clauses.[31] BERs fostered market integration and cross border trade, helped open liberalised markets to competition, increased the international competitiveness of European firms, and levelled the playing field for SMEs.[32] They played an important part in the arsenal of the EU's internal and external industrial policy tools.

This 'industrial engineering'[33] function is explicitly pronounced by the Council's Enabling Regulations, which entrust the Commission to adopt BERs. The preamble of those regulations declare that 'it is desirable' that the Commission would use BERs to exempt agreements 'if they are modified in such manner as to fall within a category defined in an exempting regulation'.[34] Indeed, the Commission had

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[27] Annual Report 1971, p 57; Annual Report 1979, pp 15–16; Annual Report 1987, p 33.

[28] Annual Report 1985, pp 53–54, 59. See also Annual Report 1983, p 61; Annual Report 1984, p13; Annual Report 1987, p 22; Annual Report 1993, p 120; Opinion of Advocate General Roemer in *Italy v the Commission and Council*, Case 32/65, ECLI:EU:C:1966:14, p 412.

[29] Annual Report 1989, p 47; Annual Report 1990, p 44; Annual Report 1995, p 19.

[30] *Delimitis*, note 20 above, paras 43–46. See also Commission, Notice on Cooperation between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C39, 13 February 1993 ('National Courts Cooperation Notice'), paras 24–27.

[31] V Korah, 'From Legal Form Towards Economic Efficiency—Article 85(1) of the EEC Treaty in Contrast to US Antitrust' (1990) 35 *Antitrust Bulletin* 1009, pp 1033–34; R Wesseling, *The Modernisation of EC Competition Law* (Hart, 2000), p 40; B Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51(4) *The Antitrust Bulletin* 915, p 931; Marcos and Sanchez-Graells, note 8 above, p 190; D Bailey, 'Reinvigorating the Role of Article 101(3) Under Regulation 1/2003' (2016) 8 *Antitrust Law Journal* 111, p 119.

[32] See Part III below.

[33] Wesseling, note 31 above, p 107.

[34] Enabling Regulation on Vertical Agreements, note 4 above; Enabling Regulation on Insurance, note 4 above; Enabling Regulation on Standardisation, R&D, and Specialisation Agreements, note 25 above.

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regularly encouraged undertakings to modify the terms of their agreements to fit the BERs safe harbours,[35] and viewed this market influencing aim favourably up until the first part of the 1990s.[36]

B. BERs Following the Modernisation of EU Competition Law

The turn of the millennium challenged the workload-reducing function, legal certainty benefits, and the market influencing motivation of the BERs. This has led to a three-front opposition against BERs:

First, from a *procedural-pragmatic* point of view, the new enforcement regime of Regulation 1/2003 has obliterated the Commission's task of responding to notifications by shifting to a decentralised self-assessment regime. As the Commission is no longer faced with the burden of responding to notifications, the workload-reducing function of the BERs has mostly lost its value. The new self-assessment regime also decreased the legal certainty BERs provide for undertakings. While BERs still aim to offer clear and predictable set of rules that can assist with self-assessment, the Commission and NCAs generally do not declare—formally or informally—that a specific agreement benefits from the terms of a BER.[37]

Second, from a *constitutional* point of view, the Regulation has transformed Article 101(3) TFEU into a directly applicable provision. Article 101(3) TFEU individual exemptions, like BERs, now have direct effect. This raises doubts about the role of BERs, which under the new enforcement system, 'exempt agreements that are, if they satisfy the four substantive criteria set out in Article [101](3), already exempt'.[38]

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[35] In its Annual Report 1980, p 81, the Commission noted it was the first time since the entry into force of Commission Regulation (EEC) No 67/67 [1967] OJ 57 ('Exclusive Dealing BER of 1967') that it refused to grant an individual exemption to an agreement that was neither exempted by the BER nor was voluntarily amended by the undertakings concerned. Similarly, see Annual Report 1973, p 52; Annual Report 1978, p 71; Annual Report 1979, pp 16, 57; Annual Report 1981, p 51; Annual Report 1983, p 69. In its Annual Report 1985, p 37, the Commission stated that after the adoption of the Motor Vehicles BER, note 3 above, it received notices on the adaptation of agreements to the terms of the BERs pertaining to 'most of the approximately 400 pending notified agreements of this kind'.

[36] Annual Report 1987, p 33; Annual Report 1990, pp 44–49; Annual Report 1991, p 93; Annual Report 1992, p 163.

[37] See note 6 above.

[38] A Albors-Llorens and J Goyder, *Goyder's EC Competition Law*, 5th ed (Oxford University Press, 2009), p 638; see also CD Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37(3) *Common Market Law Review* 566; T Wiβeman, 'Decentralised Enforcement of EU Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999' (2000) 23(2) *World Competition* (2) 123, p 142. A similar critique was raised by several Member States' delegations during the negotiations over Regulation 1/2003, note 5 above. See Progress Report from the Presidency to CORPER/COUNCIL (industry/energy), 'Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 13563/01' of 20 November 2001, p 46.

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Third, from a *substantive* point of view, there was a growing feeling of unease as to the BERs' compatibility with the more economic approach to EU competition law.[39] *Korah* and *Hawk* famously warned against the 'straitjacket effect' of BERs,[40] submitting that their formalistic approach had strongly incentivised firms to alter efficient agreements as not to risk losing the legal certainty brought by the BERs.[41] This left firms very little leeway to shape the terms of their commercial transactions, in a manner that benefited neither businesses nor consumers, stifled innovation, and deterred the conclusion of pro-competitive agreements.[42]

While often attributed to those two commentators, a similar line of criticism was already raised a decade earlier by the European Parliament. Noting the 'inadequate manpower resources available to DG IV', the Parliament warned against 'an excessive dependence on techniques to "short cut" proper competition procedures', including 'persuading companies to adapt their procedures to conform with block exemptions instead of applying its discretionary power to grant individual exemption in each case'.[43] The overreliance on BERs, according to the Parliament, had artificially limited the operation of businesses in the EU while ignoring the changing commercial, economic, and technological realities.[44]

Towards the late 1990s, the criticism against the straitjacket effect of the BERs was widely accepted by the Commission[45] and the epistemic community[46] alike. The first seeds of a transformation were already planted in the Technology Transfer BER of 1996,[47] yet the Vertical Agreements BER of 1999 was the first to fully represent a new generation of BERs.[48] It abolished the list of permitted practices and the

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[39] See also Commission Staff Working Document, 'Evaluation of the Vertical Block Exemption Regulation', SWD(2020) 173 final ('Vertical BERs Working Paper'), p 10.

[40] This term was coined by V Korah, *An Introductory Guide to EEC Competition Law and Practice*, 4th ed. (Sweet and Maxwell, 1990), p 233. See also Korah, note 31 above, pp 1033–34. The term was later used by the Commission in its Annual Report 1996, p 31; Annual Report 1998, pp 21–22; Annual Report 1999, p 7; Annual Report 2003, p 19.

[41] V Koarh, 'Group Exemptions for Exclusive Distribution and Purchasing in the EEC' (1984) 21 *Common Market Law Review* 53, p 77.

[42] B Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973.

[43] European Parliament, 'Resolution on the Fourteenth Report on Competition Policy of the Commission of the European Communities' OJ C 345, 31 December 1985, para 33.

[44] Ibid.

[45] Annual Report 1996, p 31; Annual Report p 1998, 21–22; Annual Report 1999, p 8; COM (96) 721 final, *Vertical Restraints in EC Competition Policy*, Green Paper ('Green Paper on Vertical Agreements'), para 37.

[46] See, for example, R Whish, 'Regulation 2790/99: The Commission's New Style Block Exemption for Vertical Agreements, (2000) 37(4) *Common Market Law Review* 887; A Riley 'EC Antitrust Modernisation: The Commission Does Very Nicely-Thank You! Part One: Regulation 1 and the Notification Burden' (2003) 24(11) *European Competition Law Review* 604, p 605; Albors-Llorens and Goyder, note 38 above, pp 209–10; Sufrin, note 31 above, pp 932–33.

[47] The BER significantly reduced the list of hardcore restrictions and was the first to abolish the opposition procedure.

[48] Annual Report 2003, p 19. See also Annual Report 1999, pp 23–25.

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opposition procedure—granting undertakings the freedom to devise their agreements according to their commercial needs—and subjected the exemption to the market power held by the undertakings by setting a market share threshold. Subsequent BERs followed this more effects-based approach.

The new generation of BERs has helped to align the terms of the BERs to the new era of EU competition law enforcement. At the same time, the new generation of BERs undermine the workload-reducing function and legal certainty benefits associated with the BERs because they require the undertakings—and the Commission, NCAs, and courts upon review—to engage in market definition and market share calculations. This is a resource-intensive exercise that generates uncertainties particularly when the definition of markets is challenging, or when the undertakings' market shares are not far from the protected threshold.[49]

Despite the procedural, constitutional, and substantive challenges, in the past 20 years, only very limited scholarship had criticised the BER instrument as such.[50] This is particularly true with respect to the general BERs, which exempt categories of business practices and apply without distinction to all sectors (eg Horizontal and Vertical Agreements BERs). As elaborated in Section III.B below, such BERs are typically less contentious because they are aligned with the more economic approach to Article 101(3) TFEU individual exemption, and apply to agreements having limited anti-competitive effects or that can be justified by economic efficiencies.

At the same time, sectoral BERs (sometimes also known as industry-specific BERs), are still condemned as protectionist measures sheltering inefficient industries and impeding market efficiency.[51] For that reason, in parallel to the shift to the effects-based BERs, the Commission began to eliminate the number and range of the sectoral BERs: the Vertical Agreements BER of 1999 had replaced several older BERs that dealt with specific forms of vertical restraints.[52] The Commission explained the codification of the rules into a single BER by the desire to avoid 'as far as possible, a policy bias in the choices companies make concerning distribution formats' and promote commercial choices that are 'based on commercial merit and not, as under the current system, on unjustified differences in exemptability'.[53] For similar reasons, that BER revoked the sector-specific rules for beer and petrol, noting that awarding such special treatment was 'not justified on economic or legal grounds'.[54] According to the Commission, even when

[49] Marcos and Sanchez-Graells, note 8 above, p 199.

[50] See notes 38–48 above for some notable exceptions.

[51] Koarh, note 41 above, pp 71–72; Wesseling, note 31 above, p 40; Marcos and Sanchez-Graells, note 8 above, pp 199–200; V Korah, *An Introductory Guide to EC Competition Law and Practice*, 8th ed (Hart Publishing, 2004), pp 88–89.

[52] Annual Report 1998, pp 30–31.

[53] Ibid.

[54] Ibid. See also Koarh, note 41 above, pp 71–72.

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sector-specific treatment is justified, it should be detailed in guidelines rather than in a BER.[55]

This trend was followed with the decision to let the Insurance BER lapse after it expired in March 2017,[56] and the progressive reduction of the special rules protecting agreements in the transport sector.[57] While the Commission abolished many of the sectoral BERs or replaced them with non-binding guidelines, they still exist. Sectoral BERs shelter anti-competitive practices related to the conditions for the purchase, sell or resell of spare parts for motor vehicles and the repair and maintenance services, technical agreements and grouping of SMEs in the field of inland transport, and liner shipping (consortia),[58] despite continuing condemnation noting they are not in line with economic theory.[59]

The following parts maintain that the survival of both general and sectoral BERs can be explained—and justified—by their role as a balancing tool to account for public policy considerations. The next part first demonstrates this role and Part IV advocates the use of BERs for such a purpose.

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[55] Annual Report 1998, 99, 30–31.

[56] This decision was based on the Report from the Commission to the European Parliament and the Council on the Functioning of Commission Regulation (EC) No 267/2010 on the Application of Article 101(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector SWD(2016) 62 final. See also F Marcos and A Sanchez-BERs, 'Some Preliminary Views on the Revision of the Insurance Block Exemption Regulation' (2009) 30(10) *European Competition Law Review* 475.

[57] The rules for transport were set forth in regulations detailing the application of Article 101 and 102 TFEU to different transportation services rather than only granting group exemptions. See Council Regulation (EC) No 1419/2006 [2006] OJ L269 ('Regulation on Maritime Transport of 2006') repealing Council Regulation (EEC) No 4056/86 [1986] OJ L378 ('Regulation on Maritime Transport of 1986); Council Regulation (EC) No 169/2009 [2009] OJ L61 ('Regulation on Inland Transport of 2009') which repealed Regulation (EEC) No 1017/68 [1968] OJ L175 ('Regulation on Inland Transport of 1968') yet retained some sector-specific exemptions; Council Regulation (EC) No 487/2009 [2009] OJ L148 ('Regulation on Air Transport of 2009'), which repealed Council Regulation (EEC) No 3976/87 [1987] OJ L374 ('Regulation on Air Transport of 1987). Regulation 1/2003, note 5 above, repealed the special procedural rules for transport agreements and broadened the Commission's enforcement powers in that sector.

[58] Motor Vehicles BER of 2010, note 3 above; Regulation on Inland Transport of 2009, note 57 above; Commission Regulation (EU) No 2020/436 [2020] OJ L90 extending the period of application of Commission Regulation (EC) No 906/2009 [2009] OJ L256 ('Consortia BER of 2009').

[59] With respect to motor vehicle distribution, see for example, SM Colino, 'Recent changes in the regulation of motor vehicle distribution in Europe–Questioning the logic of sector-specific rules for the car industry' (2010) 6(2) Competition Law Review 203; F Wijckmans and F Tuytschaever, *Vertical Agreements in EU Competition Law* (Oxford University Press, 2011), pp 293-299. With respect to liner shipping, see R Greaves, *EC block exemption regulations* (Chancery Law, 1994), pp 111-112; C Townley, 'The Liner Shipping Block Exemptions in European Law: Has the Tide Turned?' (2004) 27(1) *World Competition* 107; M Levitt and C Ziegler, 'The European Commission's Extension of the Liner Shipping Consortia Block Exemption Regulation until April 2020' (2014) 5(10) *Journal of European Competition Law and Practice* 696.

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III. A TOOL TO ACCOUNT FOR PUBLIC POLICY CONSIDERATIONS

A. Two Preliminary Observations: The Role of Public Policy Considerations in Article 101 TFEU

Before moving to discuss the role of public policy considerations in the BERs, some introductory remarks must be made about the role of such considerations in Article 101 TFEU enforcement more generally. This topic is subject to a heated debate for many years and was reignited recently upon growing calls to tolerate some anti-competitive agreements that safeguard environmental protection,[60] industrial policy objectives,[61] or workers' rights in the gig-economy.[62] Whereas a detailed account of such discussion goes beyond the scope of this article, it is sufficient to note the following two preliminary observations:

The first observation is that there is no doubt that up until the entry into force of Regulation 1/2003 in May 2004, public policy considerations have regularly played a role in the enforcement.[63] A wide array of non-competition interests—such as maintaining adequate levels of employment, promoting culture, increasing social cohesion, and reducing omissions—were taken into account when granting Article 101(3) TFEU individual exemptions, as well as by legal doctrines that were developed by the EU Courts declaring that there was no restriction of competition in the meaning of Article 101(1) TFEU when an agreement was justified due to overriding public or commercial interests.

The role of public policy considerations following modernisation is more quarrelsome. Some argue that the Courts' old case law leaving room for public policy considerations was based on the lack of direct applicability of Article 101(3)'s individual exemptions. Since Regulation 1/2003 had transformed the Article into a directly applicable provision, the argument goes, the provision should no longer leave room for balancing as to allow it to be clear, precise, and unconditional.[64] Others contest this view, as well as the Council's competence to alter the nature of Article 101(3) TFEU by means of Regulation 1/2003.[65] Such debate, nevertheless,

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[60] See, for example, S Kingston, 'Competition Law in an Environmental Crisis" (2019) 10(9) *Journal of European Competition Law & Practice* 517; S Holmes, 'Climate Change, Sustainability, and Competition law" (2020) 8(2) *Journal of Antitrust Enforcement* 354.

[61] See, for example, I Lianos, 'The Future of Competition Policy in Europe: Some Reflections on the Interaction between Industrial Policy and Competition Law' (2019) 2 *Concurrences*.

[62] See, for example, G Monti, 'Collective Labour Agreements and EU Competition Law: Five Reconfigurations' (2021) 17(3) *European Competition Journal,* 714.

[63] See note 14 above.

[64] In the words of Case C-26/62, *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1, pp 12-13.

[65] See discussion in R Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' (1999) 20 (8) *European Competition Law Review* 420, at 425, 432-433; H Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Article 81' (2007) *EUI Working Papers LAW 2007/30*, pp 5, 8-9; C Semmelmann, 'Non-competition goals in the interpretation

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is mostly relevant for the issuance of individual exemptions. It has only a limited bearing when it comes to the consideration of public policy within BERs, which as mentioned—were always directly applicable.

The search for the role of public policy considerations following modernisation is further unclear since as a matter of policy, the Commission has been advocating an interpretation that considerably narrows down the room for such considerations and focuses the analysis on the impact of a practice on consumer welfare and economic efficiencies. Nevertheless, although the Commission has a central role in enforcing and developing EU competition law and policy, only the European Court of Justice ('ECJ') is competent to take decision on the interpretation of EU competition law. The ECJ, however, did not fully and clearly endorse the Commission's narrow interpretation. In fact, the EU Courts and some national competition authorities and courts sometimes continue to follow a broader interpretation leaving much leeway for the consideration of public policy.[66]

The second preliminary observation necessary for our discussion is that despite the common legal basis of Article 101(3) TFEU individual exemptions and the BERs—including the presumption that the BERs protect categories of agreements that satisfy the conditions of Article 101(3) TFEU, the law and policy on the role of public policy considerations in applying each of those instruments have developed rather independently. This might be tied to the different institutional settings. As elaborated in Section IV.A below, while individual exemptions are granted by the Commission and NCAs,[67] BERs are the proceeds of a lengthy political compromise involving all of the EU institutions, the Member States, members of the industry, and interest groups. Such actors often envisioned a more multi-faceted competition regime than the Commission, pursuing multiple policy objectives.[68] As such, by design, BERs are more likely to reflect a wide array of public policy considerations beyond the protection of competition in comparison to individual exemptions.

B. The Role of Public Policy in Both General and Sectorial BERs

Keeping the above two preliminary observations in mind, this section moves to examine the role of public policy in BERs.[69] The

(F'note continued)
of Article 81 EC' (2008) 1(1) *Global Antitrust Review*, 15, at pp 196-198; Townley, note 14 above, pp 80-81, 96-98, 138.

[66] Brook, note 14 above.

[67] According to Regulation 1/2003, note 5 above, Article 5, NCAs can only issue 'no grounds for action' findings when they believe here are no grounds for action on their part.

[68] For an interesting study of the approaches as reflected in the discourses used by the political party groups in the European Parliaments Plenary see F Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54(4) *Journal of Common Market Studies* 826.

[69] The consideration of public policy in BERs is not limited to Article 101 TFEU. Article 109 TFEU - as applied by Council Regulation (EC) No 994/98 [1998] OJ L142, amended by Council Regulation (EU) No 733/2013 [2013] OJ L204 – allows the Council to enable the Commission to adopt BERs

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Commission[70] and the literature[71] often distinguish between two types of BERs: general and sectoral. As elaborated below, those two types of BERs differ in the nature of considerations they take into account and the margin of discretion left in their application. While general BERs mostly focus on the balance between competition interests and economic efficiencies and leave only limited discretion to balance when applying them to a specific agreement, sectoral BERs incorporate wider types of public policies and merit a broader discretion. This section suggests that when it comes to the consideration of public policy, the two types of BERs are not as different as they may appear. Notwithstanding some important differences, both can and are being used to justify some limitations of competition in favour of promoting EU industrial policy and other public policy considerations.

Sectoral BERs express a relatively clear balance between competition and public policy. They reflect a tailored, industry-specific political balance between multiple considerations, going beyond the efficiency-focused approach to Article 101(3) TFEU individual exemptions that has been advocated by the Commission following modernisation. By taking a more favourable view of certain restrictions of competition, and often setting higher market share thresholds in comparison to the general BERs,[72] sectoral BERs allow the Commission to 'find a reasonable compromise between the many interests involved'.[73]

Many sectoral BERs were adopted to regulate markets undergoing privatisation and liberalisation.[74] For instance, at a time various means of inland, maritime, and

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(F'note continued)

to exempt state aid that is deemed compatible with the internal market. The state aid BERs are more transparent in admitting that they serve as a means to balance the protection of competition and the promotion of a host of public policies, including aid to SMEs, R&D, environmental protection, employment, culture and heritage conservation, natural disasters, sports, and social cohesion (see Article 1 (1)(a) of the Regulation and M Blauberger, 'From Negative to Positive Integration: European State Aid Control Through Soft and Hard Law' (2008)08/4 MPIfG Discussion Paper, p 6). While the state aid BERs are not free from criticism, their existence as a balancing tool is considerably less contentious. This could be explained by their subject matter – state aid rules pertain to the consideration of public interest by governments and not by private undertakings; as well as by the different enforcement setting, namely that state aid is notified to the Commission for prior approval, similarly to the old enforcement regime for Article 101 TFEU.

[70] Motor Vehicles BER of 2010, note 3 above, Preamble 1.

[71] See, for example, Greaves, note 59 above, pp 6, 115; Wesseling, note 31 above, p 40; Monti, note 14 above, pp 1078–83; Marcos and Sanchez-Graells, note 8 above, p 185.

[72] While the Horizontal Agreements BERs apply to agreements between competitors having a combined market share that does not exceed 15%, the Consortia BER of 2009 provides that the exemption applies when the combined market share of the vessel-operating carriers does not exceed 30%, and the Insurance BER of 2010, exempted certain types of agreements regardless of the market share hold by the undertakings, and others based on a combined market share threshold of 20–25%.

[73] COM(2000) 743 final, Report on the Evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain Categories of Motor Vehicle Distribution and Servicing Agreements 15 November 2000, p 15.

[74] Commission Regulation (EEC) No 1617/93 [1993] OJ L155 ('Air Services BER of 1993'); Annual Report 1996, p 44.

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air transport and the insurance sector opened to competition, sectoral BERs were introduced to facilitate a second-best solution in previously state-owned or heavily regulated markets. Whereas full competition is not deemed desirable or possible in such markets, they offer a confined and limited degree of competition.[75] They limited competition to ensure the stability and quality of such services and of the undertakings providing them and safeguarded national interests.

Sectoral BERs are highly contentious because they embed a wide array of public policy considerations. As such, they give raise to a risk of instrumentalising the competition rules for a quasi-regulatory purpose, shifting the focus of analysis away from the potential anti-competitive effects of the agreements and serve as a means of *ex ante* regulation intended to meet the objectives of sector-specific regimes.[76] The Regulation on Inland Transport, for example, did not only grant a safe harbour for technical agreements promoting efficiencies,[77] but also accepted serious restrictions of competition such as grouping of SMEs into purchasing and crisis cartels.[78] The Regulation on Maritime Transport exempted serious restrictions of competition including the fixing of rates and conditions of carriage and market-sharing agreements, invoking 'the distinctive characteristics of maritime transport'.[79] Such types of restrictions are unlikely to be accepted under the rules and practices governing the interpretation of Article 101(3) TFEU individual exemptions.

Sectoral BERs do not only differ from general BERs in their subject matter, but also in the type of analysis they require. Sectoral BERs typically merit a more nuanced analysis, leaving the Commission, NCAs, and EU and national courts wider discretion when applying them to a specific agreement. Some sectoral BERs order a full competition analysis which does not significantly differ from the application of Article 101(3) TFEU individual exemptions.[80] Others call for a proportionality test. The Motor Vehicles BER of 2002, for instance, required the Commission, NCAs, and courts to determine what is the legitimate level of access to technical information, diagnostic, and other equipment that is necessary to meet the independent repairers' needs or for the implementation of environmental protection measures.[81] Such a decision merits a value judgment as to the appropriate

[75] When describing regulation on air transport, for example, the Commission note they 'meet a real need for legal security on the part of air carriers and other operators on the market and at the same time *encourage them to abandon earlier, more restrictive practices*' (emphasis added). See Annual Report 1989, p 40.

[76] On the use of competition law as regulation more generally, see P Ibáñez Colomo, 'On the Application of Competition Law as Regulation: Elements for a Theory' (2010) 29(1) *Yearbook of European Law* 261, pp 277, 282.

[77] Regulation on Inland Transport of 1968, note 57 above, Arts 3, 5.

[78] Ibid, Arts 4, 6. Some of those provisions still exist in the Regulation on Inland Transport of 2009, note 57 above. For a detailed discussion, see R Greaves, *Transport Law of the European Community* (Atlantic Highlands, 1991), pp 129–42, 173–83.

[79] Regulation on Maritime Transport of 1986, note 57 above, Preamble.

[80] See, for example, Regulation on Inland Transport of 1968, note 57 above, Art 5.

[81] Commission Regulation (EC) No 1400/2002 [2002] OJ L203 ('Motor Vehicles BER of 2002'), Art 4(2).

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balance between the protection of competition and the safeguarding of the independent repairers' interests and environmental protection aims. In addition to questions surrounding the democratic legitimacy and political accountability of the Commission and NCAs to take such decisions,[82] this degree of discretion may limit the legal certainty provided by the sectoral BERs and workload-reducing potential of the BERs.

General BERs, by comparison, might not appear to serve a balancing function at first sight. As mentioned, they mostly address agreements that do not significantly restrict competition or that create economic efficiencies despite restricting the commercial freedom of the undertakings. The Horizontal and Vertical BERs, for example, declare that they accommodate benefits associated with risk sharing, cost-saving, increased investments, pooling of know-how, enhancement of product quality and variety,[83] research and development ('R&D'), and innovation.[84] The types of economic efficiencies the general BERs take into account, therefore, mostly mirror the scope left to the consideration of such policies within Article 101(3) TFEU individual exemptions.

Such considerations are clearly relevant under Article 101(3) TFEU, even according to the more economic approach advocated by the Commission. Yet, striking a balance between the harm to competition caused by an agreement and the generated efficiencies is not purely an economic, value-free exercise. BERs do not solely rely on a strict welfare analysis and often require a policy compromise between conflicting and incommensurable values.[85] This is admitted by the Commission, noting that 'strict economic theory is just one of the sources of [the Vertical BERs] policy'.[86] General BERs also reflect a specific choice between different measures of allocative, productive, and dynamic efficiencies and between short- and long-term effects.

The need to strike such a balance was reflected in the Commission's account of the legislative process preceding the adoption and the amendment of the BERs. In its 1983 annual report, for example, it explained that when drafting the provisions of the R&D BERs its 'basic approach has been to seek the best possible balance between on the one hand a *reinforcement of the competitivity of European industry* and on the other hand the maintenance of workable competition'.[87] Similar considerations guided the adoption of the Technology Transfers BERs in 1996, aiming to establish a balance between 'the creation of a legal environment that will *promote technical innovation and its dissemination* within the European Union, while at

[82] See Section IV.A below.

[83] Specialisation BER of 2010, note 3 above, Preamble 6; Communication from the Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements OJ C 11 14.1.2011, para 2.

[84] R&D BER of 2010, note 3 above, Preamble 5; Vertical Agreements BER of 2010, note 3 above, Preamble 6.

[85] A Jacquemin, *Theories of Industrial Organization and Competition Policy: Competition, Efficiency, and Welfare* (Springer, 1999), pp 199–222. Also see Van Rompuy, note 14 above, p 168.

[86] Green Paper on Vertical Agreements, note 45 above, para 86.

[87] Annual Report 1983, p 44.

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the same time ensuring that healthy competition and the *completion of the single market* are not affected'.[88]

Moreover, at times, general BERs went beyond the balancing of economic efficiencies. Some were directly designed to offer SMEs an advantageous position on the market,[89] or to strengthen the ability of the European industry to compete internationally.[90] Others were directed at facilitating free movement of goods across borders and market integration.[91] General BERs were also used to mediate the effects of EU accession in new Member States. The Exclusive Purchasing BER, for example, eased the conditions for exemption for agreements that were in force in Spain and Portugal on the date of their accession.[92] More recently, it was suggested that general BERs may also include provisions on sustainability agreements.[93]

The above demonstrates that both general and sectoral BERs were—and can be—used to limit competition in favour of promoting the EU's external and internal industrial policy or other public policies. Although sectoral BERs typically do that more openly and may leave greater leeway and flexibility for the competition authorities, general BERs are not limited to the balance of pro- and anti-competitive effects. The next part suggests that there are good reasons for the continued use of both general and sectoral BERs for the consideration of public policies within the EU competition law enforcement regime.

IV. THE BENEFITS OF BERS AS A BALANCING TOOL

Using BERs to balance competition and public policy considerations is problematic, to say the least. It opens the door for abuse of the political process, to the lingering of suspicious lobbying efforts and protectionism and to regulatory capture, and may threaten the legitimacy, credibility, and economic soundness of EU competition

[88] Emphasis added. Annual Report 1996, p 25. See also Annual Report 1994, p 24.

[89] Emphasis added. Annual Report 1982, p 26; Annual Report 1983, p 32; Annual Report 1984, p 33; Green Paper on Vertical Agreements, note 45 above, para 183; Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations SWD(2021) 104 final ('Horizontal BERs Consultation of 2021'), p 9.

[90] Ibid, p 8.

[91] For horizontal agreements, see the Preamble of the Enabling Regulation on Standardisation, R&D and Specialisation Agreements, note 25 above. For vertical agreements, see Green Paper on Vertical Agreements, note 45 above, para 181. For the Franchising BER, see Annual Report 1991, p 92; Annual Report 1993, pp 89, 93; Annual Report 1994, pp 20–21.

[92] Commission Regulation (EEC) No 1984/83 [1983] OJ L173 ('Exclusive Purchasing BER of 1983'), Art 15(3)–(4), as added by Treaty (signed on 12 June 1985) between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Communities), and the Kingdom of Spain and the Portuguese Republic concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community OJ 1985 L302, Art 26.

[93] Section IV.A below.

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law enforcement. Undoubtedly, the reservations made about the BERs—and especially the sectoral ones—were reinforced given the involvement of pressure groups in their adoption and some dubious choices as to their scope and terms. One example is the Motor Vehicles BER. Applying to vehicles having three or more wheels (and not to motorcycles),[94] it was openly adopted to protect the interest of competitors and not only of competition.[95] Such concerns may be amplified given the lack of a guiding principle as to when sector-specific rules are codified within a BER, and when they are regulated by soft law instruments. For example, while vehicles having three or more wheels are subject to the BER, motorcycle distribution is governed by a press release;[96] while changing market conditions in the air transport sector were embedded in the terms of the BERs, a communication was used to relax the competition rules to remedy adverse effects caused to the airline industry during the Gulf War.[97]

That said, this part presents arguments supporting the use of BERs. It suggests that adequately drafted BERs can offer a pre-determined and transparent balancing tool, which promotes the uniformity and legal certainty within the decentralised self-assessment regime of Regulation 1/2003 and safeguards the political accountability and legitimacy of EU competition law to a greater extent than other 'conventional' balancing tools. BERs can facilitate a debate on the role of public policy, reduce compliance and enforcement costs, and provide a scope for regulatory flexibility and experimentalism.

It should be noted from the outset that this is not to say that using BERs for balancing purposes is flawless, nor that it cannot be (ab)used for populist or protectionist purposes. Rather, it is argued that BERs offer a superior balancing tool in comparison to the traditional balancing tools of Article 101(1) and (3) individual exceptions, the Commission's guidelines, or balancing by the exercise of enforcement discretion, and that some of the flaws associated with balancing via BERs can be remedied by facilitating debate and wider participation.

A. Safeguarding Independence in Parallel to Democratic Legitimacy and Political Accountability

One of the main arguments against the consideration of public policy within Article 101 TFEU stems from the institutional makeup of EU competition law enforcement. When the Commission and NCAs enforce Articles 101 and 102 TFEU, they

[94] Art 1.

[95] The Commission declared that the amendment of the Motor Vehicle BER aimed 'to strengthen competition on the motor vehicle market and, at the same time, to ensure a better balance between the interests of the various groups concerned, namely motor vehicle manufacturers, component manufacturers, dealers belonging to the manufacturers' networks, component distributors, garages and consumers'. See Annual Report 1994, p 88; Annual Report 1996, p 33.

[96] Press release IP/92/544, 3 July 1992, in the Honda case. Also see Annual Report 1996, pp 132–33.

[97] C91 422 final (1991), 'the Effects of the Gulf Hostilities for the European Air Transport Industry'. See also Annual Report 1991, p 37.

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generally enjoy a high degree of independence from political influences and external pressures.[98] They cannot seek or receive instructions from governments and from other public or private entities. This is particularly true when it comes to the consideration of public policy. The competition authorities must act independently when they apply Articles 101(1) and (3) TFEU to a specific agreement and when deciding whether or not to pursue a specific case.

While the independence of the authorities protects the integrity of EU competition law, it may not fit the task of balancing interests. Commentators have already recalled that competition authorities—and especially the NCAs—are lacking the political accountability and democratic legitimacy to strike a balance between the incommensurable legal, economic, and social considerations.[99]

Against this background, BERs provide a unique *ex ante* policy tool for the consideration of public policy, which is the result of a lengthy and continuous political-democratic cycle. By streamlining the competition authorities' discretion to balance the competing interests, BERs can reinforce the democratic legitimacy and political accountability of their decisions without compromising their independence in a specific case. The process of adopting, revising, and applying a BER is a unique phenomenon in EU competition law in that it allows the Member States, Council, Commission, EU Courts, EU Parliament, NCAs, and members of the industry and interest groups to be directly involved in the formulation and application of the EU competition rules.[100] As elaborated below, BERs are a constantly evolving legal tool, as each BER is adopted for a limited time,[101] typically expiring after a period of between ten to fifteen years.

The adoption of a BER begins with an Enabling Regulation. Adopted by the *Council*, it entrusts the Commission to enact BERs dealing with a certain category of agreements. Over the years, the Member States insisted that the Council—formed by the heads of the Member States—will retain control over the scope and timing of adopting BERs. Thus, when the first Enabling Regulation was proposed by the Commission in the mid-1960s, the Council rejected the Commission's call for a one-time delegation of powers that would have left the Commission a free hand in deciding what BERs to adopt and when.[102] Similarly, in the course of the negotiations preceding the adoption of Regulation 1/2003, the Member States refused to allow the

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[98] Directive 1/2019, Preamble 3, Art 4.

[99] See discussions in S Lavrijssen, 'What Role for National Competition Authorities in Protecting Non-competition Interests After Lisbon?' (2010) 35(5) *European Law Review* 636, p 654; B Wardhaugh, 'Crisis Cartels: Non-Economic Values, the Public Interest and Institutional Considerations' (2014) 10(2) *European Competition Journal* 311, p 336–40. More generally, see M Guidi, *Competition Policy Enforcement in EU Member States* (Springer, 2016), pp 53–55.

[100] This process was partly discussed in Brook, note 6 above, ch 4.

[101] Enabling Regulation on Vertical Agreements, note 4 above, Art 2; Enabling Regulation on Insurance, note 4 above, Art 2; Enabling Regulation on Standardisation, R&D, and Specialisation Agreements, note 25 above, Art 2.

[102] Greaves, note 59 above, pp 6, 20. D Gerber, 'The Transformation of European Community Competition Law?' (1994) 35(1) *Harvard International Law Journal* 97, p 107, added that DG COMP was the only directorate within the Commission enjoying this type of legislative power when

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Commission to adopt BERs independently, noting that a 'large majority' of the Member States' delegations felt that this would leave the Commission 'too much scope for action without proper consultation of Member States and consider that the Council should continue to establish the framework for the scope of block exemption regulations'.[103]

The Council's involvement in the adoption of BERs is especially noteworthy when compared with the Commission's great powers in the field of competition law and policy. This involvement suggests that the Member States view BERs as a matter of the EU's political agenda and priorities, which in turn fits their characterisation as a substantive instrument to balance competing interests, rather than just an administrative, workload-reduction tool.

Next, on the basis of an Enabling Regulation, the *Commission* defines the terms of each BER.[104] At times, the drafting of the BERs terms involved negotiations between the Commission's various directorates. The adoption of the Technology Transfer BER of 1996, for example, generated a fierce battle between the Directorate-General for Competition, which called to introduce a market share threshold requirement, and the Directorate-General for Industry, which warned that such a threshold is strict and complex.[105] Not less importantly, the Commission's immense influence on the BERs is not only reflected in its powers to determine how to give effect to the Enabling Regulation, but also in its competence *not* to issue a BER despite delegation of such powers from the Council.[106]

The *EU Courts* play an important part too. The exemptions set forth by the BERs must comply with the case law interpreting the conditions of Article 101(3) TFEU. Accordingly, BERs are drafted and amended[107] to match the developments of case law. At times, the EU Courts had even a greater influence. Because the adoption of each BER is a lengthy process, they had the opportunity to rule on the appropriate interpretation of Article 101(3) TFEU during a time when the Commission examined the same question for the purpose of drafting a BER. This meant that controversial terms of BERs were outlined by the EU Courts rather than the Commission.[108]

(F'note continued)
issuing BERs, and that some consider it unlikely that the Council would initiate such a practice in later years.

[103] Note from the General Secretariat of the Council to the Competition Working Party, 'the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 13563/01' 200/0243(CNS), p 47. See also Progress Report, note 38 above, p 46.

[104] See also Annual Report 1971, pp 98–99.

[105] P Bos and M Slotboom, 'The EC Technology Transfer Regulation-A Practitioner's Perspective' (1998) 32(1) *International Lawyer* 1, p 5.

[106] For example, the Commission did not extend the Insurance BERs to claims settlement and registers of aggravated risks, although such agreements were mentioned in the Enabling Regulations. See Annual Report 1999, p 49.

[107] Annual Report 1976, p 19; Annual Report 1977, p 28; Annual Report 1979, p 16.

[108] Annual Report 1982, p 30. See also Greaves, note 59 above, pp 5–7.

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After a draft BER is formed, it undergoes consultation with all *Member States* through the Advisory Committee[109] and with the NCAs.[110] This opens for the Member States additional room to express their national interests. In the past, the Member States have also retained control through the opposition procedure. Included in many of the old generation BERs, this procedure had obliged the Commission to oppose granting an exemption if a Member State had requested it. In addition, while the Commission was generally free to withdraw its opposition at any time, in such a case it had to consult the Member States via the Advisory Committee before doing so.[111]

The *general public*—including *commercial and industrial interest groups*—can also submit their observations on a draft BER.[112] In particular, the Commission declared that it seeks comments from national chambers of commerce of the Member States, the International Chamber of Commerce, the European Bureau of Consumers' Unions (BEUC), and the Union of Industries of the European Community (UNICE).[113] Since the mid-1990s, in a bid to increase public participation, the Commission publishes Green Papers prior to adoption and amendments of BERs, summarising the studies on the sector in question and setting out the proposals put forward by the various groups concerned.[114] This combination of consultation methods—including open online consultations, stakeholder conferences and consultation in closed fora—allows the Commission to receive inclusive and diverse input from various types of actors, and mediate risks of regulatory capture and undue influence of business.[115]

Those consultations are not merely a rubber-stamping exercise. The Commission stressed that it publishes the draft BERs 'not only for information purposes, but also in order to obtain feedback from interested parties on how they are received', noting

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[109] The Advisory Committee consult twice on each BER, before a draft regulation is published in the official journal and before the final BER is adopted. See Enabling Regulation on Vertical Agreements, note 4 above, Art 6; Enabling Regulation on Insurance, note 4 above, Art 6; Enabling Regulation on Standardisation, R&D, and Specialisation Agreements, note 25 above, Art 6.

[110] Commission, 'Summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements', https://ec.europa.eu/competition/consultations/2019_hbers/NCA_summary.pdf. The NCA's involvement is also codified by the preamble of the Enabling Regulation on Insurance, note 4 above, noting that '[w]hereas it should be laid down under which conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers [adopt BERs]'.

[111] Patent License BER of 1984, note 18 above, Art 4.

[112] Enabling Regulation on Vertical Agreements, note 4 above, Art 5; Enabling Regulation on Insurance, note 4 above, Art 5; Enabling Regulation on Standardisation, R&D, and Specialisation Agreements, note 25 above, Art 5.

[113] Annual Report 1994, p 34.

[114] Ibid, pp 34–35.

[115] On the impact of using various consultation instruments to avoid bias by the Commission, see AS Binderkrantz et al., "Countering Bias? The EU Commission's Consultation with Interest Groups" (2021) 28(4) *Journal of European Public Policy* 469.

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that it 'attaches the greatest importance to its [legislation] proposals being put forward in full knowledge of all the facts, with due account being taken of the points of view of the various sectors concerned'.[116] When it received a large number of written reactions, it organised conferences,[117] and even extended the validity of an old BER to engage with the comments more closely.[118] Occasionally, such feedback had led to substantial modifications to the proposed BERs.[119]

Finally, also the *European Parliament* has its say. The Commission is obliged to report to the Parliament on the application of BERs, and the Parliament has the power to recommend revisions.[120] In addition, since the 1970s, the Commission enacted an informal consultation policy, by which it consults with the relevant committees in the parliament when it has 'sufficiently crystalized its position' on a proposed BER.[121] The Commission underline the value it attaches to the political component of such opinions, 'in particular as the points of view are of a more *political nature* and the *diverging opinions inherently represented in a parliamentary forum* can serve to highlight the problems involved in the broadest possible way'.[122] Every so often, the Commission changed the terms of a BER following the Parliament's opinion, pleading to limit the full application of Article 101 TFEU in specific types of agreements or sectors.[123]

B. Enhancing Transparency: Effective Rules, Legal Certainty, and Uniformity

Following the entry into force of Regulation 1/2003, the role of public policy consideration in the enforcement of Article 101 TFEU is mostly hidden. As shown elsewhere,[124] instead of engaging in a complex balancing of competition and public policy under the balancing tools of Article 101(1) and (3) TFEU, the Commission and NCAs often refrain from pursuing cases against anti-competitive agreements that raise public policy questions, terminate the investigation, or settle by accepting negotiated remedies even if the agreement cannot satisfy the conditions for an

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[116] Annual Report 1994, p 34.

[117] Ibid.

[118] This was done, for example, with respect to the amendments of the Exclusive Dealing BER of 1967, note 35 above (see Annual Report 1982, p 21), and the Technology Transfer BER of 1996 (Annual Report 1994, p 83).

[119] I Forrester and C Norall, 'The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law is and Could be Applied' (1984) 21(1) *Common Market Law Review* 15; Albors-Llorens and Goyder, note 38 above, p 142. The Commission also acknowledged such influence when amending the Exclusive Dealing BER of 1967, note 35 above, in its Annual Report 1987, 17 and the Motor Vehicles BER of 2002, note 81 above, in its Annual Report 2002, pp 51–53. See also Annual Report 2004, p 24.

[120] Greaves, note 59 above, 131; Whish, note 46 above, p 892.

[121] Annual Report 1982, p 18. See also Annual Report 1983, p 21; Annual Report 1984, p 21; Annual Report 1993, p 105.

[122] Emphasis added. Annual Report 1982, p 18.

[123] Annual Report 2006, pp 28–29.

[124] Brook, note 6 above, ch 8.

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exception. Whereas under the old enforcement regime the Commission had to address such matters directly when responding to notifications, in the self-assessment regime the role of public policy considerations is mostly hidden in the 'dark matter' of the enforcement.

This lack of transparency has a number of adverse effects:[125] it reduces *legal certainty*, as the competition authorities do not publicly explain if and what role public policy considerations have played in a decision not to pursue a case; it has a detrimental impact on the *integrity* of Article 101 TFEU, because public policy considerations may play a greater role than what is permissible under Articles 101(1) and (3) TFEU tests; it may hamper *uniformity* across the EU, as it masks the fact that NCAs follow divergence practices; and, it may stand in the way of the effectiveness and legitimacy of the enforcement, because EU competition policy can be 'fully supported by business, policymakers, and the general public only if it is widely understood. To achieve this aim the [EU's] approach in this area must be fully transparent'.[126]

BERs offer an alternative to remedy those shortcomings. BERs, by their very nature, are directed at strengthening legal certainty. They (should) offer *ex ante*, transparent rules of thumb for the consideration of public policy, which are typically straightforward to apply and require only limited discretion. The increased legal certainty, in turn, does not only inform the undertakings' self-assessment, but can also foster the uniformity of the enforcement by harmonising the interpretation of Article 101 TFEU across the Member States.[127] This was highlighted by the Modernisation White Paper of 1999, noting that as a piece of 'legislative text', BERs are an important tool to ensure that competition policy is still determined at the EU level despite decentralisation.[128]

The BERs' safe harbour may be particularly welcomed in proceedings taking place in front of the NCAs. Even following entry into force of Regulation 1/2003, only the Commission can adopt a formal decision finding that an agreement is not in breach of Article 101(1) TFEU or fulfil the conditions of Article 101(3) TFEU.[129] An NCA can only declare that there are no grounds for action on its part when, based on the information in its possession, the conditions for Article 101 TFEU have not been met.[130] While the Commission or another NCA may reach a different conclusion, BERs can provide undertakings with additional legal certainty by binding all EU institutions, competition authorities, and courts.

Admittedly, the promise of legal certainty offered by the BERs—and thus of uniformity—is far from perfect. Some legal certainty was lost due to the shift to the new generation of effects-based BERs, which are grounded on market share calculation

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[125] Ibid.

[126] Annual Report 1993, p 103.

[127] See Regulation 1/2003, note 5 above, Preamble 10. On the importance of BERs as facilitating uniformity see, Annual Report 1996, p 31.

[128] Modernisation White Paper, note 3 above, paras 83–85.

[129] In practice, however, the Commission has rarely made use of such powers. See Brook, note 6 above, pp 96–98, 226–29, 263–66.

[130] Regulation 1/2003, note 5 above, Arts 5, 10.

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and use open-ended provisions.[131] Yet, there are some good indications that although such concerns are valid, they should not be exaggerated. An empirical examination of the Commission's and five NCAs' practices shows that the new generation of BERs were rarely invoked or accepted as a defence by the competition enforcers and courts. This implies that in general, undertakings were able to correctly self-assess their practices. Such a conclusion is further supported by comments submitted to Commission's consultation, indicating that respondents believe that the BERs increase legal certainty even in comparison to guidelines.[132]

Hence, while time and effort should certainly be dedicated to enhancing the effectiveness and legal certainty of the provisions of BERs, the enforcement tool as such may still offer greater effectiveness, legal certainty, and uniformity compared to the traditional balancing tools.

C. Efficiency: Compliance and Enforcement Efforts

The increased transparency and legal certainty resulting from (clearly) codifying the role of public policy within a BER may encourage compliance and reduce litigation costs.[133] To this end, BERs may play a double role of deterring undertakings from concluding agreements that cannot be justified due to public policy considerations and of eliminating a chilling effect that prevents undertakings from engaging in welfare-enhancing agreements.[134] This is particularly welcomed under the self-assessment regime of Regulation 1/2003, whereby undertakings bear the risk of error as to the fulfilment of the conditions for exceptions. The Commission acknowledged that BERs may facilitate better understanding of EU competition law and generate stronger political support by members of the industry, policymakers, and the general public alike.[135]

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[131] See Part III above. For an example of national divergence in the interpretation of BERs see Brook, note 6 above, pp 206-217.

[132] Horizontal BERs Consultation of 2021, note 89 above, p 8.

[133] Commission, 'Explanatory note on the new VBER and Vertical Guidelines', https://ec.europa.eu/competition-policy/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf, notes that '[t]he new VBER and new Vertical Guidelines also aim to reduce compliance costs of businesses, notably SMEs, by clarifying certain provisions perceived as particularly complex and thus difficult to implement'. See also Annual Report 2020, 12; Horizontal BERs Consultation of 2021, note 89 above, p 14.

[134] L Kaplow, 'Optimal Proof Burdens, Deterrence, and the Chilling of Desirable Behavior' (2011) 101(3) *American Economic Review,* 277. On the chilling effects arising from the uncertain role of public policy under Article 101 TFEU see, S Long, D Taylor, and T Aldred, 'Competition Law and Sustainability: A Study of Industry Attitudes Towards Multi-stakeholder Collaboration in the UK Grocery Sector" (2019) *Fair Trade Foundation*, https://www.fairtrade.org.uk/wp-content/uploads/legacy/doc/Competition%20Law%20and%20Sustainability%20-%20Fairtrade%20Report.pdf. See also A Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law" (2017) 40(4) *World Competition* 539, p 545. Also some respondents to the Horizontal BERs Consultation of 2021, note 89 above, argued that they have applied a restrictive approach to the rules to ensure maximum legal certainty, thereby foregoing opportunities that would require self-assessment (p 12).

[135] Annual Report 1992, pp 75–76.

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For essentially the same reasons, BERs can help free the competition authorities' resources.[136] Instead of investing their scarce resources to strike a complex and sensitive balance between competition and public policy considerations, the Commission and NCAs could focus on their other enforcement priorities.

Arguably, BERs can also increase law compliance by facilitating private enforcement. Although there is no presumption that agreements that cannot benefit from a BER are illegal, the Commission declares that agreements falling within the list of hardcore practices are unlikely to be justified under Article 101(3) TFEU.[137] The Commission has seemed to hint that the list of hardcore restrictions serves as a signal inviting injured parties to submit private claims in front of national courts.[138]

Where doubts arise on compliance of certain agreements with the terms of a BER, either in public or private enforcement settings, the burden of proof may work to the benefit of the competition authorities or private plaintiff. Despite the information asymmetry resulting from the lack of a notification in the new self-assessment system, once a potential infringement of Article 101(1) TFEU is established, the burden shifts to the undertakings to prove that they comply with the conditions of Article 101 (3) TFEU.[139] In 'grey-zone' cases, when it is unclear if an agreement can benefit from the scope of BER due to public policy considerations, the undertakings will need to produce the evidence justifying the limitation of competition.

D. Developing the Law: Facilitating Legal, Economic, and Public Debate on the Role of Public Policy

The transparency brought about by the BER also creates an opportunity for a meaningful debate on the role of public policy within EU competition law enforcement—and as such—is essential for the development of effective rules. As mentioned, currently much of the consideration of public policy in individual cases is developed as a matter of policy rather than of law, and is being carried out in an informal and non-transparent manner, meaning that such questions cannot later be reviewed by EU and national courts. This also leaves limited room for legal, economic, and socio-political scrutiny. The continuous political-democratic cycle that is facilitated by the BERs and the transparency it brings, therefore, is not only important for their own development, but also for forming the general EU policy and the rules governing a case-by-case assessment.

Moreover, facilitating a public debate might remedy some of the shortcomings associated with balancing by means of BERs. Encouraging a transparent and open discussion on the desired role of public policy during the process of adopting,

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[136] Annual Report 1990, p 44.

[137] Commission Art 101(3) Guidelines, note 3 above, para 46.

[138] The Commission, for example, referred to the hardcore restrictions in the Motor Vehicle BERs, noting in its Annual Report 1996, p 33 that when hardcore restrictions take place, 'consumers can take action before the competent national courts, which can - in contrast to the Commission - grant more easily injunctions and award damages'. See also Annual Report 1997, p 24.

[139] Regulation 1/2003, note 5 above, Art 2.

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evaluating, and amending the BERs can help forge the boundaries of the balance embedded in the BERs themselves, safeguarding the BERs against protectionism and undue lobbying. This could be promoted by encouraging diverse and wide-ranging submissions by actors representing industry, consumers, and the general public and by using diverse consultation mechanisms.[140]

Clearly, there is a risk that the Commission and NCAs will avoid challenging cases in the 'grey-zone' of the BERs. If such risk materialises, questions about the consideration of public policy within BERs will too be shifted to the dark matter of enforcement.[141] Yet, differing from the traditional balancing tools, it is more likely that some of those questions will see the light of day during the continuous political-democratic cycle taking place in adopting, reviewing, and amending the BERs.

E. Temporal Nature of BERs: Flexibility and Experimentalism

The limited lifespan of each BER offers a unique space for regulatory experimentalism and flexibility. BERs, as was already mentioned, are adopted for a limited period. They are regularly reviewed and amended. This allows the EU institutions and the competition authorities to 'test the water', to investigate a balance between competition and public policy considerations without the risk of being bound to a legal precedent for many years to come.[142]

Along those lines, the Commission declared that an amendment of a BER is an opportunity for 're-balancing the various interests involved',[143] to revise a BER when the premise underlying it was 'no longer entirely up to date and that the regulation's objectives had not all been attained',[144] to introduce changes to 'forestall any misuse' of the exemptions,[145] and to determine that the four cumulative conditions of exempting a category of agreements under Article 101(3) TFEU were no longer met.[146]

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[140] Binderkrantz et al., note 115 above.

[141] Such concern was voiced with respect to the Vertical BERs and Guidelines. See A Jones, 'Expert Report for the European Commission on the Review of the EU Vertical Block Exemption Regulation: Cases Dealing with Online Sales, and Online Advertising, Restrictions at EU and National Level' (2021) *European Commission*, https://ec.europa.eu/competition-policy/system/files/2021-06/kd0921156enn_VBER_online_sales. pdf (2021), p 35.

[142] Annual Report 1993, p 81, the Commission noted that it 'was anxious to prepare a balanced and flexible framework for a block exemption instrument which took account of the special features of maritime transport'. The regulation was adopted for a period of five years.

[143] COM(2000) 743 final, Report on the evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, 15 November 2000, p 20.

[144] Ibid; Annual Report 2002, p 52. See also Annual Report 2003, p 26.

[145] Annual Report 1980, p 15.

[146] See, for example, the Commission's statement on the reason leading it to repeal the Regulation on Maritime Transport of 1986, note 57 above, in its Annual Report 2006, pp 28–29. See also Annual Report 1972, p 21.

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BERs were also used to provide short-term solutions. In some cases, BERs were adopted to mediate adverse effects resulting from liberalisation of markets in the interest of undertakings, their employees, and their customers, which were later amended to meet the progress of the liberalisation process.[147] In other cases, transitional provisions in BERs provide the industry with a necessary time span to adapt to legislative changes.

A decision granting an individual exception under Articles 101(1) and (3) TFEU balancing tools, by comparison, could not offer such room for experimentalism and flexibility. Such a decision does not only bind its direct addressees, but also carries a *de facto* precedential effect. Even when it comes to non-binding national 'no ground for action' findings, the articulation of the competition authority's interpretation of the law is likely to be relayed on by other undertakings in the future.

The temporal nature of BERs can also substitute some of the benefits Article 101 (3) TFEU individual exemptions had under the old notification regime, which were lost following the transition to self-assessment. In the past, individual exemptions were often granted by the Commission for a limited period, and could be extended if need be.[148] Undoubtedly, even under the self-assessment regime, an individual exception may still be limited in time, for example, apply only as long as a restriction is deemed necessary and proportionate to achieve the benefits produced by an agreement.[149] Yet, the temporal effect of the individual exceptions has lost much of its sway because it is very difficult to pinpoint the exact point in time when an agreement does no longer comply with the conditions of the Article. BERs, therefore, can provide much needed legal certainty for undertakings as to the duration of the exemption.

A BER can provide the Commission and NCAs with flexibility even during its limited lifespan. A BER may be amended while it is in force to exclude terms that do no longer seem to be justified or to avoid abuse.[150] In addition, the Commission and NCAs (following prior notification to the Commission)[151] may withdraw the benefits of a BER from a specific agreement, when such an agreement does not produce objective advantages that compensate for its negative effects on competition.[152] While withdrawal should not be used frequently and may hamper the very legal certainty the BER aims to promote,[153] the mere threat of withdrawal can safeguard

[147] Annual Report 1988, p 47, referring to air transport BERs. See also Annual Report 1989, p 41.

[148] Regulation 17/62, Art 8(1).

[149] See Commission Article 101(3) Guidelines, note 3 above, Point 81.

[150] This was done, for example, by Regulation 1532/96 excluding from the scope of the Air Services BER of 1993, note 74 above, consultation on tariffs for the carriage of frights. See Annual Report 1996, pp 44–45.

[151] Regulation 1/2003, note 5 above, Art 11(4).

[152] Ibid, Art 29. See also Commission Article 101(3) Guidelines, note 3 above, paras 2, 36.

[153] The harm to legal uncertainty, however, should not be overstated as the withdrawal of a BER will only have *ex nunc* effect, meaning that the safe harbour applies until the date at which the withdrawal becomes effective (Communication from the Commission, 'Guidelines on Vertical Restraints' OJ C 248, 30 June 2022 ('Guidelines on Vertical Restraints'), para 268). Moreover, in the past, the

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against abuse and provide the competition authorities with a back door to control unexpected effects.[154]

The possibility for withdrawal, furthermore, is not limited to situations of abuse; it may also apply to adapt to changing economic realities. The Commission, for example, declared that it will investigate a possible withdrawal of the BER on Motor Vehicle Distribution upon the emergence of large-scale price differences between Member States. Faced with the threat of withdrawal, car manufacturers and their industrial organisation agreed to cooperate with the Commission accepting various measures to reduce such price differences.[155] Similarly, the possibility for a withdrawal of the Technology Transfer BER intended to ensure that undertakings having a very strong position in a market would not block the introduction of innovations competing with their own products and particularly innovatory SMEs.[156]

Therefore, although BERs are a binding form of legislation, they are a dynamic tool. The 'granting and taking away of block exemptions', in the words of the European Parliament, 'should be a dynamic process. Block exemptions should not be "hewn in stone"'.[157]

V. GUIDELINES ARE NOT A GOOD SUBSTITUTE

The criticism voiced against the functional, constitutional, and substantive justifications of BERs led some commutators[158]—including the Commission[159]—to consider replacing them with soft-law guidelines[160] detailing the application of

(F'note continued)
Commission published soft law notices explaining in what circumstances it is likely to consider a withdrawal (eg Commission, Notice concerning Regulation (EEC) No 123/85 of 12 December 1984 on the Application of Article 85 (3) of the Treaty to certain Categories of Motor Vehicle Distribution and Servicing Agreements 85/C 17/03, Sec II.

[154] In IP/86/631*VEB/Shell* of 19 December 1986, for example, the Commission rejected a complaint alleging that Shell's pricing policy involved indirect resale price maintenance and price discrimination. As part of the investigation, the Commission examined whether the restrictions went beyond the scope permitted by the Exclusive Purchasing BER of 1983 and, if so, whether it constituted an abuse of such a nature as to warrant the withdrawal of the BER. Such intervention was deemed unnecessary after Shell modified its practice. Similarly, in IV/31.043 *Tetra Pak I* of 26 July 1988, para 28, the Commission stated that if Tetra would have not modified it practice it would have withdrawn the BER.

[155] Commission, Notice Concerning Regulation (EEC) No 123/85 of 12 December 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements 85/C 17/03, Sec II. See also Annual Report 1990, p 47; Annual Report 1991, p 89; Annual Report 1992, pp 168–69.

[156] Annual Report 1996, p 26.

[157] European Parliament, Resolution on the Sixteenth Report of the Commission on Competition Policy (annexed to the annual report 1987), Point 8. See also Annual Report 1987, p 22.

[158] Monti, note 7 above, pp 186–88; Marcos and Sanchez-Graells, note 8 above.

[159] Vertical BERs Working Paper, note 39 above, p 5. See also Annual Report 2020, pp 11–12.

[160] The Commission have used different names to describe its non-binding soft policy instruments. In addition to guidelines, it sometimes issues 'notices', 'announcements', or 'press releases'. Those different instruments have a similar legal status, and would be collectively referred to as 'guidelines'.

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Article 101 TFEU to specific circumstances, sectors, or practices.[161] Such guidelines, it was argued, could ensure a similar degree of legal certainty and facilitate self-assessment, as well as safeguard the uniformity of the enforcement in the decentralised regime. This part maintains that while guidelines are a useful and important legal instrument to *supplement* BERs, they do not offer a compelling *substitute* when it comes to the balance of competition and public policy considerations.

The Commission has a long history of issuing guidelines in parallel or shortly after the adoption of BERs, going back to the exclusive distribution and purchasing agreements guidelines of 1983.[162] In addition to legal certainty,[163] such guidelines aimed at encouraging a uniform application,[164] becoming particularly important following decentralisation.[165] Moreover, it was suggested that guidelines might help adapt the BERs to the more economic approach. The Commission Modernisation White Paper of 1999, for example, declared that soft policy instruments are 'particularly well suited to the interpretation of rules of an economic nature, because they make it easier to take account of the range of criteria that are relevant to an examination under the competition rules'.[166] Their relatively high degree of specificity and use of examples fit the task of communicating the Commission's interpretation and the analytical approach it will pursue.[167]

When it comes to the balance of competition and public policy considerations, nevertheless, stand-alone guidelines, substituting rather than supplementing BERs, fail to provide the full benefits of BERs as a tool to balance competition and public policy:

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[161] Some of the abolished sectoral BERs were replaced with guidelines. See Marcos and Sanchez-Graells, note 8 above, p 185.

[162] Communication from the Commission, 'notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements' OJ 1983 C355/7 ('Guidelines on of exclusive distribution and purchasing agreements of 1983'), para 1.

[163] Ibid.

[164] Guidelines on of exclusive distribution and purchasing agreements of 1983, note 162 above, paras 1–3. On the immense influence and strong pervasive value of guidelines on NCAs and national courts, also see Z Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective' (2015) 16(2) *German Law Journal* 223; M Eliantonio, E Korkea-aho, and O Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Bloomsbury Publishing, 2021). On the NCAs deviation from the Commission's approach, see Brook, note 14 above.

[165] See, for example, Commission Article 101(3) Guidelines, note 3 above, para 4, noting that: 'Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of Article [101](1) and (3) of the Treaty'; and National Courts Cooperation Notice, note 30 above, para 8 noting that 'without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in (…) Commission notices and guidelines relating to the application of Articles [101] and [102]'.

[166] Modernisation White Paper, note 3 above, para 86.

[167] S Bishop, 'Modernisation of the Rules Implementing Articles 81 and 82' in CD Ehlermann and I Atanasiu (eds), *The Modernisation of EC Antitrust Policy (*Hart Publishing, 2001), pp 60–61.

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First, guidelines have only limited effect in enhancing the democratic legitimacy and political accountability of the balance between competition and public policy considerations. As early as the first guidelines on the exclusive distribution and purchasing agreements, it became clear that guidelines do not only codify existing rules and case law, but also express considerable value choices.[168] Although the Commission engages in broad consultations, guidelines are ultimately adopted by the Commission alone. The Commission enjoys substantially greater autonomy to design the scope of protected practices, policy objectives, and the terms of analysis. Moreover, guidelines are not subject to the same strict reporting requirements, nor to the conditions of the withdrawal procedure. Guidelines, as such, do not reflect the same EU-wide consensus and continuous political-democratic cycle of the BERs.

The potential of using BERs to increase democratic legitimacy and political accountability of balancing was illustrated by the 2021 consultations over the Horizontal BERs. When asked whether there were other elements that should have been clarified, added, or removed from the draft BERs on R&D and Specialisation Agreements, stakeholders called to include provisions rewarding sustainability goals and adapting the BERs to mirror technological and digital developments.[169] Some NCAs also asked to include provisions on the application of Article 101 TFEU to self-employment professionals and during the Coronavirus pandemic.[170]

The Commission decided to address only a limited range of those questions in its updated draft, notably leaving the rules on sustainability agreements to its guidelines.[171] The Vertical Guidelines of 2022 repeat a similar approach.[172] This seems like a lost opportunity. Adding such provisions could have gone beyond the mere *restatement* of the law. Drawing such terms would have inevitably required making difficult legal, economic, and political choices, on matters that stakeholders and NCAs signalled as unclear and important and which are subject to much academic debate. Instead of leaving this balance to the discretion of each (independent) competition authority that is not well placed to engage in such a balancing of interests, the BER could have *determined* the law based on a broad social agreement.[173]

Second, and for similar reasons, guidelines are less effective in developing the law by way of facilitating legal, economic, and public debate on the role of public policy.

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[168] Koarh, note 41 above, pp 78–79; J Shaw, 'Group Exemptions for Exclusive Distribution and Purchasing agreements in the EEC' (1985) 34(1) *International & Comparative Law Quarterly* 190, p 193.

[169] Horizontal BERs Consultation of 2021, note 89 above, p 11.

[170] Commission, note 110 above, p 11.

[171] C(2022) 1159 final, 'Approval of the content of a draft for Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements'.

[172] Guidelines on Vertical Restraints, para 8.

[173] It could be argued that this example could be a testament to the Commission's immense influence over the adoption of BERs, and its ability *not* to act on the power conferred on it to adopt BERs to account for public policy. Similarly, it is clear that the Commission or a NCA may use their margin of discretion when applying a BER to favour the protection of competition interests over the room provided for public policy. This, however, does not render the political-democratic cycle superfluous. The process of adopting and amending BERs bring those matters into the light, inviting scrutiny and debate.

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Determining the role of public policy in the enforcement of EU competition law is mostly left to the Commission as a matter of policy, rather than developed in law.

Third, while guidelines can certainly increase the transparency by clarifying how the law is being interpreted and applied, they bring about only limited uniformity and as such legal certainty. As soft law instruments, guidelines are binding on the Commission alone. Unless the provisions of guidelines are explicitly applied to an individual case and later confirmed by the EU Courts, the NCAs and EU and national courts can—and often do—deviate from them.[174]

Fourth, the lack of a binding effect on EU Courts and national enforcers limits the reduction in compliance and enforcement costs. Given the room for deviation, undertakings must self-assess their conduct in light of multiple (national) approaches, and cannot assume that conduct that is permitted by the Commission's guidelines will automatically be tolerated by NCAs and national courts or by the EU Courts if they later become subject to an appeal.

Finally, guidelines offer only limited flexibility and experimentalism advantages over BERs. They are not necessarily quicker to adopt or amend,[175] and despite being a soft law instrument, the Commission cannot easily deviate from them. While guidelines 'may not be regarded as rules of law which the administration is always bound to observe' the Commission 'may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment'.[176] In other words, if the Commission wishes to accept an anti-competitive practice due to overriding public policy considerations, it would need to justify its position with reference to its regular competition rules and more economic approach or explain why different rules should apply. BERs, by comparison, permit deviation from the 'regular' competition law analysis—and can be capped in time or later amended if need be—thereby leaving greater room for flexibility and experimentalism.

VI. CONCLUSION

This article defended BERs as a valuable tool for balancing competition with public policy considerations. BERs offer a pre-determined and transparent balancing tool that is based on an EU-wide consensus, safeguarding the political accountability and legitimacy of EU competition law, promoting uniformity and legal certainty, reducing compliance and enforcement costs, facilitating a debate that could lead to

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[174] This advantage of BERs over guidelines in providing legal certainty were supported by the submissions to the Horizontal BERs Consultation of 2021, note 89 above, pp 7, 21.

[175] Cf the consultation over the Guidelines on collective bargaining of self-employed (https://ec.europa.eu/competition-policy/public-consultations/2021-collective-bargaining-2_en#policy-field).

[176] *Liberos v Commission*, C-171/00P, ECLI:EU:C:2002:17, para 35, as applied to competition law enforcement in *Dansk Rørindustri and Others v Commission*, C-189/02P, ECLI:EU:C:2005:408, paras 209–10. See also N Petit and M Rato, 'From Hard to Soft Enforcement of EC Competition Law-A Bestiary of Sunshine Enforcement Instruments' in C Gheur and N Petit (eds) *Alternative Enforcement Techniques in EC Competition Law: Settlements, Commitments and Other Novel Instruments* (Bruylant, 2009), pp 202–05.

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more effective rules, and offering room for regulatory experimentalism and flexibility. It suggested that despite the bad reputation BERs gained over the years, they may offer a better way to embed public policy within Article 101 TFEU enforcement in comparison to the conventional balancing tools. Moreover, instead of leaving the development of the balance to be determined *as a matter of policy* in the course of exercising the discretion of each competition authority, balancing by means of BERs can shift those questions *back to the scope of the law*, which would be determined on the basis of a broad social consensus.

This is not to say that BERs go without faults. Poor BERs were unquestionably adopted over the years, reflecting bad law, bad economics, and/or bad politics. Nevertheless, this article suggested that openly embracing BERs as a balancing tool may remedy some of those shortcomings. An EU-wide discussion on the role of public policy within the process of adopting, evaluating, and amending the BERs—involving all EU institutions, the Member States, NCAs, and wide public participation—can bring about analytically sound and clear rules that rest on sounds and flexible understanding, from theory and experience.[177] Such rules can increase the quality of the BERs themselves, as well as the rules applicable to Article 101(1) and (3) TFEU individual exceptions.

Using BERs to account for public policy considerations may be particularly welcomed to tackle some of the EU's contemporary challenges. Questions regarding the room left for sustainability initiatives, cooperation among self-employed and gig-economy workers, and the creation of EU-champions cannot be decided merely based on the current legal rules or an economic welfare analysis. Those are complex socio-political choices that deserve to be determined on the basis of broad public and political debate. BERs may offer such a way forward.

[177] Cf A Jones and WE Kovacic, 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) 62(2) *The Antitrust Bulletin* 254, pp 258–59.

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