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Article 3 of Regulation 1/2003: a historical and empirical account of an unworkable compromise

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ABSTRACT

Combining historical, conceptual, and empirical approaches, this article studies one of the most fundamental, yet underexplored, questions surrounding Regulation 1/2003: What limits European Union (EU) competition law places on the adoption and application of national competition and other laws? The relationship between EU competition and national laws was supposedly settled with the adoption of Regulation 1/2003. There are two exceptions to the rule in Article 3(1), under which national competition authorities and courts must apply EU competition law when applying their national competition laws, with primacy for EU provisions: Article 3(2) leaves room for 'stricter' national competition rules on unilateral conduct, and Article 3(3) for national rules pursuing a 'predominantly different objective'. The solution offered by Article 3 is not workable. Through a historical study of the political discussions preceding Article 3's adoption, a conceptual analysis of potential interpretations, and a systematic content analysis of French and German practice, this article reveals the lack of a dividing line between the notions of national competition laws and other laws. It calls for reform of Article 3 to ensure that conduct that should be governed by EU law is not assessed under national rules and standards that differ from one Member State to another.

KEYWORDS: Article 3, Regulation 1/2003, Unfair trading practices, Abuse of economic dependence, EU competition law, National competition law, Unilateral conduct, Decentralized enforcement, Level playing field, Digital markets
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I. INTRODUCTION

The relationship between European Union (EU) competition and (competition and other) national laws has been subject to controversy for many years.[1] This is hardly surprising. The Treaties' provisions on competition have not only transferred numerous functions from the Member States to the EU, but also created new institutions and powers that are independent of national governments. The primacy of EU competition law clearly limits the competence of Member States to issue and enforce national laws on anti-competitive agreements and abuse of dominance, which lie in the 'core' *of competition law*. What is more questionable is whether it also precludes *other* national measures that regulate markets and market participants, such as unfair trading practices or the regulation of digital markets. Defining the relationship between the EU (competition) and national laws, therefore, has an important bearing on the distribution of powers between the EU and its Member States and the functioning of the internal market.

This controversy, as elaborated below, resulted in a years-long game of hot potato, shifting the resolution of this relationship to the Member States and the EU institutions. The matter was supposedly settled in 2003 when Regulation 1/2003 saw the light of day. Article 3 of the Regulation represented a *political compromise* between the Member States and the Commission. Article 3(1) sets out the general principle of primacy of EU competition law, providing that if there is an effect on trade between Member States, national competition authorities (NCAs) and courts must apply EU competition law when they apply their national competition laws. Yet, the Article sets two limitations to this general principle: First, Article 3(2) distinguishes between anti-competitive agreements that are covered by Article 101 TFEU (in which EU law has absolute primacy), and abuse of dominance that is governed by Article 102 TFEU (permitting 'stricter' national rules on unilateral conduct). Secondly, Article 3(3) notes that the NCAs and national courts retain the possibility to apply national rules which are not considered to be national competition law, namely rules with a 'predominantly different objective'.

Article 3's compromise is generally considered a triumph. A 2009 Commission's Staff Working Paper concluded that '[o]verall, Article 3 can be characterized as *one of the major successes* of Regulation 1/2003. Stakeholders from the legal and business communities have largely confirmed that Regulation 1/2003 has positively contributed to the creation of a level playing field, along with the substantive convergence of national laws with the EC competition rules'.[2] While the Working Paper added that 'the divergence of [national stricter] standards regarding unilateral conduct was commented on critically by the business and legal communities',[3] the relationship between EU and national competition laws received little attention in the case law of the EU Courts[4] and scholarship.[5]

[1] For early literature on the topic, see Arved Deringer, 'The Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty' (1963) 1(1) CML Review 30; Carl H Fulda, 'Antitrust in the European Economic Community' (1962) 41 Texas Law Review 402; Kurt E Markert, 'The Dyestuff Case: A Contribution to the Relationship Between the Antitrust Laws of the European Economic Community and Its Member States' (1969) 14 Antitrust Bulletin 869; Jean-Francois Verstrynge, 'The Relationship between National and Community Antitrust Law: An Overview after the Perfume Cases' (1981) 3 Northwestern Journal of International Law and Business 358; Joachim Zekoll, 'European Community Competition Law and National Competition Laws: Compatibility Problems from a German Perspective' (1991) 24 Vanderbilt Journal of Transnational Law 75.

[2] Emphasis added. Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003 [COM(2009) 206 final] ('Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003'), para 142.

[3] ibid.

[4] Few preliminary rulings have interpreted art 3 in general, see eg, C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, ECLI:EU:C:2006:734; C17/10, *Toshiba Corporation and others v Úřad pro ochranu hospodářské soutěže*, ECLI:EU:C:2012:72; C226/11, *Expedia Inc v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795; C-151/20, *Bundeswettbewerbsbehörde v Nordzucker AG and Others*, ECLI:EU:C:2022:203. There are a few GC cases, see T466/17, *Printeos SA and others v European Commission*, ECLI:EU:T:2019:671. Those judgments, nevertheless, did not discuss what should be considered as national competition law.

[5] For two notable exceptions, see Lúcio T Feteira, *The Interplay between European and National Competition Law after Regulation 1/2003: 'United (Should) We Stand?'* (Kluwer 2015) and two papers by Lucey, discussing the conflict between the

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Nevertheless, this article suggests that the political compromise offered by Article 3 is incomplete, vague, and significantly hampers the level playing field across the EU. Based on a historical study of the political discussions preceding the adoption of the Article, a conceptual analysis of the proposed solution, and a systematic content analysis of French and German practice as case studies, the article offers robust evidence pointing to the lack of a dividing line between the notions of national *competition laws* and *other laws*. The absence of a clear benchmark to distinguish the two, the article submits, hampers the primacy of EU competition law. It also entails that conduct that should be governed by EU law is exclusively assessed under national rules and standards that differ from one Member State to another.

This is not purely a hypothetical matter. In parallel to the voluntary convergence of national competition laws to those of the EU Treaties, in recent years an increasing number of Member States are adopting or actualizing rules on the abuse of economic dependence, unfair competition, and restrictive trading practices.[6] While such provisions often share similar terminology and economic concepts as Articles 101 and 102, they pursue different objectives. They are typically designed to protect competitors—particularly small- and medium-sized enterprises (SMEs)—alongside or instead of protecting the competitive structure and process as such.[7] To add to the confusion, at times, such provisions were included within the national competition laws, while at other times they were set out in separate statutes.

Such national rules were found to hamper the internal market, by increasing legal uncertainty and raising compliance costs for those engaged in cross-border trade. Grocery retail, intermediate products, and infrastructure are amongst the most affected sectors.[8] Many of the national rules were also said to be harmful to consumers because the protection of small competitors often leads to higher prices.[9] Such national rules, moreover, were explicitly used by some Member States to re-establish national boundaries. For example, 'stricter' national rules governing food retail in the Czech Republic[10] openly aim to protect small *national* companies against big foreign retail chains.[11] Similar hindrance to free movement was reported from 'stricter' national laws on food supply chains in Slovakia and Romania.[12]

Understanding the scope of Article 3, furthermore, is crucial for clarifying the distribution of powers between the EU and its Member States in other fields of EU law, beyond competition. In particular, Article 3's test has recently served as a model for determining the Commission's competence to act when regulating the conduct of powerful digital platforms as part of the Digital Market Act (DMA).[13] In addition to the DMA to be applied at the EU level in a centralized manner by the Commission, several Member States have joined the

British restraint of trade doctrine and art 101 (Mary C Lucey, 'Unforeseen Unintended Consequences of Article 3 of EU Regulation 1/2003' (2006) 27(10) European Competition Law Review 558 and Mary C Lucey, 'Safeguarding the Restraint of Trade Doctrine from EU Competition Law: Identifying the Threat and Proposing Solutions' (2014) 52 Irish Jurist 115.

[6] College of Europe, 'Study on The Impact of National Rules on Unilateral Conduct that Diverge from Article 102 of the Treaty on the Functioning of the European Union' (2012) <https://ec.europa.eu/competition/calls/tenders_closed.html>; Roberto Alimonti and Matthew Johnson, 'Abuse of Economic Dependence and Its Interaction with Competition Policy: The Economics Perspective' (2022) 21(2) Competition Law Journal 87.

[7] Feteira (n 5), chaps 6–9.

[8] College of Europe (n 6).

[9] ibid.

[10] The Act on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof15 (the Market Power Act) Act No 395/2009 of 9 September 2009.

[11] Doris Hildebrand, 'Article 3 (2) in Fine: Time for Review' Concurrences No 2-2015, 1–3; Petr Frischmann and Vaclav Smejkal, '2016 Amendment of the Czech Significant Market Power Act of 2009' (2016) 14 *YARS* 227.

[12] Hildebrand ibid; Ilya GJ Bruggeman and Christian Verschueren, 'Protectionism in Central and Eastern Europe and the EU Internal Market: The Case of Retail' in Wolfgang Heusel and Jean-Philippe Rageade (eds) *The Authority of EU Law* (Springer, Berlin, Heidelberg 2019) 169–91.

[13] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (DMA) L 265.

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fray, interpreting old or adopting new provisions to govern digital markets.[14] The meaning of Article 3, therefore, does not only determine the relationship between EU competition law and the national provisions on competition and digital markets but also has an immense influence on the interpretation of the DMA.[15]

The article is divided into six sections. Section II details the history of the relationship between EU competition law and national (competition and other) laws. It explores how this relationship was governed prior to Regulation 1/2003, and how it changed following the process of negotiation and political compromises preceding its adoption. It contributes to the scarce scholarship on Article 3 by analysing the legislative history of the Regulation, as reflected by the publicly available records of the negotiations preceding it, and by outlining the substantive, procedural, and institutional significance of the classification of a rule as national competition or other laws. Tracing such history, we believe, is crucial for understanding the meaning of Article 3, and the possible benchmarks to guide its interpretation.

Offering a conceptual contribution, Section III first submits that the process of negotiation and political compromise has resulted in the adoption of complex and vague wording that does not clearly distinguish between national competition and other laws; and Section IV presents three possible benchmarks to guide this that can be inferred from the wording of Regulation 1/2003, its legislative history, and the EU Courts case law: based on the objectives of the national statute, the objectives of the national provision, or the harm addressed in the enforcement of the national provision.[16]

Next, since EU law and case law do not clearly favour one of the benchmarks, Section V turns to examine the national practice of German and French NCAs and courts as a case study. Aiming to explore how NCAs and national courts interpreted the dividing line between competition and other laws, we apply systematic content analysis of legal text to public and private enforcement of the EU and national competition laws, provisions on abuse of economic dependence, unfair competition, and restrictive practice agreements (May 2004–April 2020). The methodology and case selection criteria guiding this section are elaborated in 'Methodology and case selection' section. The analysis of national practice offers two conclusions: First, we show that like the EU level, there was almost no discussion on how to distinguish between national competition and other laws in the meaning of Articles 3(2) and (3). Secondly, we demonstrate that the objectives of the French and German statutes, their specific provisions, and the definition of harm addressed in their enforcement—as interpreted by national practices—were not sufficiently consistent and clear. The solution offered by Article 3 cannot be workable, therefore, as none of the possible benchmarks can inform the distinction between competition law and other laws.

Finally, Section VI discusses the normative implications and calls for substantive reform of Article 3 based on a new political compromise. Such a proposal is not only particularly timely for the ongoing work to regulate digital markets but also considering the recently announced evaluation of Regulation 1/2003.[17]

It should be noted that this article focuses on the lack of a dividing line between national competition and other laws. A linked, yet separate, challenge involves the definition of the effect on trade between Member States criterion. AG Roemer's 1969 assertion that 'harm to interstate trade' is an 'unreliable, fluid and changeable' criterion[18] still holds true today. There

[14] Italy, France, and Belgium, for example, used their existing provisions. New provisions were adopted, for instance, by Germany (s 19a GWB); and Greece, (Amendments to the Greek Competition Law (L.3959/2011)).

[15] Although art 3 inspired the DMA, it should be noted that the DMA is founded on a different legal ground (art 114 TFEU rather than art 103 TFEU as the rules on competition), and is not an area of law where the EU has exclusive competence. We elaborate on the relationship between art 3 and the DMA in Or Brook and Magali Eben, 'Who Should Guard the Gatekeepers: Does the DMA Replicate the Unworkable Test of Regulation 1/2003 to Settle Conflicts Between EU and National Laws?' CPI 2022.

[16] Those benchmarks are defined and explained in Section IV below.

[17] European Commission, Daily News 19 May 2022, MEX/22/3204.

[18] Opinion of AG Roemer in Case 14/68 *Walt Wilhelm v Bundeskartellamt*, ECLI:EU:C:1968:55, 22.

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are indications that NCAs forego an adequate assessment of the potential effect on trade, leaving the question open or proceeding on the doubtful assumption that there is no effect.[19] The French and German cases examined in this study also indicate that even when the NCAs and courts applied EU competition law alongside their national prohibitions, they did not always discuss the effect on trade criterion. While such concerns clearly impact the division of powers between the EU and its Member States, they go beyond the scope of this study.

II. HISTORY: THE RELATIONSHIP BETWEEN EU AND NATIONAL LAWS

Prior to regulation 1/2003

The controversy surrounding the relationship between EU competition and national laws traces back to the drafting of the Treaty of Rome. Confronted with the heated negotiations over the design and scope of EU competition law, the drafters of the EEC Treaty opted for open-ended and vague provisions, leaving many of the enforcement details to be decided by future Council regulations.[20] Article 87(2)(e) EEC provided that during the first 3 years after the entry into force of the Treaty, the Council shall lay down appropriate regulations or directives designing, *inter alia*, the relationship between EU competition and national laws. This choice is particularly noteworthy as the earlier ECSC Treaty had *not* left room for the parallel application of national competition laws.[21]

When the issue came to the doorstep of the Council as part of the drafting Regulation 17/62, it too had avoided taking a clear position.[22] This void meant that the Council, made up of the leaders of the Member States, had transferred the matter to the discretion of the ECJ.

The ECJ first considered the relationship between EU and national *competition* laws shortly after the entry into force of Regulation 17/62. In the preliminary reference of *Walt Wilhelm* of 1969, the Court was asked whether the Bundeskartellamt was competent to impose fines for the infringement of German competition law when the Commission investigated the same price-fixing cartel under Article 101.[23] Three considerably different answers were advocated, demonstrating—in the words of AG Roemer—'that we are concerned with a difficult question'.[24]

First, the cartel members invoked the *single barrier theory*, by which EU competition law will apply to the exclusion of national competition law. According to this approach, only Article 101 should apply when conduct affects trade between Member States.[25]

Secondly, the German, French, and Dutch governments, supported by the AG, promoted the *double barrier theory*, by which both EU and national laws apply side-by-side concurrently and independently.[26] Accordingly, a practice would only be lawful if it satisfies the elements of both national and EU competition laws. AG Roemer argued that this position was not

[19] Marco Botta and others, 'The Assessment of the Effect on Trade by the National Competition Authorities of the "New" Member States: Another Legal Partition of the Internal Market?' (2015) 52(5) CML Review 1247; Wouter PJ Wils, 'The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt' (2019) 3 Concurrences 58.

[20] Lorenzo F Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-fought Compromise' in Kiran K Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 54–88. Giuliano Marenco, 'Does a Legal Exception System Require an Amendment of the Treaty?' (2000) European Competition Law Annual 145.

[21] arts 65(1), 66(1), and 66(7) ECSC; Commission's annual report 1972, para 27.

[22] This was a conscious choice, as summarized by the Commission's annual report 1974, 31.

[23] Case 14/68, *Walt Wilhelm v Bundeskartellamt*, ECLI:EU:C:1969:4.

[24] AG Roemer (n 18) 20.

[25] Case 14/68, *Walt Wilhelm*, 4–5.

[26] ibid 7–8; AG Roemer (n 18) 20.

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only supported by the wording of the Treaty and Regulation 17/62, but was also merited by the 'unreliable, fluid and changeable' effect on trade criterion.[27]

Thirdly, the Commission endorsed an intermediate case-by-case approach, combining the *parallel application* of EU and national competition laws with the principle of *primacy* of EU law. Like the double barrier theory, the Commission did not object to the concurrent application of EU and national competition laws. Yet, like the single barrier theory, it added that this solution should apply as far as it does not threaten the uniform application of EU law. According to the Commission, until a universal set of rules is introduced, conflicts between the two sets of laws should be resolved on a case-by-case basis by reference to the general principles of EU law—and in particular—the duty of sincere cooperation entailing that Member States should refrain from instituting domestic proceedings until the Commission's proceedings have come to an end.[28]

The Court concurred with the Commission. It held that in the absence of a relevant regulation on the matter, NCAs may apply national competition law to cases that are likely to be subject to a Commission's decision under EU competition law. EU and national competition laws may consider the same restrictive practices from different points of view,[29] as long the national rule 'does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules'.[30] National competition laws, accordingly, could neither exempt an agreement that is prohibited under EU law nor prohibit an agreement that is exempted under Article 101(3). This logic was presumed to apply also to Article 102.[31]

Walt Wilhelm left many open questions as to the relationship between EU and national competition laws, which have not been fully resolved before the entry into force of Regulation 1/2003.[32] For example, the EU Courts did not take a clear position on the compatibility of practices that were not found to restrict competition in the meaning of Article 101(1) but were prohibited by stricter national competition rules. In *Perfumes*, the ECJ seemed to allow the application of national competition rules in such situations, holding that a Commission's comfort letter clearing an agreement did not prevent the application of a French competition law provision prohibiting the refusal to sell.[33] Nevertheless, the full impact of this ruling is unclear, because the reason the agreements did not infringe Article 101(1) was the lack of effect on trade. The outcome might have been different if an agreement with cross-border effect was not considered to restrict competition.[34]

A separate, yet linked question, related to the relationship of EU competition law to *other national laws*. In *Sachversicherer*, the ECJ seemed to extend the *Walt Wilhelm* principles to situations where EU competition law prohibited conduct that was *permissible* under other types of national laws. In that case, the Court examined recommendations issued by the German

[27] ibid 22.
[28] Case 14/68, *Walt Wilhelm*, 9.
[29] ibid 13.
[30] ibid 14.
[31] When the ECJ had restated Walt Wilhelm in later cases, it replaced the reference to 'rules on cartels' with a more general term 'restrictive practices', mentioning both arts 101 and 102. See C-253/78, *Procureur de la République v Giry and Guerlain* ECLI:EU:C:1980:188 ('Perfumes'), para 15; C-67/91, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others ECLI:EU:C:1992:330*, para 11. This was also repeated following modernisation, see C-550/07P, *Akzo Nobel Chemicals Ltd and others v Commission and others*, ECLI:EU:C:2010:512, para 103; C-17/10, *Toshiba*, para 81.
[32] This relationship was often discussed by the Commission, see annual report 1968, para 659; annual report 1969, para 528; annual report 1971, para 129; annual report 1972, para 27; annual report 1974, 9; annual report 1976, paras 110–113; annual report 1987, 23.
[33] C-253/78 *Perfumes*, paras 14–19. Also see Kurt E Markert, 'Some Legal and Administrative Problems of the Coexistence of Community and National Competition Law in the EEC' (1974) 11(1) CML Review 92, 92; Explanatory Memorandum to COM(2000) 582 Implementation of the rules on competition laid down in arts 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, para 14.
[34] For a discussion, see Rein Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' (1999) 20(8) ECLR 420, 427.

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Association of insurance companies, which were found by the Commission to infringe Article 101. The Court rejected the association's claim that the recommendations should not be prohibited due to an exception in the German competition act, stating that the national prohibition does not apply to agreements that are linked to matters supervised by the Federal Supervisory Office for the Insurance Industry. The Court observed that whilst it is true that national legislation may establish a close link between the application of competition law and laws pursuing other economic policies (eg, the supervision of the insurance industry), EU competition law does not make the implementation of Articles 101 and 102 dependent upon the manner in which the supervision of certain areas of economic activity is organized by national legislation.[35]

The same principles, however, did not apply where a national law *prohibited* conduct that was exempted by Article 101(3). This was established in *VAG-Händlerbeirat* and *Metro*, two cases examining the relationship between Article 101 and a German provision on unfair competition.[36] Differing from the *Walt Wilhelm* rule, the ECJ held that an agreement that benefited from an Article 101(3) exemption could nevertheless be prohibited by the German law.[37] The Court's analysis was based on the assumption that the German unfair competition rules did not amount to national competition law. Yet, despite the importance of such classification, the Court did not explain why.[38] In fact, as discussed in Section V below, German scholars, legislators, and enforcers often describe these provisions as being part of a broader system of national competition law.

The complex array of rules guiding the relationship between EU competition law and national competition and other rules prior to the adoption of Regulation 1/2003 is summarized in Table 1.

Notwithstanding the above, this complex relationship had limited repercussions during the early years of EU competition law enforcement. When the *Walt Wilhelm* judgment was rendered, the EU was composed of merely six Member States, from which only Germany had an active national competition law enforcement.[39] NCAs, therefore, had few opportunities to adopt decisions that stood in conflict with EU competition law. This was particularly true considering the early stage of EU market integration and the centralized prior-notification regime prescribed by Regulation 17/62, in which the Commission held an exclusive competence to apply Article 101(3).[40] Consequently, although the Commission and Member States have occasionally considered formalizing the relationship between EU competition and national law, they have not promoted such initiative.[41]

The tension between EU and national laws had grown towards the turn of the millennium, upon the enlargement of the EU and the acceleration of the integration process.[42] This had become even more pressing after the Commission presented its modernization plan in 1999, aiming to stimulate national enforcement.[43] Especially as the Commission did not take a

[35] C-45/85, Verband der Sachversicherer v Commission ECLI:EU:C:1987:34 C-45/85, *Verband der Sachversicherer v Commission*, ECLI:EU:C:1987:34, paras 21–22.

[36] C-41/96, *VAG-Händlerbeirat eV v SYD-Consult*, ECLI:EU:C:1997:283, para 16; C-376/92, *Metro v* Cartier, ECLI:EU:C:1994:5, para 24.

[37] Wesseling (n 34) 429–30.

[38] ibid 429–30; Suzanne Kingston, 'A New Division of Responsibilities in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call' (2001) 22(8) ECLR 340, 342.

[39] Fulda (note 1) 403.

[40] Commission's Staff Working Paper, Commission's proposal for a new Council Regulation implementing arts 81 and 82 – art 3, 31 May 2001, 4, 8 ('Article 3 Working Paper'). Also see Zekoll (n 1) 78.

[41] See Commission's annual report 1972, 34; annual report 1974, 9.

[42] The need for clearer rules was demonstrated, for example, by a number of notifications in which undertakings asked the Commission to grant an art 101(3) exemption rather than a negative clearance, noting that according to the *Walt Wilhelm* principle, this was the only way to ensure that their agreements would not be later prohibited by national competition laws. See Article 3 Working Paper, 8.

[43] ibid 4.

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Table 1. The relationship between EU competition and national laws prior to Regulation 1/2003

Type of conduct	Conduct that is permissible under Articles 101 and 102		Conduct that is prohibited by Articles 101 and 102
	Does not infringe Articles 101(1) or 102	Exempted under Article 101(3)	
Conduct that is permissible under national competition law	Conduct is not prohibited	Conduct is not prohibited	Conduct is prohibited (*Walt Wilhelm*)
Conduct that is permissible under other national law	Conduct is not prohibited	Conduct is not prohibited	Conduct is prohibited (*Sachversicherer*)
Conduct that is prohibited under national competition law	Conduct is probably prohibited (*Perfumes*)	Conduct is not prohibited (*Walt Wilhelm*)	Conduct is prohibited
Conduct that is prohibited under other national law	Conduct is probably prohibited (*VAG-Händlerbeirat eV*)	Conduct is prohibited (*VAG-Händlerbeirat eV, Metro*)	Conduct is prohibited

position on this matter in its Modernization White Paper consultation,[44] the relationship between EU competition and national law, which have accompanied the EU from its very inception, had to be defined.

The negotiations over Article 3: power struggle between the EU institutions and Member States

Regulation 1/2003 was the first time in which the Council had acted on its powers to regulate the relationship between EU competition and national laws. Defining this relationship had become one of the most contentious points in the negotiations preceding its adoption,[45] which took place between October 2000 and November 2002.

At the opening of the negotiations, the Commission advocated replacing the *Walt Wilhelm* principles of parallel application and primacy of EU competition law with the single barrier theory. The Commission maintained that it would be inconsistent with the notion of a single market if practices having a cross-border effect would be subject to different standards. Accordingly, Article 3 of the Commission's original proposal for Regulation 1/2003 of September 2000 suggested that Articles 101 and 102 should 'apply to the exclusion of *national competition laws*' when a practice has an effect on trade between Member States.[46] The draft explicitly disregarded a parallel application, warning that this would lead 'to unnecessary parallel proceedings'.[47]

[44] ST 12290 2000 INIT Working Party on Competition Report of 10 October 2000 ('Working Party on Competition Report of 10 October 2000'), para 7; The White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, para 85, however, provides that agreements which are exempted by a block exemption should not be held contrary to national law.

[45] As declared, in particular, in the Presidency Progress Report of 24 November 2000, para 10.

[46] Emphasis added. Proposal for a Council Regulation on the implementation of the rules on competition laid down in arts 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 (2000/C 365 E/28), Recital 8.

[47] Explanatory Memorandum (n 33) para 6. Also see Commission's annual report 2000, para 47; Article 3 Working Paper, paras 9–15; Wesseling (n 34) 431; German Monopolies Commission, 'Cartel Policy Change in the European Union? On the European Commission's White Paper of 28 April 1999' (2000) 33–34.

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Embracing the Commission's initial proposal would have considerably altered the relationship between EU and national competition laws. This proposal attracted high praise from the European Economic and Social Committee, noting it 'is clear and remarkably bold in its concision and brevity and it should remove one of the main causes for concern' about the renationalization of competition rules,[48] as well as by the European Parliament,[49] its Committee on Economic and Monetary Affairs,[50] and the Council.[51]

Yet, the Member States fiercely opposed. The German, Spanish, French, and Austrian delegations warned that it would supersede national competition laws in important areas where national rules have been applied, and would not be a proportional means to ensure the consistent application of EU competition law.[52] The Italian and Swedish delegations did not object to the reform as such but called to issue an unambiguous and practicable set of guidelines on what constitutes an effect on trade between Member States.[53] The Belgian, Danish, Greek, Irish, Luxembourg, Dutch, Finish, and British delegations were hesitant too, calling for more clarifications of the impact and purpose of arrangement on national competition rules.[54]

Faced with this disagreement, the discussion on this matter was suspended.[55] It was only commenced in May 2001, after the Commission's staff issued a Working Paper exclusively dedicated to this matter ('Article 3 Working Paper'). In this long, reasoned paper, the Commission continued to strongly advocate an absolute primacy of Articles 101 and 102, excluding national competition laws. It vindicated this approach by the desire to realize 'the enforcement potential' of NCAs and national courts[56] while ensuring a level playing field and coherent application.[57] The exclusion of national competition laws, according to the Commission, complied with the principles of subsidiarity and proportionality, as the old rule was 'inefficient due to the distortions that it creates in the internal market and the compliance burden that it imposes on companies'.[58]

The solution advocated by the Working Paper convinced neither the EU institutions[59] nor the Member States.[60] In November 2001, the Presidency of the Council had advanced a compromise: instead of excluding national competition laws as the Commission suggested, national competition laws would apply *in parallel* to Articles 101 and 102 subject to a *convergence rule*, according to which such parallel application will not lead to the prohibition of agreements that fulfil the conditions of Article 101(3) or that are not prohibited by Article 101(1).[61]

During most of the negotiations, however, the (draft) Article 3 expressed the single barrier theory. Only in May 2002, the Working Party first indicated that Articles 101 and 102 would be applied in parallel to national competition laws[62]; and only in September 2002—1 month before the adoption of the final version of Regulation 1/2003—did Article 3 reflect the

[48] Opinion of the Economic and Social Committee (2001/C 155/14), para 2.6.1. Also see para 2.6.3 and Opinion of the Economic and Social Committee OJ C 51 (2000/C 51/15), paras 2.3.5.6 and 2.3.5.12.

[49] The European Parliament resolution on the Commission White Paper on modernization of the rules implementing art 85 and 86 of the EC Treaty (COM(1999) 101, C5-0105/1999, and 1999/ 2108(COS)) of 18 January 2000, para 16.

[50] Committee on Economic and Monetary Affairs, Report of 30 November 1999, A5-0069/1999, para 14.

[51] 2347th Council meeting, 'Energy/Industry', 8538/01 of 14–15 May 2001, 23.

[52] Working Party on Competition Report of 10 October 2000, para 7, 12.

[53] ibid, para 13.

[54] ibid, para 14.

[55] ibid, para 15. Also see General Secretariat of the Council Report of 11 January 2001, art 3.

[56] art 3 Working Paper, para 22.

[57] ibid, para 24.

[58] ibid, para 49–50.

[59] Opinion of the Committee on Economic and Monetary Affairs of 13 June 2001, 4; Committee on Economic and Monetary Affairs, Report of 21 June 2001, 28.

[60] Progress Report from the Presidency to Coreper/Council (Industry/Energy), of 20 November 2001, 5.

[61] Moreover, the Presidency repeated the Commission's position in its Working Paper, allowing for the parallel application of stricter national competition rules on the abuse of unilateral conduct.

[62] ST 8383 2002 INIT Council Presidency Progress report of 16 May 2002 ('Council Presidency Progress report of 16 May 2002') 5.

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Presidency's compromise with respect to Article 101.[63] The German delegation, supported by the Finnish and Swedish delegations, expressed the main opposition to the primacy of EU competition law, insisting up until the end of October 2002 that the 'application of stricter national law should be possible'.[64]

Regulation 1/2003: a new distinction between national competition and other laws

After long months of negotiations, the Council reached a political agreement on the proposed Regulation in late November 2002[65] and adopted Regulation 1/2003 on December 2002. The final version of Article 3 rejected the Commission's efforts to considerably limit the room for national competition laws. As elaborated in the next section, it follows the line of *Walt Wilhelm* to the extent it allows the parallel application of EU and national competition laws, and reforms the relationship between EU competition and national laws in two important aspects:

First, Article 3(1) obliges NCAs and national courts to apply Articles 101 and 102 when they apply national competition law to anti-competitive agreements and unilateral practices that affect trade between Member States. The old enforcement regime of Regulation 17/62, in comparison, did not impose a similar obligation.

Secondly, Regulation 1/2003 explicitly permits stricter national rules on unilateral conduct, meaning that conduct that is not prohibited under Article 102 could still be prohibited under national competition rules on unilateral conduct (Article 3(2)), as well as other non-competition national laws that pursue a predominantly different objective from that of protecting competition on the market (Article 3(3)). This exception is often labelled as the 'German Clause', reflecting its abovementioned legislative history.[66]

The compromise of Article 3 is summarized in Table 2. The changes introduced by Regulation 1/2003 are marked in bold.

The approach under Article 3 may raise various questions, but the one which stands out and will be discussed in the following sections is the distinction in treatment between national *competition* laws and other national laws (those with a predominantly different objective). At first sight, classifying a national rule as a stricter national competition law on unilateral conduct (governed by Article 3(2)) or as a rule that predominately pursues a different objective (governed by Article 3(3)) may seem to have only limited real consequences. After all, in both scenarios, the national rule may apply even if an agreement has an effect on cross-border trade. Yet, the distinction between national competition laws and other laws has important substantive, procedural, and institutional implications.

In terms of *substance*, classifying a rule as national *competition* law entails that when an NCA or a national court apply such a rule it must also apply Articles 101 and/or 102 if the conduct has a cross-border effect.[67] Deviation from the EU prohibitions would only be permissible to the extent the conduct is not prohibited by Article 101 or if the national rule amounts to 'stricter' (rather than different) rules on unilateral conduct in the meaning of Article 102. Moreover, classifying a rule as national competition law also informs the rights

[63] ST 11791 2002 INIT Competition Policy Working Party Report, of 9 September 2002 ('Competition Policy Working Party Report of 9 September 2002') 17.

[64] ST 12998 2002 INIT Competition Working Party Report of 11 October 2002 ('Competition Working Party Report of 11 October 2002') 18. Subsequently, only the Germans continued to oppose the primacy of EU competition law, while the other delegations did not object. See, for instance, ST 13451 2002 INIT Report of the General Secretariat of the Council of 28 November 2002, 18.

[65] 2467th meeting of the Council of the European Union Competitiveness (Internal Market, Industry and Research) of 26 November 2002.

[66] Hildebrand (n 11). The reason for the distinction made between "stricter" anti-competitive agreements and unilateral conduct are discussed in Section III below.

[67] Regulation 1/2003, art 3(1).

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Table 2. The relationship between EU competition and national laws pursuant to Regulation 1/2003

Type of conduct	Conduct that is permissible under Articles 101 and 102		Conduct that is prohibited by Articles 101 and 102
	Does not infringe Articles 101(1) or 102	**Exempted under Articles 101(3)**	
Conduct that is permissible under national competition law	Conduct is not prohibited	Conduct is not prohibited	Conduct is prohibited[a] (*Article 3(1)*)
Conduct that is permissible under other national law	Conduct is not prohibited	Conduct is not prohibited	Conduct is prohibited[a]
Conduct that is prohibited under national competition law	**Anti-competitive agreements: Conduct is not prohibited**[b] **Unilateral conduct: Conduct is prohibited (*Article 3(2)*)**	Conduct is not prohibited (*Article 3(2)*)	Conduct is prohibited
Conduct that is prohibited under other national law	**Conduct is prohibited (*Article 3(2)*)**	Conduct is prohibited	

[a] While such practices are formally prohibited under EU competition law, an NCA may use its enforcement discretion to refrain from the enforcement or to address the matter by alternative enforcement instrument.

[b] In C-226/11, *Expedia*, paras 14–38, the ECJ clarified that because the Commission's *de minimis* notice is not binding on Member States, an NCA may still apply Article 101 to an agreement that does not reach the thresholds specified by the notice if it constitutes an appreciable restriction of competition within the meaning of that provision.

of claimants in private litigation. The Damages Directive extends its scope to 'actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1)'.[68]

In terms of *procedure*, the obligation to apply Articles 101 and 102 alongside national *competition* law in cases where cross-border trade is affected triggers a set of notification requirements and coordination mechanisms. Article 11 of Regulation 1/2003 obliges NCAs to inform the Commission before commencing formal investigative measures, adopting decisions requiring an infringement be brought to an end, accepting commitments, or withdrawing the benefit of a block exemption regulation. The Commission may, in turn, initiate its own proceedings, thereby relieving the NCA of its competence to act. Article 16 of the Regulation further prohibits NCAs and national courts from taking decisions running counter to a Commission decision on the application of Articles 101 and 102 to the same conduct, and orders national courts to avoid giving decisions which would conflict with a decision contemplated by the Commission. Such obligations do not only apply to the application of EU competition law but also to national competition law.[69]

[68] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ L 349, Recital 10.

[69] C17/10, *Toshiba*, paras 86–87.

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Finally, we believe that the classification of conduct as (stricter) national competition law also carries a significant *institutional* impact. Regulation 1/2003 does not clearly define what national bodies are under the obligation to apply Articles 101 and 102. Reflecting the principle of procedural autonomy, Article 35 of the Regulation leaves it to the Member States to designate the 'competition authority or authorities responsible'. Because Article 5 of the Regulation has a direct effect,[70] *any* national authority that applies what could be considered to be 'national competition law' under Article 3(2) should also apply Articles 101 and 102,[71] even if it is not normally viewed as an NCA in the national setting (eg, a consumer protection agency).[72] Thus, even where a Member State has not explicitly classified a law as *competition* law, but there are reasons to believe it is a competition law within the meaning of Article 3(2), the authority applying it would have to consider Articles 101 and 102. Understanding what competition law is under Article 3 is therefore crucial. The ECN+ Directive, moreover, specifies that an NCA should enjoy a degree of independence, resources, and enforcement and fining powers when it enforces EU or national competition law.[73] Any institution applying (stricter) national competition rules, therefore, must comply with such requirements. Such obligations do not apply to the application of other rules in the meaning of Article 3(3).

III. ARTICLE 3: LACK OF DIVIDING LINE BETWEEN NATIONAL COMPETITION AND OTHER LAWS

Although Regulation 1/2003 has put to rest many open questions on the relationship between EU competition law to national laws, its peculiar and vague terminology gave rise to new questions. This section traces the source of these uncertainties. It shows that Article 3 and Recitals 8 and 9 were adopted as a patchwork of political compromises, following a lengthy and complex negotiation process, rather than based on a coherent theory. It sets out challenges related to the distinction between Articles 101 and 102 ('Distinction between conduct falling under Articles 101 and 102' section), the scope of 'stricter' national rules (Distinction between Article 102 and 'stricter' national rule on unilateral conduct' section), and the distinction between national competition rules and other, non-competition, rules ('Distinction between national competition and non-competition rules' section). These last challenges—the distinction between national competition laws and other laws—provides the basis for the analysis in the rest of the article.

Distinction between conduct falling under Articles 101 and 102

Regulation 1/2003 introduced a new distinction between anti-competitive agreements that are covered by Article 101 (in which EU law has absolute primacy), to unilateral conduct covered by Article 102 (in which stricter national rules could prohibit a practice that is permissible under EU law).[74] This distinction, which was not applicable in the pre-Regulation 1/2003 era, was not explained with reference to a coherent economic theory. Rather, as

[70] C375/09, *Prezes Urzadu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp.zo.o*, ECLI:EU:C:2011:270, para 34.

[71] Also see Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' (Report to FIDE Congress 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139776> 102–03 (accessed 15 May 2023).

[72] For a similar conclusion based on the duty of sincere cooperation, see John T Lang, 'The Duty of Cooperation of National Courts in EU Competition Law' (2014) 17 Irish Journal of European Law 27, 29.

[73] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11, Recitals 3 and 4.

[74] art 3 Working Paper, Section IV(A).

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elaborated below, it seems to be linked to a political motivation, aimed to satisfy some of the Member States' reluctance to grant the Commission more power.[75]

This political motivation was not explicitly declared. The distinction between conflicts with Articles 101 and 102 was first proposed by the Commission in its Article 3 Working Paper, on the curious grounds that while Article 101 applies to all *undertakings* irrespective of their market power, Article 102 only applies to *dominant undertakings*. According to the Working Paper, because Article 101 does not prohibit agreements that do not appreciably restrict competition in the meaning of Article 101(1) or can be justified under Article 101(3), it should apply to the exclusion of both more lenient and stricter national competition laws applicable to such practices. This will ensure that 'negative' anti-competitive agreements that cannot be justified by overriding benefits would be prohibited, while 'positive' agreements that create benefits to society would not be blocked by national competition laws.[76]

The division between 'positive' and 'negative' effects, according to the Working Paper, is not applicable to Article 102, which only applies to dominant undertakings. Therefore, 'the need to exclude the application of stricter national laws to the behaviour of dominant undertakings is less compelling', and '[t]here may even be good reasons to apply more detailed national rules to such unilateral practices of dominant firms, thereby facilitating access to the market of a particular Member State'.[77] The Working Paper, notably, does not explain what such 'good reasons' might be.

The Commission maintained that the wording of its first proposal for Article 3—suggesting it will give primacy to the EU rule on 'the *abuse* of a dominant position'[78]—reflected this difference. This wording implies that the Regulation would *not* prohibit a stricter national rule on unilateral conduct, but only national rules that are 'equivalent' to Article 102.[79] National competition rules could remain applicable when they are applied to the unilateral conduct of a non-dominant firm or to the unilateral conduct of a dominant firm in a stricter way than Article 102.[80]

The merits of the Commission's purported distinction between Articles 101 and 102 are questionable. One can argue that in the same way that Article 102 only applies to the *abuse* of a dominant position, Article 101 only applies to agreements that have the 'object or effect the prevention, restriction or distortion of competition'. In practice, NCAs and national courts often analysed agreements that were concluded by relying on one of the parties' dominant position or superior bargaining power only under Article 102, enabling the application of stricter national competition rules.[81]

Distinction between Article 102 and 'stricter' national rule on unilateral conduct

Another set of challenges relates to the question of what type of conduct falls under the exception of Article 3(2), prescribing that the Member States are not precluded from adopting and applying 'stricter national laws which prohibit or sanction unilateral conduct'.

Those challenges originate from the very wording of Article 3(2). In the first place, the Article refers to 'stricter national laws' in general, and not to national competition laws. In principle, the Article should be understood in conjunction with Recital 8, clarifying that this rule refers specifically to 'stricter *national competition laws*'.[82] Yet, the recitals of EU acts have

[75] Feteira (n 5) s 1.01. Also see, Giorgio Monti, *EC Competition Law* (CUP 2007) 402; Hans Gilliams, 'Modernisation: From Policy to Practice' (2003) 28(4) European Law Review 464.
[76] art 3 Working Paper, paras 53–57.
[77] ibid, para 60.
[78] Emphasis in original.
[79] ibid, para 61.
[80] ibid.
[81] See 'No benchmarks in national practices' section.
[82] Emphasis added.

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no binding legal force. They cannot be relied on as a ground for derogating from the actual provisions of the act in question.[83] Thus, although it seems reasonable to conclude that Article 3(2) is meant to cover *competition* laws specifically, there ambiguity remains. In the second place, Article 3(2) and Recital 8 use different terminology from the rest of Regulation 1/2003. While Articles 1 and 3(1) of Regulation 1/2003 refer to an 'abuse prohibited by Article [102]', they refer to national competition laws that prohibit or sanction 'unilateral conduct', suggesting that they include conduct beyond abuse of a dominant position.

In the third place, Article 3(2) does not clarify what 'stricter' means. Various interpretations are permissible, including (i) a stricter standard of what constitutes an abuse (ie, narrow or broad MFN clauses in the Booking.com national litigation)[84]; (ii) a lower level of market power to establish a position of dominance[85]; (iii) different degrees and types of economic power (eg, economic dependence, or gatekeeper powers)[86]; or (iv) rules applying to conduct that was objectively justified under Article 102.

Distinction between national competition and non-competition rules

Finally, Article 3 raises a set of challenges related to the distinction between rules covered by Article 3(2) (national competition law) and by Article 3(3) (other rules). It is these challenges that have prompted the analysis in Sections IV and V.

The definition of what constitutes national competition laws was first discussed by the Commission's Staff Article 3 Working Paper of May 2001, at a time when the (draft) Article 3 still included absolute primacy for EU competition rules. Aiming to avoid the parallel application of EU and national competition laws, the Working Paper advocated a broad interpretation of what may fall under the term 'national competition law', noting that emphasis should be placed on the substantive content of the national rule, rather than on the legal instrument of which it forms part of.[87] This broad interpretation is reflected by the Annex of the Working Paper, comparing the main *competition* law provisions of the Member States. This Annex includes national rules applicable to non-dominant undertakings (eg, Germany, France, Poland) and whose dominance is assumed under statutory thresholds that differ from the EU rules (eg, Austria, Germany, Poland, UK). The Working Paper, however, is confusing. Some of the national rules on abuse of economic dependence and restrictive practices that are labelled as competition law in the Annex, are explicitly mentioned in the body of the Paper as 'not constitute competition laws within the meaning of Article 3'.[88]

The main type of national laws that were addressed by the Article 3 Working Paper as other national rules included liberalization measures adopted in telecommunications, gas, and electricity sectors. The Commission explained that those measures aim to introduce competition in markets previously served by incumbents holding exclusive or special rights. They are often based on EU Directives implemented in national law and mirror EU law obligations.[89]

The Member States, as mentioned, were not satisfied with the Commission's proposal. In fact, the status of stricter national unilateral conduct rules was one of the most contentious questions in the final stages of the negotiations over Article 3.[90] Only in May 2002, after the Council pressured the delegations to reach a compromise on the structure of Regulation 1/2003, the French

[83] C-162/97, *Nilsson and others*, ECLI:EU:C:1998:554, para 54.
[84] Pinar Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2016) 12(4) Journal of Competition Law and Economics 781, 794.
[85] Or Brook and Magali Eben, 'Abuse Without Dominance and Monopolisation Without Monopoly' in Pinar Akman and others (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing 2022).
[86] ibid.
[87] art 3 Working Paper, para 62.
[88] ibid, para 64.
[89] ibid, para 74.
[90] Council Presidency Progress report of 16 May 2002, 5.

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delegation put forward a new draft proposal for Article 3. Supported by Finland and Sweden, it called, for the first time, to add the provision of what would later become Article 3(3), suggesting that '[t]his provision is without prejudice to the implementation by national competition authorities or national courts of *national law provisions* that *mainly pursues a different or complementary objective* from that assigned to articles [101] and [102]'.[91]

Notably, this initial version of Article 3(3) was presented at a time when Article 3 did not yet include a provision on stricter national laws on unilateral conduct in the meaning of Article 3(2). Moreover, it did not distinguish between national competition and other rules. Rather, it was supposed to apply to 'national provisions that prohibit or punish on national territory unilateral acts of companies that, *without holding a dominant position*, can affect competition or acts of companies that affect fair trade'.[92]

This was changed after 4 months of negotiations when the Working Party adopted the final structure of Article 3. The new version distinguishes between conflicts with national *competition* laws (Article 3(1) and (2)); and other laws that 'pursues predominantly an objective different from that of protecting competition on the market' (Article 3(3) and Recital 8(a), later transformed with minor changes into Recital 9). This Recital refers to national legislation that prohibits or imposes sanctions on acts of unfair trading practice, either unilateral or contractual, which 'pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market'. This includes legislation that prohibits undertakings from imposing on their trading partners terms and conditions that are unjustified, disproportionate or without consideration.[93]

Upon pressure from the German delegation,[94] this was also the first time that Recital 8 formally declared that stricter national laws on unilateral conduct were not excluded. [95] This first version of Recital 8 simply referred to stricter 'national laws', and was changed a month later to refer to 'stricter national competition laws'.[96] This amended version of October 2002 was also the first to include a reference to stricter national rules on unilateral conduct in the body of Article 3(2) itself. Yet, as mentioned above, the second sentence of Article 3(2) still refers to 'stricter national laws' rather than to 'stricter national competition laws'.[97]

In November 2002, the delegations clarified in Recital 8 that the abuse of economic dependence—which was not considered to be national *competition* law in Article 3 Working Paper[98]—should be classified as stricter national competition law.[99]

The dividing line between (stricter) national rules on unilateral conduct in the meaning of Article 3(2) and national rules with a predominantly different objective in the meaning of Article 3(3), to conclude, hinges on identifying the objective(s) or the national rules and determining whether they are sufficiently similar to those of EU competition law. This is by no means an easy task. Identifying the goals of EU competition law is subject to great policy debates; there is no single, acceptable goal, and multiple and often conflicting objectives must be balanced against one another.[100] Moreover, as the next section shows, determining the objective of the national laws is not a straightforward exercise either.

[91] ibid, emphasis added.
[92] ibid, emphasis added. This was also reflected in the wording of the Recital France suggested to insert to the Regulation (see footnotes for Recital 8).
[93] Competition Policy Working Party Report of 9 September 2002.
[94] Council Presidency Progress report of 16 May 2002, 21.
[95] Emphasis added. Competition Policy Working Party Report of 9 September 2002, Recital 8.
[96] Competition Working Party Report of 11 October 2002.
[97] On the legal status of the recital, see n 92.
[98] para 65.
[99] ST 13983 2002 INIT Competition Working Party Report of 8 November 2002.
[100] Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 24(2) Legal Studies 620.

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IV. ARTICLE 3'S POSSIBLE BENCHMARKS

The previous sections showed that despite some significant substantive, procedural, and institutional implications, Article 3 does not offer clear guidance on drawing the dividing line between practices that fall under Articles 3(2) and (3).[101] This section presents three possible benchmarks to inform such decision based on the wording of Regulation 1/2003, the EU Courts case law, and the Commission's policy papers. As elaborated below, the classification of conduct as (stricter) national competition or other laws may differ according to the selected benchmark. The presentation of the benchmarks in this section is not intended to be normative. Rather than discussing the preferred solution, it aims to search for the meaning of Article 3 according to law, jurisprudence, and soft law and inform the empirical analysis presented in the next section. A normative suggestion will be discussed in the concluding section of this article.

Benchmark 1: the objective of the national statutes

A first dividing line between national competition and other laws might be drawn according to the objective of the national statutes. Such benchmark is implied by the wording of Article 3(3), referring to the objective of the national *legislation* as being 'predominantly different' from that of Articles 101 and 102. Accordingly, a national law will not be classified as a competition law when it has a different aim of 'protecting competition on the market', as stated by Recital 9 of Regulation 1/2003.

This benchmark corresponds to the ECJ's ruling in *VAG*. As mentioned, the ECJ assumed that the German law on unfair competition did not amount to national competition law because it was not part of the competition law statutes.[102] This benchmark was also suggested by the Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003, contrasting national competition laws that protect 'competition on the market' with other laws that 'regulate contractual relationships between undertakings' (such as unfair trading practices).[103]

Using the objective of the national statutes as the benchmark informing Article 3 analysis carries the advantages of offering a clear and predictable rule, which can be easily administrated given the relatively high degree of harmonization among Member States' competition laws. Note that, unlike the aims of competition *law* in general, which as mentioned are vague and subject to much controversy, many national competition law *statutes* explicitly invoke specific aims.

At the same time, it is highly formalistic; the classification of a rule as national competition or other law is only dependent on the statute in which it appears. Member States could easily circumvent their duties under Regulation 1/2003 by listing national rules outside their main competition law statutes. This benchmark also hampers uniformity as similar national rules may be classified differently based on the statutes they were included in. For this reason, this benchmark may conflict with *Sachversicherer*, in which an exemption for insurance agreements listed in the German competition act was classified as another national law. The ECJ emphasized that the implementation of Articles 101 and 102 is not dependent upon the way the supervision of certain areas of economic activity is organized by national legislation.[104]

[101] See Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003, para 181, for an acknowledgement by the Commission that '[d]rawing the borderline appears particularly difficult'.
[102] C-41/96 *VAG-Händlerbeirat*, paras 12–14. Also see Monti (n 75) 408.
[103] para 181.
[104] C-45/85 Verband C-45/85 *Verband*, paras 21–22.

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Benchmark 2: objective of the specific national provision

A second possible benchmark is similar to the first to the extent it is based on the objective of the national measure. Yet, instead of focusing on the national statutes as a whole, it examines the objective of a specific provision on a standalone basis. This objective would be defined explicitly in the legislation or its preparatory work, and gain meaning through EU and national jurisprudence.

The Commission's Staff Working Paper accompanying the 2009 Report on the functioning of Regulation 1/2003 includes some indications favouring this benchmark. The Commission cited a paper by *Smijter* and *Kjoelbye*—both Commission officials at the time—arguing that the main distinctive feature is whether the aim of the national *provision* is limited to regulating a contractual relationship with a view to protecting a weaker party against a stronger party or whether competition on the market is considered in the elaboration of the rule or its application. Each national provision should be examined, rather than the overall statute in which it is contained.[105]

The focus on the provision rather than the statute it forms part of renders this benchmark less formalistic and *facilitates* greater uniformity in the classification of national rules. At the same time, it may not offer equal legal certainty, because it may be more difficult to identify the objectives of a specific provision. In some cases, moreover, a single provision may tackle multiple objectives, some of which should be classified as competition law while others focus on contractual relations.

Benchmark 3: harm addressed in the enforcement of the national provision

Differing from the first two benchmarks, the third does not focus on objectives *in abstracto*, but rather looks at the harm the enforcement of a national provision addresses in practice. This benchmark can be inferred from the wording of Recital 9, stating that national rules that protect trading partners will not be classified as national competition law, because they apply 'irrespective of actual or presumed effects of such acts on competition on the market'. Accordingly, protecting competition in the market should be classified as competition law, where the protection of the individual interests of market participants for their own sake is not. This benchmark is also hinted at by the Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003. The Commission explained that national rules 'combating excessive market power or protecting smaller undertakings in a market against their larger competitors' are likely to be considered competition law provisions.[106]

This benchmark is in line with EU competition law to the extent it focuses on the effects of the national rules in a specific set of legal and economic circumstances, rather than their form. It is also sensitive to the diversity of national laws. For the same reasons, however, this benchmark does not offer legal certainty. The protected harm is case-specific and may not be clear in the early days of the case; the enforcement of a single case, moreover, may tackle multiple harms.

The three benchmarks, their promises and shortcomings, are summarized in Table 3. The table demonstrates that each of the benchmarks represents a unique trade-off between formalism, legal certainty, and uniformity: the first benchmark (objective of the national statutes) is formalistic. While it could allow Member States to easily circumvent their duties under Regulation 1/2003 and may hamper the level playing field, its application is predictable; the third benchmark (harm addressed in the enforcement of the national provision) is based on a substantive, case-by-case analysis. The opportunity to account for the specific legal and

[105] Footnote 213, citing Eddy De Smijter and Lars Kjoelbye 'The Enforcement System under Regulation 1/2003' in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition* (OUP 2007), para 2.59.
[106] paras 180–181 and fn 213.

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Table 3. Article 3 benchmarks

Benchmarks	Advantages	Disadvantages
Objective of the national statutes	Clear and predictable rule Supported by the wording of Article 3	Formalistic May hinder level-playing field
Objective of the specific national provision	Not formalistic Facilitates uniform treatment	Limited legal certainty given the difficulties identifying the provision's objective
Harm addressed in the enforcement of the national provision	Effects-based Facilitates uniform treatment	Very low legal certainty

economic circumstances and to apply the law uniformly across the EU, however, entails a limited degree of legal certainty. The second benchmark (objective of the specific national provision) lies in between the two other benchmarks.

V. AN EMPIRICAL ANALYSIS OF NATIONAL CASE LAW

This section turns to national practices in the search for the dividing line between 'stricter' national competition law (Article 3(2)) and other laws pursuing a predominately different objective (Article 3(3)). French and German practices are used as a case study to demonstrate how each of the proposed benchmarks may operate in practice, highlighting their challenges and advantages. In addition, the study of national practices reveals that none of the proposed benchmarks currently clearly guide the classification of national laws as 'competition' or 'other' laws in the meaning of Article 3 in national practice.

Next section first presents the methodology and case selection guiding this section. Next, 'No benchmarks in national practices' section demonstrates that the French and German practices did not identify a single benchmark to guide the distinction. Later three sections test each of the proposed benchmarks, showing that none of them can explain national practices. Not only was there no uniformity between the benchmarks used in France and Germany but also these benchmarks fail to explain practices in each of those countries individually.

Methodology and case selection

We applied systematic content analysis of legal text (ScA) to French and German practices, to demonstrate how each of the proposed benchmarks may operate in practice. ScA provides a structured approach to study a body of case law, to trace patterns, and diverging interpretations.[107] A full breakdown of the variables, the coding book guiding the ScA, and the output of the analysis are available upon request from the authors.

France and Germany were selected as a case study not only given their immense impact on the drafting of Article 3, as elaborated in Section II, but also given their (diverse) national provisions on abuse of economic dependence and unfair practices, as well as recent activities to regulate digital markets. As the historical overview above pointed out, the classification of those provisions lies at the heart of the controversy surrounding the interpretation of Article 3.

[107] Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl and others (eds), *The Politics of European Legal Research* (Edward Elgar Publishing 2022) 109–23.

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Our database includes publicly available cases rendered from the entry into force of Regulation 1/2003 in May 2004 and until April 2020, involving public and private enforcement of (i) Articles 101 and 102 and the national equivalent provisions (ii) national laws on abuse of economic dependence, unfair competition, and restrictive trading practices (either in conjunction with Article 101 and/or 102 TFEU or on their own); and (iii) appeals on the application of those provisions.[108] These provisions were identified as relevant based on an extensive literature review of both international comparative scholarship (in English) and national scholarship in French and German. The database also includes all cases mentioning Article 3 of Regulation 1/2003 (or national equivalents, such as section 22GWB in Germany), or the unique elements of the article (eg, 'stricter' or predominantly different objective).

Based on these case selection criteria, the database includes 59 cases from France and 46 from Germany. As not all decisions and judgments in Germany and France are publicly available, this is not expected to be a full record of national cases. While this is a limitation of this study, as elaborated below, even this sample is sufficient to support our conclusion as to a lack of a single and uniform benchmark.

The EU and national law provisions included in the database are listed in Table 4.

No benchmarks in national practices

A first step to study national practice calls for examining whether the French or German competition authorities and courts explicitly adopted a benchmark to guide the interpretation of Article 3. Yet, a systematic content analysis of French and German practices demonstrates that like at the EU level, no clear benchmark was invoked by the NCAs and courts to distinguish between national rules falling under Articles 3(2) and (3). Although several French (16/59) and German cases (18/46) referred to Article 3, no case explored the dividing line, and hardly any attempted to interpret the meaning of the Article.

A closer look reveals how Articles 3(2) and 3(3) were principally used in national practice. Cases examining anti-competitive agreements mostly used Article 3 to confirm the primacy of EU law.[109] A few cases examined whether Article 3(2)'s exception for stricter national competition law can apply to agreements that were concluded by relying on one of the parties' dominant position or superior bargaining power. Departing from the interpretation advocated by the drafters of the Article,[110] both French and German courts and NCAs considered that the primacy of Article 101 in those situations was irrelevant, arguing that the conduct should be seen as unilateral.[111] These cases did not interpret the meaning of 'stricter', but only discussed the distinction between unilateral and concerted conduct.

In the context of unilateral conduct, national practice invoked Article 3(2) as a justification for applying diverging national law.[112] In both jurisdictions, it was used to bring cases under the national provision on abuse of *economic dependence*. In Germany, one court also held that

[108] The following sources were used to identify and access the judgments and decisions: <www.legifrance.gouv.fr> accessed 15 May 2023; <https://www.autoritedelaconcurrence.fr/fr/liste-des-decisions-et-avis> accessed 15 May 2023; <www.bundeskartellamt.de> accessed 15 May 2023; <https://dejure.org/gerichte> accessed 15 May 2023; <https://openjur.de/> accessed 15 May 2023; <https://www.research.wolterskluwer-online.de> accessed 15 May 2023; <http://juris.bundesgerichtshof.de/> accessed 15 May 2023.

[109] Eg, Germany: Higher Regional Court Düsseldorf ('HRC DU'), VI-Kart 5/09(V) (13 November 2013); Bundeskartellamt, B9-66/10 (20 December 2013); Higher Regional Court Hamburg, 3 U 38/11 (12 December 2013). France: Appeals Court Paris ('ACP'), 04/01850 (21 September 2004), 15/13603 (20 February 2019), 2009/05544 (23 February 2010); Court of Cassation, 10-14.881 (16 April 2013).

[110] See 'Distinction between conduct falling under Articles 101 and 102' section.

[111] Germany: Bundeskartellamt, B9-121/13 (22 December 2015); HRC DU, VI-Kart 5/09(V) (13 November 2013), VI-Kart 5/11(V) (21 December 2011); Federal Court of Justice ('BGH'), KVR 11/12 (12 July 2013). France: Autorité de la Concurrence ('AdlC'), 20-D-04 (16 March 2020), 10-D-08 (3 March 2010); Court of Cassation, 15-17.004 (5 July 2017).

[112] Germany: Regional Court Nürnberg-Fürth ('RC NF'), 4 HK O 6645/04 (3 August 2005); HRC DU, VI-Kart 5/11(V) (21 December 2011); Higher Regional Court Frankfurt ('HRC FRA') 11 U 26/13(Kart) (29 May 2018); BGH, KVR 17/08

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Table 4. Database

Type of conduct	France	Germany	EU law
Competition law statutes	Code de Commerce, Book IV, Title II	Gesetz gegen Wettbewerbbeschränkungen (GWB)	'EU competition law'
Anti-competitive agreements	L.420-1	section 1	Article 101 TFEU
Abuse of dominance	L.420-2, para 1	section 19 (and section 18)	Article 102 TFEU
Abuse of economic dependence	L.420-2, para 2	section 20	–
Restrictive practices statute	Code de Commerce, Book IV, Title IV	–	–
Practices restrictive of competition: imbalance in the commercial/contractual relationship	L.442-1[a] and L.442-3	–	–
Unfair competition statute	–	Gesetz gegen den unlauteren Wettbewerb (UWG)	–
Unfair commercial practices	–	section 3	–
Protection of competitors	–	section 4	–

[a] Ex. L.442-6 (prior to 2019).

the national provision on *abuse of dominance* may be stricter in practice.[113] Notably, although these cases relied on the exception for 'stricter' national competition laws, they did not explain what constitutes 'stricter'.

Only a few cases—and only in France—examined other national laws in the meaning of Article 3(3). Article 3(3) was relied on, in particular, to prohibit conduct under a national provision on practices restrictive of competition (L.442-1, ex L.442-6), which did not infringe EU competition law.[114] The courts explained that the national provision protects the functioning of markets and competition through the protection of competitors. Since it does not rely on the 'market notion', it is distinct from the objectives of EU competition law, aiming to protect the competitive functioning of the market as a whole.[115] Yet, the French judgments do not point to a consistent benchmark because the same provision was also

(11 November 2008), KVR 11/12 (12 July 2013); Bundeskartellamt, B8-101/11 (30 November 2012), B9-149/04 (8 May 2006). France: AdlC, 20-D-04 (16 March 2020), 10-D-08 (3 March 2010); Court of Cassation, 15-17.004 (5 July 2017).

[113] HRC FRA, 11 U 26/13(Kart) (29 May 2018).

[114] ACP, 12/13845 (15 January 2014), 11/01468 (2 July 2014), 13/05110 (24 June 2015), 13/23968 (11 May 2016), 15/13603 (20 February 2019). See also Commercial Court Paris, 2015000040 (7 May 2015); Court of Cassation, 15-17.004 (5 July 2016); ACP, 15/18784 (21 June 2017).

[115] ACP, 15/13603 (20 February 2019) 12–13; 11/01468 (2 July 2014), 12/13845 (15 January 2014), 13/23968 (11 May 2016); Commercial Court Paris, 2015000040 (7 May 2015) 13.

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considered as a stricter national competition law under Article 3(2).[116] Thus, despite a few interesting cases, even the French national practice is not conclusive on the dividing line between Articles 3(2) and 3(3).

Since national practices did not explicitly favour a benchmark to inform the interpretation of Article 3, the following sub-sections turn to examine if, and how the distinction could be drawn considering the national interpretations of the objectives of the law, the objectives of the national provisions, and the harms addressed in their enforcement.

Objectives of the national statute

This section examines whether the dividing line between national competition and other laws in French and German practice can be understood in light of the objectives of the national statute. For this purpose, we distinguish between two types of statutes. First, as indicated by Table 4, are the *competition law statutes*: in France, Book IV, Title II of the Code de Commerce ('anti-competitive practices'); and in Germany the GWB. Those two statutes contain the national equivalents to Articles 101 and 102, as well as provisions on abuse of economic dependence that have no equivalent in EU competition law.[117] These provisions are enforced by the NCA.[118]

Secondly, we examine statutes including prohibitions on unfair competition and restrictive trading practices. In France, such prohibitions are included in the same part of the commercial code as the rules on competition. Book IV, Title IV of the Code de Commerce ('practices restrictive of competition') also includes prohibitions on abrupt terminations of commercial relationships or the attempt to obtain disproportionate terms and conditions.[119] These provisions were described as 'situated between contract law and competition law', filling in gaps left by the competition statute.[120]

In Germany, the UWG ('Act Against Unfair Competition'), includes prohibitions on unfair commercial practices, and protections for competitors against obstruction.[121] It declares that it has a hybrid aim, that is it 'serves the protection of competitors, consumers and other market participants against unfair commercial practices', while at the same time 'it protects the interests of the public in undistorted competition'.[122] The relationship of those provisions with the competition law statutes is described by French and German scholars in similar ways but with possibly different nuances. French scholarship distinguished between abuse of economic dependence that is part of 'big' or 'broad' competition law,[123] and the statute on restrictive practices that constitute 'small' competition law.[124]

German scholarship classified the UWG as part of a broader 'competition'-based field of law, having a similar overarching goal, acting as a 'lex generalis'.[125] While there seems to be a consensus that the objectives of the UWG and GWB are overlapping, or at least complementary, the exact scope of their relationship is still subject to debate by the German courts and scholars alike.[126]

[116] Court of Cassation, 15-17.004 (5 July 2016).
[117] See 'Objectives of the national provision' section for further detail on the specific national provisions.
[118] L.462-3 Code de Commerce; s 32 GWB.
[119] L-442-1, L.442-3.
[120] Marie-Anne Frison-Roche and Jean-Christophe Roda, *Droit de la Concurrence* (Kindle) (2nd edn, Dalloz 2022) 688, 707.
[121] ss 3 and 4 UWG.
[122] s 1 UWG, as translated by <https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html> accessed 15 May 2023.
[123] Laurence Boy, 'L'abus de pouvoir de marché: contrôle de la domination ou protection de la concurrence?' (2005) 19(1) Revue Internationale de Droit Économique 29; Marie Malaurie-Vignal, *Droit de la Concurrence Interne et Européen* (8th edn, Dalloz 2020) 138.
[124] Frison-Roche and Roda (n 120) 716.
[125] Helmut Köhler, 'Zur Konkurrenz lauterkeitsrechtlicher und kartellrechtlicher Normen' (2005) 6 Wettbewerb in Recht und Praxis 653; Rupprecht Podszun, 'Der "more economic approach" im Lauterkeitsrecht' (2009) 5 Wettbewerb in Recht und Praxis 511.
[126] Freedom of competition and fairness in competition seem to permeate the interpretation of both areas of law—which should be understood within Germany's particular legal and historical context. The theory that the UWG protects individuals whereas the GWB protects competition as an institution has been argued to be inaccurate (as the UWG also refers to competition as an institution, see Podszun ibid). There have been various theories on the relationship between the UWG and GWB in

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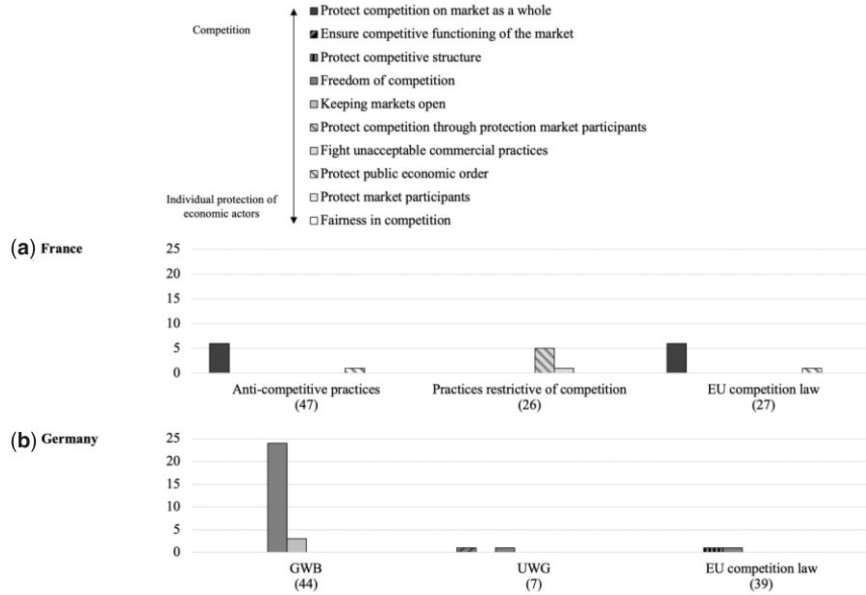

Figure 1. Objectives of the national statute.

Note: The number in brackets represents the number of cases in the database concerning the enforcement of each statute. As elaborated below, in some cases, more than one objective was invoked for the same statute.

The French and German statutes on unfair competition and restrictive trading practices, therefore, are interpreted as including multiple and overlapping goals, grounded on both competition law and contract law theories. This appears to be sufficient to demonstrate that interpreting Article 3 based on the objectives of the statutes may be fraught. The empirical analysis below confirms this.

Figure 1 summarizes the number of times the French and German NCA and courts defined the objectives of the national statutes within the cases included in the database. For each of the examined statutes, the various objectives are presented on a scale, ranging from protection of competition on the market as a whole (on the left, suggested as a reasonable basis for classifying statutes as national competition law) to individual protection of economic actors (on the right, suggested as a reasonable basis to classify statutes as other national laws).

The range of possible objectives presented on the horizontal axis was identified by a combination of a literature review and a bottom-up approach based on the objectives invoked in the decisional practice. This article does not engage with the origin of those different objectives. While this is an interesting topic of study,[127] these questions fall outside of its scope.

Starting with France, the figure demonstrates that very few cases referred either to the objectives of the national statute on competition (six cases) or the statute on practices restrictive of competition (six cases). These numbers seem especially low numbers when

its application (such as the blocking effect of competition law as a lex specialis, or the '*Vorfeld*' theory that unfair competition rules eliminate problems before they arise under competition law, that the UWG has to be applied with respect to the principles of competition law, and/or that an obstruction which violates the GWB may violate the UWG if additional unfairness elements are present). To read up on this national discussion, see Köhler ibid 645; Podszun ibid 509; Hermann-Josef Omsels, 'Behinderungstatbestände im Kartellrecht und deren Verhältnis zu § 4 Nr. 4 UWG' in Henning Harte-Bavendamm and Frauke Henning-Bodewig (eds), *UWG Gesetz Gegen den unlauteren Wettbewerb Kommentar Auflage* (Beck 2016) vol 4, Rn. 9–12.

[127] David Gerber and Richard Azarnia, '*Dirigisme* and the Challenge of Competition Law in France' (1995) 3(1) Cardozo Journal of International and Comparative Law 9; David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (OUP 1998); Laurent Warlouzet, 'The EEC/EU as an Evolving Compromise between French Dirigisme and German Ordoliberalism' (2019) 57(1) Journal of Common Market Studies 77.

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considering that 47 cases in the database concern the enforcement of provisions within the national statute on competition, and 26 concern the enforcement of provisions within the statute on practices restrictive of competition.

Five of these cases overlap, as the courts explicitly considered both statutes in the same cases, contrasting their objectives. These cases concerned abrupt terminations of contractual relationships and imbalances in contractual obligations, which are prohibited under the statute on practices restrictive of competition but may also infringe the statute on the competition.[128] In all those cases, the courts defined the objective of the competition statute as protecting the competitive functioning of the market as a whole, and the objective of the statute on practices restrictive of competition as the functioning of the market and competition through the protection of competitors.[129] In other words, while competition law protects competition on the market *directly*, other laws protect competition *indirectly*, focusing on the protection of individuals (competitors or contract parties).

According to the courts, practices restrictive of competition fall under the example given in Recital 9 of Regulation 1/2003 as legislation on terms and conditions imposed on trading partners, 'irrespective' of 'competition on the market'. Although the courts did not explicitly explain the distinction between *direct* and *indirect* protection of competition, it might be inferred from the context. Contract partners who have not received sufficient notice of the termination, may not have had sufficient opportunity to find alternative sources of supply or to recoup their investments. Ensuring that individuals are in a reasonable position to participate in the market may be beneficial for the functioning of the market and competition, but the protection of competition is not the primary concern.

Similar conclusions were reached in the cases that do not consider both statutes at the same time. In one case on the competition statute, the NCA contrasted the objective of the competition statute with that of contract law. It stated that contract law protects the private interests of contract parties, while competition law protects the 'economic public order'.[130] A similar reflection can be seen in the case which focused on the statute on practices restrictive of competition, as the *Conseil Constitutionnel* contrasted the statute with the law of obligations, noting that the legislator's aim was to address commercial practices which depart from the norm.[131]

French practice, therefore, suggests that the first benchmark—the objective of the national statute—can provide relatively straightforward guidance on how to distinguish between national competition law and other laws, at least when it comes to unfair practices: Protecting competition on the market directly falls under Article 3(2) and protection of individuals (even if it indirectly protects competition) under Article 3(3). Yet, the German practice did not adhere to the same distinction.

In Germany, the objective of the competition statute was described in 24 of the 44 cases in which the statute was enforced. The courts and NCA consistently described the objective of the competition statute as 'freedom of competition' (24/24 cases).[132] This objective was

[128] L.442-1, art L.420-2.

[129] ACP, 12/13845 (15 January 2014), 11/01468 (2 July 2014), 13/05110 (24 June 2015), 13/23968 (11 May 2016), 15/13603 (22 February 2019).

[130] AdlC, 19-D-26 (19 December 2019), para 341.

[131] Constitutional Council, 2010-85 QPC (13 January 2011) 1.

[132] Higher Regional Court Celle, 13 U 248/04(Kart) (7 April 2005); HRC DU, VI-Kart 5/11 (V) (21 December 2011), VI-2 U(Kart) 10/05 (16 May 2007), VI-U(Kart) 6/13 (13 November 2013); Regional Court Hamburg, 315 O 80/11 (22 December 2011); Regional Court Köln ('RCK'), 31 O 292/12 (20 December 2012); Higher Regional Court Hamburg, 3 U 38/11 (12 December 2013); HRC DU, VI-U(Kart) 6/13 (13 November 2013); HRC FRA, 11 U 84/14(Kart) (22 December 2015); Bundeskartellamt, B9-55/03 (11 February 2005), B7-25/17 (3 December 2019), B9-121/13 (22 December 2015), B7-30/07 (24 May 2013), B8-101/11 (30 November 2012), B10-148/05 (23 August 2006), B9-149/04 (8 May 2006), B9-66/10 (20 December 2013), B3-93/03 (9 February 2006), B3-64-05 (14 July 2009); BGH, KZR 65/10 (31 January 2012), KVR 3/17 (23 January 2018), KZR 40/02 (13 July 2004), KVR 17/08 (11 November 2008), KVR 21/07 (4 March 2008).

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interpreted by weighing the individual interests of the parties, suggesting that the protection of market participants is included within this broader objective. Three cases added a possible second objective of 'keeping markets open',[133] although it is unclear whether this forms part of the first objective.

Only a few cases concerning the unfair competition statute described its objectives at all (2/7). This can perhaps be explained by the definition of the objective in the statute itself, noting in section 1 that it 'serve[s] the purpose of protecting competitors, consumers and other market participants against unfair commercial practices' while 'at the same time, it shall protect the interests of the public in undistorted competition'. As the objective is already defined in the statute, it may not be necessary to further discuss it. However, this wording does not make the distinction between competition law and unfair competition statutes clear: The objective described in section 1 UWG is two-fold and it is unclear to what extent 'undistorted competition' is the same or a distinct objective from that of the GWB.

Unlike France, the German courts did not clearly distinguish between the objectives of the UWG and the GWB. In one case, the lower court described the objective of the unfair competition statute in the same way as the courts describe the objective of the competition statute: freedom of competition.[134] However, in another case, a higher regional court defined the unfair competition statute as regulating market behaviour in the interests of market participants, which may include but is broader than competition law.[135]

Therefore, the objectives of the statutes as interpreted in practice, do not provide clarity on how to distinguish between national laws falling under Articles 3(2) and 3(3). Whereas the French cases may provide some indication, the interpretation of the national statutes in German cases does not draw a consistent distinction.

Objectives of the national provision

Next, we examined whether the dividing line between national competition and other laws can be understood in light of the objectives of specific national provisions. To this end, the objectives of three types of provisions were examined:

First, we examined national provisions equivalent to Article 101 on anti-competitive agreements (L.420-1 of the Code de Commerce; section 1 GWB) and 102 on abuse of dominance (L.420-2(1) of the Code de Commerce; section 19 GWB). Those provisions clearly fall under the definition of national competition laws.

Secondly, we examined national provisions on the abuse of economic dependence (L.420-2(2) of the Code de Commerce) and the abuse of relative power (section 20 GWB). Those types of prohibitions do not exist in EU competition law. The French prohibition on abuse of economic dependence was added to the national provision on abuse of dominance in 1986. It prohibits a non-exhaustive list of practices, including refusal to sell, tying, discriminatory practices, and range agreements. Some of these practices overlap with those of abuse of dominance. Unlike the French prohibition, the German prohibition on abuse of economic dependence is separate from the national prohibition on abuse of dominance. Yet, there is still a link: section 20 GWB explicitly refers to section 19 GWB, stating that its prohibition, including a non-exhaustive list of abuses, will also apply in a situation of relative market power. It applies to abusive conduct adopted by an undertaking on which another undertaking is economically dependent.[136] The provision was reformed in a number of legislative

[133] Bundeskartellamt, B3-64-05 (14 July 2009), para 140; B7-30/07 (24 May 2013) 42; B3-93/03 (9 February 2006) 34.
[134] RCK, 31 O 292/12 (20 December 2012).
[135] Higher Regional Court Stuttgart, 2 U 11/14 (20 November 2014), para 98.
[136] Torsten Korber, Heike Schweitzer and Daniel Zimmer, *Immenga/Mestmäcker Wettbewerbsrecht* (C.H.BECK 2012) 339.

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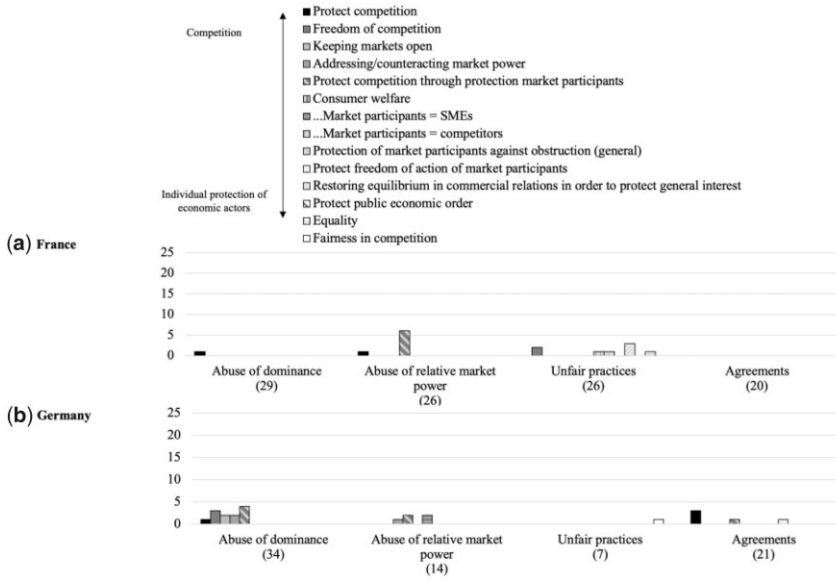

Figure 2. Objectives of the national provision.

Note: The number in brackets represents the number of cases in the database concerning the enforcement of each provision.

amendments since its introduction in 1973, from focusing on the protection of SMEs, to the abuse of *relative* power.

Thirdly, we examined national provisions governing practices restrictive of competition (L.442-1 and L.442-3 of the Code de Commerce) and unfair competition (sections 3 and 4 UWG). Those provisions are collectively referred to in Fig. 2 as 'unfair practices' and raise particular challenges under Article 3.

In France, Article L.442-1 prohibits (i) (trying to) obtain terms and conditions which do not correspond to or are manifestly disproportionate to the value of the other party's consideration; (ii) applying obligations which create a significant imbalance in the commercial relationship; and (iii) abruptly terminating an established commercial relationship. L.442-3 prohibits an undertaking to adopt a clause which retroactively awards it the more favourable conditions previously awarded to its competitors.[137] The French law itself distinguishes between the objective of practices restrictive of competition, where the wording of the provisions *does not explicitly refer* to harm to competition on the market—and the objectives of anti-competitive practices, whose provisions *do refer explicitly* to harm to competition on the market. Yet, this dividing line is not always clear as the prohibitions on restrictive practices are sometimes applied in parallel to the national prohibition on abuse of dominance. In fact, the national prohibition on abuse of dominance explicitly refers to L.442-1 to L.442-3 as types of conduct that may constitute an abuse of economic dependence where the requirement of an effect on the structure or functioning of competition is satisfied.

In Germany, section 3 UWG includes a prohibition on unfair commercial practices; and section 4 UWG, special protection for competitors against denigration and deliberate obstruction, spreading untrue information, and illegitimate replication of their products.

Figure 2 summarizes the number of times an NCA or court defined the objectives of the abovementioned national provisions. The figure includes, for each provision, the objective as

[137] L.442-3(b).

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interpreted in practice, ranked on a scale from the protection of competition on the market as a whole (on the left) to individual protection of economic actors (on the right).

In France, perhaps unsurprisingly given the more extensive discussion on the objectives of the law, there was very little discussion on the objectives of the national prohibitions on abuse of dominance and relative market power (economic dependence), and no discussion of the objective of the national prohibition on anti-competitive agreements. Only one case referred to the objective of the prohibition of abuse of dominance, and only one case referred to the objective of the prohibition of abuse of relative market power. Both these cases referred to the same objective for these distinct prohibitions: the protection of (the structure or functioning of) competition on the market.

The French NCA and courts more often discussed the objectives of the provisions on practices restrictive of competition (12/26 cases 'unfair practices'). All those cases were discussed in the context of private enforcement. Similar to the objective of the statute as a whole, the courts interpreted the objectives of those provisions as the protection of individual competitors, for the purpose of protecting the functioning of the market and competition.[138] Two cases added a second objective of 'maintaining free competition' and 'the free exercise of competition'.[139] The latter, according to the court, calls for equal treatment of all economic partners, protecting competitors in their inter-individual relationships.[140]

Although practices restrictive of competition are private law provisions, which typically protect individual interests, four additional cases were initiated by the Minister of the Economy. Reflecting a public interest aim, such actions were justified as protecting the functioning of the market and competition by restoring the economic equilibrium in commercial relations and maintaining free competition.[141]

Given the low number of cases on the objectives of abuse of dominance, abuse of economic dependence, and agreements, and the variety of objectives attributed to practices restrictive of competition, the objectives of the specific national provisions as identified in practice are of limited use in identifying a dividing line. Nevertheless, if the low number of cases was disregarded and the few additional objectives discounted, this benchmark informs similar classifications as the first benchmark: competition law protects competition on the market directly, while other laws focus on the interests of economic actors and may only indirectly protect competition on the market.

In Germany, the number of cases discussing the objectives of the provisions on anti-competitive agreements (3/21 cases), abuse of dominance (9/34 cases), and abuse of relative market power (4/14 cases) is higher than the number of cases discussing the objectives of the unfair competition provisions (1/7 cases). Contrary to France, the practice does not point to a conclusive benchmark to distinguish competition law provisions from other provisions. The single case in which the objectives of the unfair competition provision were examined suggests that its objectives differ from those of the provisions of competition law and focus on regulating market conduct to protect fairness in competition.[142] However, the objectives of the respective provisions listed within the competition statute itself are less clear.

[138] ACP, 15/13603 (20 February 2019), 13/23968 (11 May 2016), 13/05110 (24 June 2015), 11/01468 (2 July 2014), 12/13845 (15 January 2014).

[139] Appeals Court Versailles ('ACV'), 2003-02078 (7 October 2004); Appeals Court Nîmes ('ACN'), 07/00606 (25 February 2010).

[140] ACV, 2003-02078 (7 October 2004). See also ACP, 15/18784 (21 June 2017).

[141] ACV, 08/05366 (24 September 2009), 08/07356 (29 October 2009); ACN 07/00606 (25 February 2010); ACP, 15/18784 (21 June 2017).

[142] Regional Court Hamburg, 315 O 80/11 (22 December 2011).

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Despite being part of the same statute, the courts and NCA distinguished between the objectives of the prohibition on anti-competitive agreements, on the one hand, and the objectives of the prohibitions on abuse of dominance and abuse of relative power, on the other hand. The former was mostly described as the protection of competition,[143] and the protection of market participants, particularly their economic freedom of action.[144] Moreover, the cases do not describe 'freedom of competition' (the wording used for abuses of dominance or economic dependence), but refer to the 'competitive process' and 'competition as an institution'.[145] In addition, one court referred to the protection of the market from the perspective of the 'competitive order', considering this protective purpose alongside the protection of competition as an institution.[146]

When it comes to abuse of dominance, the German courts and NCA pointed to a multiplicity of objectives, sometimes even within a single case, ranging from the protection of market participants to protect competition,[147] freedom of competition,[148] keeping markets open or freedom of market access,[149] to the protection of competition.[150] In one case, the court interpreted the objective of freedom of competition as being related to the ordering principles of a competitive economy.[151] Some cases went further, by distinguishing between different objectives of the different types of abusive conduct set out in the sub-provisions.[152]

All four cases discussing the objective of the prohibition on abuse of relative market power also applied the abuse of dominance provision. In these cases, the court generally equated the objectives of the two provisions as protecting market participants to protect competition.[153] It is noteworthy that in the abuse of relative market power cases, the court added references to the protection of SMEs.[154] This can be explained by reference to the text of the provision which, until 2021, explicitly considered only the dependence of *SMEs* rather than *all* undertakings. This has now changed.

Given the above, the stated objectives of the provision, just like the objectives of the statute, is not a conclusive benchmark for Article 3 based on the French and German practices. Not only do the objectives of similar provisions not align across jurisdictions, but even within a jurisdiction (Germany) the objectives cannot be exclusively attributed to specific provisions.

Harm addressed in the enforcement of the national provisions

This section examines the third benchmark, namely, the harm the enforcement of a national provision addresses. Unlike the second benchmark, the harm addressed in the provision is not derived from the definition of the objective of the provision in law and jurisprudence, but rather the effect of applying the prohibition to a specific case; that is, what type of harm it aims to combat.

Initially, this might seem like the most promising benchmark to guide the application of Article 3. After all, in each case, the assessment of harm is essential to the application of the

[143] Bundeskartellamt, B7-30/07 (24 May 2013), B7-25/17 (3 December 2019); HRC DU, VI-Kart 7/11 (1 August 2012).
[144] Bundeskartellamt, B7-25/17 (3 December 2019), para 72.
[145] Bundeskartellamt, B7-30/07 (24 May 2013); HRC DU, VI-Kart 7/11 (1 August 2012).
[146] 'Wettbewerbsordnung'. HRC DU, VI-Kart 7/11 (1 August 2012), para 73.
[147] HRC DU, VI-Kart 7/11 (1 August 2012), VI-Kart 5/11 (21 December 2011); BGH, KVR 3/17 (23 January 2018); Higher Regional Court Celle, 13 U 248/04 (7 April 2005).
[148] HRC DU, VI-Kart 7/11 (1 August 2012), VI-Kart 5/06 (14 March 2007); BGH, KVR 21/07 (4 March 2008).
[149] Bundeskartellamt, B6-132/14-2 (4 December 2007); B9-55/03 (11 February 2005).
[150] HRC DU, VI-Kart 7/11 (1 August 2012).
[151] ibid.
[152] HRC DU, VI-Kart 5/11 (21 December 2011); BGH, KVR 3/17 (23 January 2018).
[153] RC NF, 4 HK O 6645/04 (3 August 2005); HRC DU, VI-Kart 5/11(V) (21 December 2011); BGH, KVR 3/17 (23 January 2018); Bundeskartellamt, B9-149/04 (8 May 2006).
[154] RC NF, 4 HK O 6645/04 (3 August 2005); Bundeskartellamt, B9-149/04 (8 May 2006).

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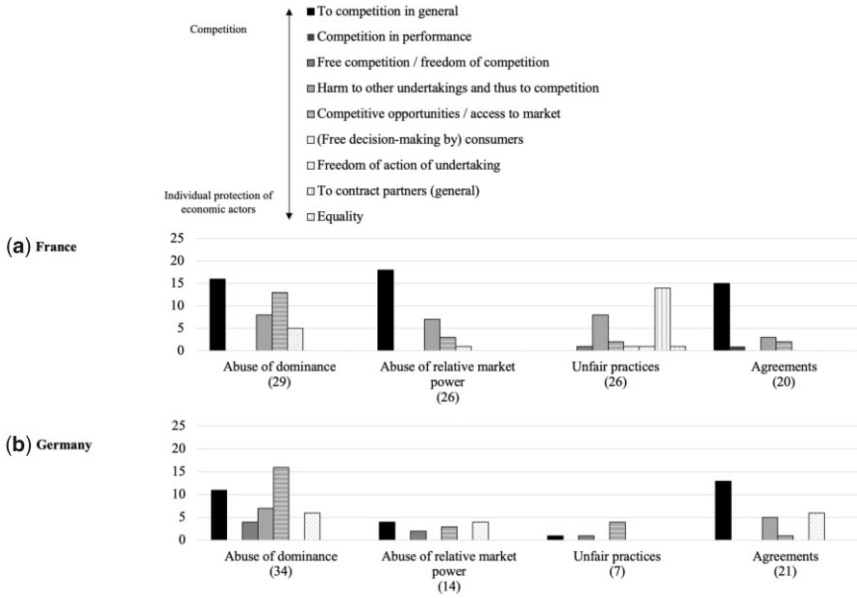

Figure 3. Harm addressed in the enforcement of the national provisions.
Note: The number in brackets represents the number of cases in the database concerning the enforcement of each provision.

provisions. However, the empirical findings summarized in Fig. 3, indicating the number of times an NCA or court referred to a particular harm under a specific national provision, point to a multiplicity of protected harms, which were invoked within the application of a single provision in a single case, across the different provisions in one jurisdiction, and across jurisdictions. The types of protected harm in the figure are ranked on a scale from protection of competition on the market as a whole (left side) to individual protection of economic actors (right side).

In Germany, there is a broad range of harms shared across all the provisions, ranging from harm to competition, through competitive opportunities, to freedom of action of undertakings. This suggests that the protection of freedom of competition—the objective of the competition law provisions as identified in practice should be interpreted broadly, to include the protection of competitive opportunities and even the freedom of action of individual undertakings. Indeed, in the abuse of dominance cases, the NCA and courts explicitly linked the description of the harm to the objectives of the law.[155] This brings the protected harm of the competition law provisions closer to those of unfair practices, once again blurring the dividing line between national competition and other laws.

In France, harm is a more indicative benchmark. Although, like in Germany, there is a multiplicity of harms across provisions, only in the application of the practices restrictive of competition ('unfair practices' in the figure) do the courts refer to harm to contract

[155] BGH, KVR 17/08 (11 November 2008) para 14; KVR 3/17 (23 January 2018), para 75; KVR 21/07 (4 March 2008), KZR 65/10 (31 January 2012), KZR 40/02 (13 July 2004); HRC DU, VI-U(Kart) 6/13 (13 November 2013), para 53; Bundeskartellamt, B9-55/03 (11 February 2005), B9-149/04 (8 May 2006), B7-30/07 (24 May 2013), B3-93/03 (9 February 2006), B8-101/11 (30 November 2012); Regional Court Celle, 13 U 248/04(Kart) (7 April 2005); HRC FRA, 11 U 84/14(Kart) (22 December 2015); RCK, 31 O 292/12 (20 December 2012); HRC DU, VI-2U(Kart) 10/05 (16 May 2007), VI-Kart 5/11 (21 December 2011).

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partners.[156] Moreover, harm to competition on the market was discussed in the application of all the provisions of the competition statute—abuse of dominance, anti-competitive agreements, and abuse of relative market power—but not for practices restrictive of competition.

The harm in the enforcement of specific provisions, therefore, also fails to provide a conclusive benchmark for Article 3. There is a lack of alignment between the two jurisdictions and a multiplicity of harms in Germany. None of the possible three benchmarks (objective of the statute, objective of the provisions, harm addressed in the enforcement of the provision) and, therefore, can provide a conclusive dividing line between competition law and other laws based on French and German practices.

VI. CONCLUSIONS AND OPPORTUNITIES FOR REFORM

Article 3 of Regulation 1/2003 aimed to settle one of the great controversies of EU competition law: the relationship between EU competition and national (competition and other) laws. It purported to limit Member States' competence by prohibiting the adoption and application of conflicting rules, to ensure the level playing field across the EU and uniform competition conditions.

This article has shown through a historical and empirical analysis that Article 3 has failed in this mission. The political negotiations that preceded its adoption resulted in vague and convoluted wording, providing for a limited exception for *stricter* national competition rules on unilateral conduct (Article 3(2)), and a broader exception for rules that predominately pursue a different objective (Article 3(3)). It showed that none of the suggested benchmarks for the dividing line between those two exceptions (based on the objectives of the national statute, objectives of the national provision, and harm addressed in the enforcement of the national provision) can conclusively explain the French and German practices. Not only do those two jurisdictions follow different interpretations and classifications, but there is even no single benchmark that can inform the application of Article 3 within each jurisdiction.

It is concerning that after nearly 20 years, the scope of Article 3 remains unclear since the distinction between those two categories is important. Where a conflicting rule is classified as national competition law in a case involving cross-border trade, it can only apply to the extent it is considered 'stricter' than Article 102 (and not merely different) and is subject to the substantive, procedural, and institutional obligations of EU competition law. In such a case, the national body enforcing the rule—regardless of its national competencies and even if it is not generally considered to be an NCA or court—must also apply Article 102 and comply with a set of notification requirements and coordination mechanisms.

The uncertain interpretation of Article 3 undermines the raison d'être of Regulation 1/2003, namely avoiding the distortion of competition in the common market, creating a level playing field, and ensuring legal certainty, through uniform and consistent enforcement.[157]

The planned evaluation of Regulation 1/2003 seems like an excellent opportunity to reflect on the scope of Article 3. This is particularly true as the historical and empirical analysis casts doubts on whether the relationship between EU competition and national laws can be solved merely by dint of interpretation. Given the lack of a specific legal or economic test to draw a dividing line, we believe that solving it will ultimately require a political decision of the Member States and EU institutions. After all, Article 3—as this article shows—is not

[156] Appeals Court Poitiers, 03/1282 (20 February 2008); ACP, 05/23026 (15 May 2008), 12/13845 (15 January 2014), 15/18784 (21 June 2017), 15/18784 (11 April 2018); Commercial Court Lyon, 09/05002 (15 July 2009); Appeals Court Versailles, 08/05366 (24 September 2009), 08/07356 (29 October 2009); ACN, 07/00606 (25 February 2010); Constitutional Council, 2010-85 QPC (13 January 2011); Court of Cassation, 12-26705, 12-26970, 12-29281 (20 May 2014), 14-25718 (8 March 2016), 15-17004 (5 July 2016). See also AdlC, 11-D-20 (16 December 2011).

[157] Regulation 1/2003, Recitals 1, 8, and 22.

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only about law or economics. It is foremost a political provision that distributes the regulatory powers between the EU and its Member States.

One option for reform could be amending the wording of the exception of Article 3(2), limiting it to national rules comparable to those of Articles 101 and 102. The new provision could replace '*stricter* national laws which prohibit or sanction *unilateral conduct*' with 'national laws which prohibit the *abuse of a dominant position*'.[158] Such a reform would also need to clarify the meaning of 'stricter'. Limiting the exception provided by Article 3(2) to national rules comparable to those of Articles 101 and 102 could be ensured by indicating that stricter is confined to a lower standard of what constitutes abuse or more severe sanctions. Hence, Article 3(2) could not be used to permit national rules that are not based on the notion of market power, such as those involving a lower level of market power to establish a position of dominance or different degrees and types of economic power (eg, economic dependence or gatekeeper powers).[159] Given the potentially harmful impact of such rules on both competition and the internal market, they could only be tolerated if they fulfil the test of Article 3(3), that is are comparable with 'general principles and other provisions of Community law'.

Other, second-best solutions are also available in the event of a lack of political support. Aiming to provide legal certainty, Article 3(3) could replace the vague phrase 'an objective different from that pursued by Articles [101] and [102] of the Treaty' with a more precise alternative. Following the discussion in Section IV, we believe that a combination of the second and third benchmarks may be advisable; that is, clarifying that the objectives of the specific national provision and of the harm addressed in the enforcement of the national provision are predominantly different from the objective of protecting the competitive structure and process.

Debating, clarifying, and amending the scope of Article 3, to conclude, are necessary to ensure that the relationship between EU competition law and national laws is finally settled, so as to ensure both the protection of competition and the functioning of the common market.

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[158] Emphasis added.
[159] See discussion in 'Distinction between national competition and non-competition rules' section above.

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