

How does article 101(3) TFEU case law relate to
EC guidelines and the welfare perspective?



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Working paper

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Abstract

The cartel exemption of article 101(3) TFEU offers room to include public interest. The 2004 guidelines of the European Commission state that only direct economic benefits should be included and only users on the relevant market (or other related markets) can benefit. This condition raises important questions about the meaning of public interest in the context of European cartel law. By definition social effects impact society as a whole. Social cost-benefit analysis classifies effects as direct, indirect or external effects. This classification suggests that social effects may impact consumers not directly affected by the cartel agreement. Environmental improvements for example, may be beneficial to consumers that are not buyers in the market for the product that generates the improvement. This paper elaborates on the use of the social cost-benefit analysis in the assessment of article 101(3) TFEU and how public considerations can be quantified.

This welfare perspective contradicts with the Commission guidelines. How does case law relate to the guidelines and the welfare perspective? The majority of cases involve a solution to the negative external effects on the environment. The benefits are often only complementary to economic benefits and are not quantified. Only in two cases the European Commission and the Dutch Competition Authority seem to use the welfare perspective. This involved cases in which the public interest was a determining factor in granting or decline the exemption.¹

¹ The author thanks Bert Tieben and Saskia Lavrijssen for useful feedback.

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1 Introduction

Fighting cartels is one of the pillars of competition law. The European Commission has prosecuted 717 undertakings for cartel behavior in 100 cartels since 1990.² But not all cooperation between competitors is a violation of cartel law. An agreement or another form of cooperation between competitors that restricts competition can be exempted from cartel law if the four conditions of article 101(3) TFEU are satisfied.³ In short, such an exemption is possible if the benefits of the cooperation outweigh the negative effects of the restriction of competition. If that's the case article 101(1) TFEU is declared inapplicable for that cooperation.⁴

Most European Member States, including the Netherlands have a similar exemption. Up until 2004, the European Commission had a monopoly for the application of article 101(3) TFEU.⁵ Some guidance was offered through case-law and through block-exemptions for certain categories of agreements.⁶ Since 2004, undertakings need to perform the analysis of the four criteria in the form of an ex ante self-assessment.⁷

The Commission published guidelines that offer insight into how the criteria should be interpreted.⁸ It acknowledges objective economic efficiencies and users of the product or service in question must receive a fair share of these efficiencies. This seems to imply that public interest are either not acknowledged or that benefits for non-users of, for example a better environment, are, in principle not taken into account. This contradicts with the welfare perspective that uses social cost-benefit analysis to balance positive and negative effects of a project. Social cost-benefit analysis classifies effects as direct, indirect or external effects. This classification suggests that social effects may impact consumers not directly affected by the cartel agreement. Environmental improvements may be beneficial to consumers that are not buyers in the market for the product that generates the improvement. For example, a cyclist benefits from a cleaner environment, but does not incur the costs of the agreement to implement cleaner technology in cars.

There seems to be a gap between the legal stance of the guidelines and the welfare perspective. The question is how case law related to either of these two. Community case law and judgments by courts shows that non-competition concerns have been taken into account in cases up to 2004.⁹ Relevant is which non-competition concerns were acknowledged, how the gains of the

² European Commission (2013a).

³ By referring to article 101(3) TFEU, also its predecessors article 81(3) EC and 85(3) EEC are meant.

⁴ Cooperation between competitors that does not restrict the competition with an appreciable effect, is not an infringement of the cartel law and hence no exemption is needed.

⁵ National competition authorities could write comfort letters or informal opinions but they could not conclude on the applicability or inapplicability of agreements with article 101(1) TFEU. They could however publish decision on the application of the national equivalent of article 101(1) TFEU if there was no effect on trade between Member States.

⁶ European Commission (1999) paras 30-32.

⁷ The exemption can also be called upon in cartel investigation by the competition authority, ex post the forming of the agreement. The burden of proof still lies with the undertakings.

⁸ European Commission (2004).

⁹ Jones, A. and Sufrin, B. (2008).

agreement were determined and how and which consumer benefited from the non-competition concerns.

There is an extensive literature on public interest and article 101(3) TFEU. This paper adds to the existing literature by going into detail how the economic method of social cost and benefit analysis can be applied.¹⁰ Using a welfare perspective it shows which effects should be taken into account and how these can be quantified. Finally, this paper adds a comparison between the EC guidelines, the welfare perspective and the case law to see where we stand in practice.

This question is answered first by briefly explaining the cartel exemption and the manner non-competition concerns are included. A distinction is made between non-competition concerns that are economic public interests and political public interest. Section 3 examines how the EC guidelines suggest the analysis of article 101(3) should be conducted. Next, the welfare perspective of this analysis is presented. Which effects of an agreement between competitors can be distinguished, for which group of consumers and how can these effect be measured and weighed with the negative effects on competition? This is followed by section 5 which provides an analysis of European and Dutch case law. What type of effects are seen as public interest by competition authorities? How are these effects taken into account and for which consumers? The paper elaborates on the cases in which public interest played a crucial role in justifying the restrictive agreement. Finally, the paper examines whether case law seems to follow the view presented by the EC guidelines or the broader welfare perspective.

¹⁰ This paper looks specifically to the analysis of public interest in article 101(3) and not in terms of article 101(1). Courts have on occasion concluded that an agreement that involved public interest did not fall under article 101(1) TFEU. However, this means that this agreement does not (to an appreciable extent) deter competition in the relevant market. Hence, no balancing of positive and negative effects is needed.

2 The cartel exemption

Cartels can be harmful for customers and consumers when they increase prices, decrease quantity or quality and restrict freedom of choice. Fighting cartels can therefore be welfare enhancing. Because of this importance of preventing cartels, an exemption of the cartel prohibition (article 101(1) TFEU¹¹) is only possible under specific circumstances.

The exemption is in order if, in short, the benefits of the agreement outweigh the negative effects of the restrictive agreement. The four conditions of article 101(3) TFEU are:

1. The arrangement contributes to improving the production or distribution of goods or to promoting technical or economic progress;
2. Consumers get a fair share of the resulting benefit;
3. The arrangement is necessary to achieve these benefits and does not go beyond what is necessary;
4. The arrangement does not lead to competition being eliminated in a substantial part of the market. The arrangement must leave enough room for competition.

Article 101(3) TFEU only applies to agreements that restrict the competition in the relevant market. Hence, undertakings can only benefit from the exemption if they first plead guilty as to their restrictive agreement.¹²

2.1 The analysis of 101(3) according to the EC guidelines

The analysis of article 101(3) TFEU consists of four cumulative criteria that needs to be fulfilled for the pro-competitive effects of an agreement to outweigh its anti-competitive effects. Pro-competitive effects are taken into account in the first criterion of this article. The Guidelines on the application of Article 81(3) of the Treaty from the European Commission¹³ (hereafter: guidelines) state that the pro-competitive effects only involve direct economic benefits of the agreement. These are either cost efficiencies or qualitative efficiencies (par. 59).

This means that non-economic benefits are not taken into account in the application of article 101(3) TFEU. While these type of benefits may represent the public interest. As will be seen from the discussion of the EU case law, the Commission has acknowledged (or given weight to) some non-economic benefits in the analysis of the first criterion of article 101(3) TFEU.

After having established that there are gains from the restrictive agreement, the second criterion analyses whether consumers get a fair share of these benefits. The Commission uses the concept of 'consumers' to comprise "*all direct or indirect users of the products covered by the agreement*" (par 84). This also involves future consumers since there may be a time lag before the efficiencies

¹¹ "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". (article 101(1) TFEU)

¹² Or, before 2004, if the Commission concluded an infringement under article 101(1) TFEU.

¹³ European Commission (2004).

materialize (par 87). The benefits of future consumers should be discounted to be able to compare them with negative effects on current consumers.

The effect of the agreement must compensate consumers for the actual or likely negative effects caused by the restriction of competition by the agreement.¹⁴ At the very least, the balance must be neutral for these consumers (par 85).

The definition of ‘consumers’ seems to imply that if you are not a user of the product covered by the agreement, the potential benefit you experience from the agreement will not be taken into account. By ignoring the positive external effects of the agreement on non-users of the product (or the limiting of negative external effects), agreements with large positive external effect might be judged not to comply with article 101(3) TFEU while they offer benefits to a large group of people.

The Commission does however recognize the benefits for society as a whole where “*the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources*” (par 85). Hence maybe the Commission sees the benefit for users as a minimum requirement.¹⁵ But this would still mean that the existence of positive external effects for non-users are irrelevant in deciding whether the second criterion is satisfied. It can only add to the economic benefits for users.

Both positive and negative effects of the agreement should be measured and balanced on the relevant market to which the agreement relates (par 33 and 43). But, as the agreement can have effect on non-users, it may also have effect on other markets than the relevant market of the agreement. However, the Commission states that if that other market is unrelated to the relevant market, negative effects on the relevant market cannot be compensated with positive effects on the other market. Only if these two markets are related, compensation is possible. This is only the case if both markets involve by and large the same group of consumers (par. 43). Hence, if more or less the same group of consumers suffers from a price increase, but at the same time benefits from efficiency gains, these effects can both be taken into consideration in the application of article 101(3) TFEU.

¹⁴ This does not mean that each individual consumer needs to be compensated. It only means that the group of users as a whole is compensated (par 87).

¹⁵ ACM (2013a).

3 Public interest in article 101(3) TFEU

Criterion one and two of the cartel exemption speak of benefits caused by the agreement. These benefits can, among others be in the form of cost efficiencies or quality improvement. These factors are called competition concerns because they influence the parameters on which companies compete. As discussed in the introduction, also non-competition concerns have been accepted in the assessment of article 101(3) TFEU. The guidelines from the EC provide room for at least some non-competition concerns: “Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)” (par 42). This means that effects on the environment (article 11 TFEU), protection of employment (article 147 TFEU), cultural diversity (article 167 TFEU), consumer protection (article 169 TFEU) and economic and social cohesion (article 175 TFEU) can be taken into account.¹⁶

Next to these Treaty goals (cross-section clauses), other interest are considered to be taken into account. These are the “specificity” of sport, the public interest in safeguarding the independence of the legal profession (professional ethics) and media pluralism.¹⁷ Hence, in some cases the European Commission used a wider definition of consumer benefits than only economic ones.¹⁸

These afore mentioned non-competition concerns are frequently called public interest, public policy or general interest considerations¹⁹. Whichever term used, it does not correspond with the economic concept of public interest. Instead non-competition concerns include both economic and political public interest. The next two paragraph will discuss these concepts respectively.

3.1 Economic concept of public interest

Economic public interest arises when welfare loss occurs because markets do not function well. For example if buyers do not have enough or the right information to compare goods and make a good product choice. Or when a company has so much market power that it can ask high prices or offer too little quantity of the product. Each economist tends to have its own list of market failures. However there are four forms which are present at almost everyone’s list²⁰:

1. Market power;
2. Externalities;
3. Public goods;
4. Asymmetric information.

For the assessment of article 101 TFEU two of these are important; market power and externalities. In essence, the assessment of article 101(3) TFEU is a weighing of the effects of market power and the effects of externalities.

¹⁶ Respectively ex article 6 EC, ex article 127(2) EC, ex article 151(4) EC, ex article 153(2) EC and ex article 159(1) EC.

¹⁷ Komninos (2005); Petit (2009).

¹⁸ Cseres (2007).

¹⁹ Petit (2009), Semmelman (2008), Komninos (2005), Schweitser (2007)

²⁰ Baarsma, Koopmans, Theeuwes (2010).

The effect of such market power represents the negative consequences of a restrictive agreement, formulated in article 101(1) TFEU. If such an agreement is formed, the undertakings together have the ability to increase prices or decrease quality and hence exploit their market power. Cartel law is designed to ensure that such situations do not occur. By examining whether the exemption of article 101(3) TFEU can be granted the positive effects of the agreement should therefore be weighed against the negative effects of market power. In the case of an agreement that increases sustainability, the market power is needed to solve the negative external effect on the environment.²¹

The prevention of negative externalities or the support of positive externalities is considered in article 101(3) TFEU. Negative externalities are present where individual consumers or producers do not (sufficiently) take into account all costs of production that are experienced by others than the producer or consumer. For example, if the production of a certain good is bad for the environment and these costs are not reflected in the price, one speaks of negative external effects for the environment. If these costs would be internalized, the price would be higher which would cause the demand for the good to decrease. The lower quantity produced is less damaging for the environment. The higher price and lower quantity would be beneficial for social welfare. Hence, a restrictive agreement that internalizes negative externalities and leads to higher prices might be welfare enhancing.²²

Instead of internalizing the external effects, one could also prevent or limit the negative external effects. By changing the production technology or process, the negative impact on the environment can be limited. Such new technology might be more expensive than the older, more damaging one. The increased costs may increase prices but the new technology may be beneficial for social welfare. In my opinion, this latter way to ensure a good environment is better than the internalization of external costs. This is because by internalizing the cost, the damage to the environment is only dampened by the decrease in production while in the second approach, the damage is dampened by using other, less damaging technology. The first approach offers the undertakings the possibility to profit from the internalization of the negative effects.²³ This does not seem justified.

Because both approaches to deal with negative external effects lead to a price increase, individual undertakings are reluctant to do something about the negative effects if competitors do not. Instead, if they would agree with competitors to internalize costs or invest in more expensive but environmentally friendly technology, they would not have to fear to lose market share opposite to their competitors. Moreover, investing in more expensive technology may not be possible for individual companies and hence they need to cooperate to be able to bear the investment costs.

Public interest gained attention in competition law and policy. The OFT organized an expert meeting in 2010 trying to answer questions like “How broadly should benefits arising from improvements in production or distribution or from promotion of technical and economic progress be defined”.²⁴ The Nordic competition authorities worked together to publish a report

²¹ Minister of Economic Affairs (2013).

²² De Bijl, Van Dijk (2012).

²³ De Bijl, Van Dijk (2012).

²⁴ OFT (2010).

about competition policy and generating economic growth based on sustainable development.²⁵ Also European Courts accept the concept of public interest in cartel law. The Dutch competition authority published a concept position paper Competition and Sustainability and the Dutch Ministry of Economic Affairs published concept policy rules about the same topic.²⁶

Sustainability should not be considered as a public interest itself but rather as an example of negative externalities. The definition of the Brundtland report in 1987: “*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”²⁷, shows that it involves the negative effects of our current consumption and production to future generations. As will be seen from the European and Dutch case law, many agreements between undertakings involve a sustainability element.

3.2 Political concept of public interest

A public interest can also be formulated as a consequence of political motives. This is the case if it cannot be justified based on welfare economic arguments.²⁸ In other words, it does not address market failures. Examples of this are redistribution of income based on solidarity concerns or paternalistic concerns. These type of public interest are called political public interest.²⁹

Since political public interests are based on political value judgments, the safeguarding of these concerns does not seem as a task for the competition authority and courts.³⁰

Hence, it is questionable whether the safeguarding of political public interests should be addressed by competition law. However, there have been cases where such political public interest are accepted.

²⁵ Nordic competition authorities (2010).

²⁶ Ministry of Economic Affairs (2013).

²⁷ World Commission on Environment and Development (WCED) (1987).

²⁸ Baarsma et al. (2010).

²⁹ Den Butter (2010).

³⁰ Schweitser (2009).

4 The welfare perspective of an analysis of 101(3)

4.1 The effects on a restrictive agreement

From a welfare perspective, all effects of an agreement that fall under article 101(1) TFEU should be taken into account in the application of article 101(3) TFEU. A distinction can be made between three types of benefits³¹:

- Direct economic benefits: Effects on price, quality, range and service. This is also addressed as PQRS offering.
- Indirect economic benefits: These benefits do not affect the relevant market to which the agreement relates but affect other markets. In those other markets, the economic benefits can be qualified as direct effects. For example fuel efficiency gains caused by the introduction of a new production method for cars. The relevant market is the car market but the fuel efficiency gains are also enjoyed in the energy market.
- Non-economic benefits: These benefits are not directly related to characteristics of a product or service and are non-pecuniary.

As discussed in section 2, the guidelines of the Commission only prescribe the consideration of direct economic benefits into the application of article 101(3) TFEU. It only allows for indirect economic benefits in other markets if those markets are related and the group of consumers affected by the restriction and benefiting from the gains are substantially the same. Non-economic benefits are only briefly mentioned by the Commission, by stating that the whole society can benefit from some efficiencies if it leads to a more efficient allocation of resources.

The Commission's framework for balancing negative effects and benefits of the restrictive agreement, as defined in the guidelines, is rather narrow. There are reasons to use a welfare perspective for the analysis of 101(3) TFEU.

First of all, a welfare perspective provides room to include the effects on public interest. By taking all three types of benefits into account, a complete picture is formed of all effects of the agreement. Hence, it is less likely that agreements with a net benefit will be prohibited. In other words, using the narrow definition in the application of article 101(3) TFEU would cause article 101(1) TFEU to be inapplicable with agreements that may be desirable for society as a whole. Furthermore, by extending the analysis of the negative effects and benefits with indirect economic benefits and non-economic benefits, the appraisal framework is more in line with the framework of the social cost and benefit analysis.³² Finally, the guidelines do acknowledge benefits to future consumers. Especially where negative externalities on the environment are prevented or limited, can the agreement have significant positive effects on future generations.³³ This means that benefits to consumers yet to be born can be included, but current consumers on other (not related) markets cannot. This is inconsistent since both groups involve other consumers than the users in the relevant market. Hence, why include one, and exclude the other?

³¹ OFT (2010).

³² OFT (2010).

³³ ACM (2013) p. 13

The next subsections describe the welfare perspective, the social cost and benefit analysis and the methods for quantifying effects.

4.2 Using a welfare perspective

By using a welfare perspective, not only more benefits can be taken into account, but also more types of consumers. The definition of consumers of the European Commission is abandoned and instead consumers will be defined as both users and non-users of the relevant product or service. This means that if a production agreement between two competing car manufacturers leads to a new type of electric cars, not only the users of such car profit from more choice and better technology, but also the cyclists profit because it results in cleaner air. In this broader approach the requisite of relatedness between the relevant market of the agreement and other markets, and overlap in consumers between both markets is no longer necessary to take effects on the other markets into account.

The question then is whether each group of consumers (users and non-users) should be considered separately, and if so, whether the net effect of the agreement has at least to be neutral for each group. Or whether the net effect for the whole society should at least be neutral, irrelevant of whether all groups of consumers have a neutral net effect. This touches at the core of the distribution problem. The guidelines state that *“the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement”* (para 85). If this precondition is fulfilled, the competition authority does not have to worry about the further distribution of the effects.

A paper by Townley (2010) seems to imply that all type of consumers should benefit in some way but that the balance does not necessarily has to be positive for each group as long as society as a whole benefits (for example from environmental improvement). It remains unclear whether Townley argues that it is enough if users of the relevant product benefit from the societal gain or that other benefits such as the PQRS offering for users are needed to exempt the agreement from cartel law.

The welfare perspective overlaps with Townley (2010) in the sense that the benefits of society as a whole is the determining factor in granting the exemption. The social cost and benefit analysis only shows which effects there are, to which groups and whether this is beneficial or negative for society as a whole. This means that it is not necessary that each group of consumers enjoys some benefits to conclude on an overall positive effect for society. In other words, benefits of one group of consumers can be compensated by costs of another group of consumers, leading to an overall positive effect. This would be the case if the group benefiting from the agreement is larger than the group suffering from the agreement, or when the benefits are much higher than the negative effects. The social cost and benefit analysis can provide an actor analysis showing how the effects are distributed along the groups of consumers. By means of this overview, one can conclude whether the distribution of effects is acceptable. However, the question what is and what's not acceptable should be left to the politicians. The competition authority would not be fit to make those political decisions. This question of distributing the benefits and costs of the agreement is for example relevant if an agreement has effects in two different Member States,

where one state benefits and the other pays the higher price.³⁴ This may be the reason why the Commission has formulated the minimum requirement of neutral effect on users.

The four cumulative criteria of article 101(3) TFEU weight the positive effect of the agreement with the negative effect of the restriction in competition. The quantification and weighing of negative effects and benefits of the agreement is difficult and should be conducted on a case-by-case basis. But as Townley (2010) rightly points out “*Ease of measurement is not a proxy for importance*”. The UK Treasury agrees with this and states that “*Wider social and environmental costs and benefits for which there is no market price also need to be brought into any assessment. They will often be more difficult to assess but are often important and should not be ignored simply because they cannot easily be costed.*”³⁵

Needless to say, both non-economic benefits and costs needs to be included. By including non-economic benefits it is consistent to also include non-economic costs.³⁶ Otherwise, all positive effects are compared with only a part of the negative effects. These costs would, like the restriction in competition be placed in 101(1) TFEU. But in the current article 101(1) TFEU there is no place for such costs (OFT, 2010). By using the social cost and benefit analysis which spans both article 101(1) and 101(3) TFEU, both non-economic costs and benefits can be taken into account.

4.3 Social cost and benefit analysis

A framework that fits well for weighing different effects to different (group of) consumers is social cost and benefit analysis. This analysis can be defined as follows: “*a confrontation of all costs and benefits experienced by all parties in the community associated with the implementation of a project expressed in monetary terms, supplemented by (preferably quantitative) information on impacts which cannot reliably be expressed in monetary terms*”.³⁷

This method is often used to determine the effect of a certain investment or government policy for the whole society.³⁸ For all aspects of the investment or government policy both positive and negative effects are simultaneously taken into account.³⁹ This means that both economic and non-economic effects are incorporated (see next paragraph for methods to quantify non-pecuniary effects). Furthermore, the social cost and benefit analysis is intergenerational. Effects that only materialize in the future or affect future consumers can be taken into account by discounting them to their present value. In sum, if benefits exceed cost, the project under research is attractive for society.⁴⁰

This simultaneously approach contradicts with the application of article 101 TFEU which is divided into two subsequent steps. First, the negative effects of the agreement (101(1) TFEU) and second the positive effects of the agreement (101(3) TFEU). Some competition economists

³⁴ OFT (2010).

³⁵ HM Treasury, para.5.12. [Accessed December 8, 2013].

³⁶ Townley (2010); OFT (2010).

³⁷ Eijgenraam, Koopmans, Tang, Verster (2000) p 54.

³⁸ Koopmans, Berden, Kerste (2011).

³⁹ Baarsma et al. (2010).

⁴⁰ De Nooij (2012).

therefore propose to integrate both parts of article 101 TFEU, but this a discussion is beyond the scope of this paper.⁴¹

The social cost and benefit analysis present the effects of a proposed project. Using it for the assessment of article 101(3) TFEU, the analysis will present the effects of the restrictive agreement opposite to the situation in which the restrictive agreement is not formed (the counterfactual).⁴²

The EC guidelines state that only effects on the relevant market and other related markets needs to be taken into account. The social cost and benefit analysis however does not distinguish between markets but makes a distinction between direct, indirect and external effects. Direct effects are caused by the restrictive agreement and indirect effects are caused by the direct effects. This latter is in most cases a passed-on direct effect.⁴³ For example if a restrictive agreement leads to more cost efficiency this is termed as a direct effect. An indirect effect can occur where the producers pass on these efficiency gains to consumers in lower prices.⁴⁴ The different parties that are affected by the agreement are called actors.

Because the analysis does not distinguish among markets it is possible that very large positive effects on market A caused by the agreement, more than compensate the negative effects on market B. In such a case, also if it does not involve the same actors, the net effect for society is positive.

The social cost and benefit analysis itself does not comment on whether the restrictive agreement should be exemption, it only shows the effects. It aggregates all effects for each actor and for all actors together. This twofold approach enables one to see respectively who benefits from the restrictive agreement and who is harmed, and whether the agreement has net aggregate benefits or costs.⁴⁵ This overview on both actor level and society level provides insight in the distribution of effects.

4.4 How to quantify non-economic effects?

The first and the second criteria of article 101(3) TFEU - the efficiency gains following from the restrictive agreement and the fair share for consumers of these gains - are were public interests come in. The last two criteria - no indispensable restrictions in the agreement and the agreement must not afford undertakings the possibility of eliminating competition – are not affected by whether or not the agreement has effect on public interest. This paper therefore only analyses how the application of the first two criteria can be quantified.

⁴¹ Among others, Baarsma (2010) and Teulings, Bovenberg & van Dalen (2005).

⁴² De Nooij (2012).

⁴³ De Nooij (2012).

⁴⁴ It is important to avoid double counting. For example when both the direct effect and the indirect are counted, this may be a double counting.

⁴⁵ De Nooij (2012).

4.4.1 Different methods

Where the production of a certain product involves negative effects for the environment, animals or preservation of nature, an agreement between undertakings can be made to limit or prevent these negative effects. This leads to an environmentally friendly or animal friendly product and can be seen as an improvement in production as described in the first criterion of article 101(3) TFEU. In most cases, by preventing or limiting the negative effects on the environment the production costs increase and hence the price of the product may increase.⁴⁶

The existence of gains of the improved product depends on the existence of positive value attached to it by consumers. Firstly, by the ones who are willing to pay more for the improved product and secondly, by non-users who value the prevention of negative effects to environment, animals or nature.

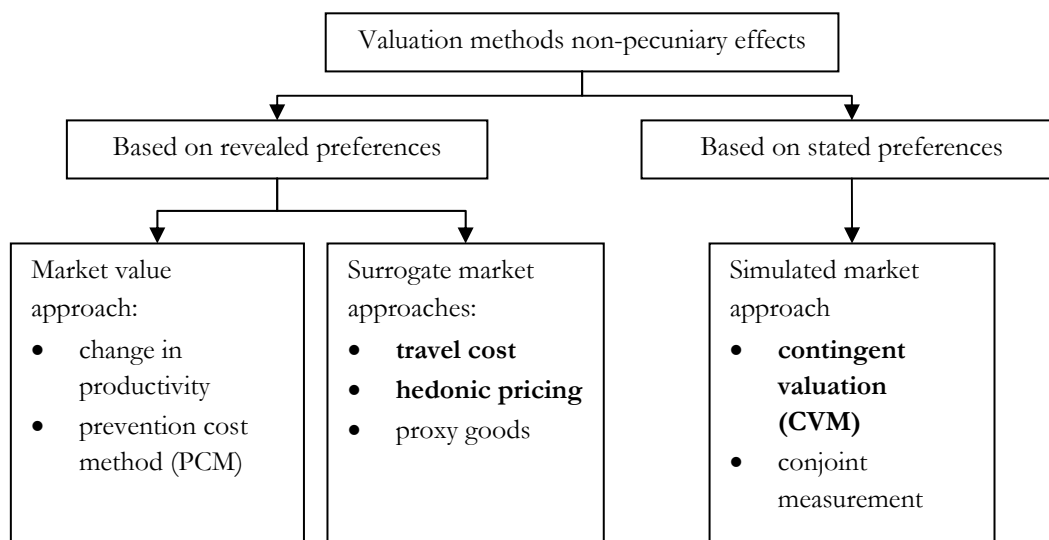
There are several methods to estimate whether people attach value to a product or service, or to the prevention of negative external effects. The methods not only calculate whether the agreement leading to a 'friendlier' product has a positive effect for consumers, it also calculates the size of this effect in terms of willingness to pay. Hence they can also be used to quantify the second criterion of article 101(3) TFEU. For economic benefits, the fair share for consumers can be quantified using a competition analysis.⁴⁷

Existing methods are divided into two different approaches (see Figure 1). Methods based on revealed preferences include methods that use market information on costs and prices. Stated preferences methods directly or indirectly ask consumers for the value they attach to a product or product characteristics. Three of them are discussed here (see bolded names in Figure 1).

⁴⁶ It is also possible to internalize the negative effects by adding them as a cost component to the production costs. This may also increase the price and hence signals to consumers the true production costs. However, if the undertakings do nothing to prevent or limit the negative effect, they simple profit from this internalization. It is therefore preferable that undertakings prevent or limit the negative effects instead of internalizing them.

⁴⁷ This means in short that for each layer in the production chain the competitive pressure needs to be established to determine the likelihood that lower costs are passed through in lower prices. Indicators such as the HHI and Lerner index are suitable for this. See Rosenboom (2012) for a more detailed description.

Figure 1 Overview of valuation methods



Source: Van der Noll, De Nooij, Tieben (2010)

Travel cost method

A method that specifically can be used to estimate the value of (the access to, size of, quality of) recreational nature is the travel cost method. This method can only be applied if the restrictive agreement would prevent any negative effect on the recreational nature from happening. This method is not applicable if the damage to the nature area already occurred and the agreement would limit or stop this damage.

The travel cost method uses the travel cost of visitors to the nature area to calculate the willingness to pay by consumers of using the area for recreational purposes.⁴⁸ If the recreational area would have no visitors, people do not value the nature and hence would not be harmed if the area would be environmentally damaged. In this situation, an agreement preventing environmental harm would not result in benefit for consumers.

An example of using this method in the application of article 101(3) TFEU is the following. Two undertakings producing the same good have build their production facility nearby a recreational nature area and start operating it in the near future. In their production process they use water to wash the ingredients and cool of the ovens. This wastewater can either be dumped in the ditches and lakes in the nature area or it can be stored, cooled down and filtered after which it can be used again. The recreational area is mostly used for swimming and fishing. The dumping of polluted wastewater would increase the water temperature and hence killing the fish, making the water unfit for swimming and fishing. The investment in a system that cools down the water and recycles it is too large for one undertaking. They decide to form an agreement to invest together in one system which they can both use. The benefits and fair share for the consumers can be calculated as follows. At the time of the agreement, the production facilities are not operative and hence the recreational area is unpolluted by the undertakings.⁴⁹ Since the travel costs reflect the value attached to the use of this unpolluted recreational nature area, these costs reflect the

⁴⁸ Moons, Eggermont, Hermy and Proost (2000).

⁴⁹ Since polluted areas lose (a large part of) their value for visitors, this method is not applicable to nature which is already polluted.

willingness to pay to keep the nature unpolluted. By forming the restrictive agreement, the recreational area remains intact and hence the fair share for consumers is shown by their willingness to pay.

Hedonic pricing method

The hedonic pricing method values the willingness to pay by individuals. It can be used to estimate the benefits of environmental quality such as clean air and clean water but also environmental amenities including the availability and proximity of recreational nature. By looking at variations in housing prices between regions with and without environmental damage, and by correcting for other relevant factors that could explain the difference in prices, the environmental effect can be isolated.⁵⁰ Because it looks at housing prices, this method can only be used where housing prices are not regulated.

If the housing prices in the 'clean' region, after correcting, are higher than in the polluted area, there is an environmental effect. This implies that an agreement that would limit or prevent the environmental damage would lead to a benefit to consumers. This method was, amongst others, used to calculate the price of noise nuisance of the Dutch airport Schiphol in 2006.⁵¹

An example of the use of this method in the application of article 101(3) TFEU would be where the production of paint by three companies in country A causes air pollution.⁵² The production process of paint can be adjusted to reduce this air pollution by purchasing a large filter. This is a large investment which the paint producers cannot bear alone. They decide to form an agreement to invest in this newer technology. To determine the benefits to both consumers of paint and non-users but inhabitants of country A, the hedonic pricing method can be used. The housing prices in country A will be compared with those in country B where there is either no paint production or paint production without air pollution. If, after correcting for other factors influencing the housing prices in both regions, the prices in country B are higher, the consumers in country A benefit from the agreement. The extent to which the housing prices are higher is the value that inhabitants attach to living in a non-air polluted region. To speak in economic terms, inhabitants get utility from an unpolluted region and this is the fair share of the benefits for consumers that is caused by the agreement.

This benefit can be weighed against the negative effects of the restrictive agreement. In most cases this entails an expected price increase if the agreement is exemption from article 101(1) TFEU. The expected price increase in absolute values, multiplied by total number of products sold in a year is the total negative effects to consumers. This amount needs to be compared with the willingness to pay, resulting from the hedonic pricing method.

Contingent valuation method

The contingent valuation method can be used to quantify the willingness to pay for an environmentally friendly product (or animal or nature friendly) or service. By using a questionnaire, respondents need to answer questions about the price they would want to pay for the product or service that is covered by the agreement, for example an energy efficient car or the

⁵⁰ Cotteleer, Luijt, Kuhlman and Gardebroek (2007).

⁵¹ CPB (2006).

⁵² In this and the two following examples, the assumption is made (for explanatory purposes) that the agreements fall under article 101(1) TFEU.

free collection of used material.⁵³ This method is applicable to more situations than the hedonic pricing method because it can also be used in cases with negative external effects that do not affect housing prices. Furthermore, by asking some screening questions it is possible to distinguish the willingness to pay for different groups of consumers, based on their characteristics.

An example of this method would be where several retailers agree that they only use recyclable package material. Respondents would be answering questions about how much more they would want to pay for cookies packed in recyclable material opposite to not-recyclable material. If the overall response is such that people are willing to pay more for groceries packed in recyclable material than in not-recyclable material, the agreement benefits consumers. The amount that they are willing to pay more reflects the utility derived from a better environment caused by recycling the packages and hence the fair share passed on to consumers.

⁵³ Hutsebaut, Ochelen, Cerulus and Putzeijs (2007).

5 The exemption of cartel law in practice

Case law from the European Commission, the Dutch Competition Authority (ACM, formerly NMa) and judgments from Community Courts shows that several non-competition concerns are taken into account in the assessment of article 101(3) TFEU and the national equivalents.⁵⁴

Quite some research has been attributed to describe which non-competition concerns are present in article 101(3) case law.⁵⁵ This section will therefore only briefly provide an overview of the interests and moves on to discussing the way these interests are analyzed in terms of efficiency gains and fair share for consumers.

The majority of the cases see to agreements that would (allegedly) lead to environmental benefits. This is true for cases handled by the European Commission and the Dutch Competition Authority. These cases involved new production technology or a collective waste management or recycling system that limited or prevented negative external effect on the environment. By doing so, the agreements tried to provide a solution to the market failure of externalities. Hence, these restrictive agreements involved economic public interests.

The Community Courts and the Commission have shown that the protection of employment,⁵⁶ cultural diversity and media pluralism,⁵⁷ regional development,⁵⁸ professional ethics,⁵⁹ are also factors to take into account when assessing article 101(3).⁶⁰ These non-competition concerns are political public interests. Some of which are included in the TFEU through cross-section clauses.

5.1 How do these public interest lead to benefits and how is the fair share for consumers determined?

5.1.1 Economic public interest

In the majority of cases with economic public interest, the limiting or prevention of externalities was taken into account complementary to economic benefits.⁶¹ The four Dutch cases *Stichting Papier Recycling Nederland*, *Vereniging van Bloemenveilingen in Nederland*, *Stibat* and *Stichting*

⁵⁴ Both before and after the modernization of the EC Treaty starting with the White Paper in 1999.

⁵⁵ See among others Petit (2009), Schweitzer (2007), Komninos (2005) and Semmelman (2008).

⁵⁶ ECJ, C-42/84, *Remia BV vs. Commission*, ECR 2545 [1985] at para 42 [1985]; ECJ Joined cases C-209/78 to 215/78 and 218/78, *Van Landenyeck vs. Commission* [1980] ECR 3125 at para 182; Commission Decision of 4 July 1984, 84/380/EEC *Synthetic Fibres*, OJ 1984, L207/17, para 37.

⁵⁷ Commission Decision, *VBVB/VBBB*, 25 November 1981, IV/428, OJ [1982] L54/36; ECJ 43 and 63/82, *VBVB and VBBB vs. Commission*, [1984] ECR 19; Commission Decision *EBU/Eurovision System*, OJ 1993 L179/23, at para 62.

⁵⁸ Commission Decision 93/49/EE of 23 December 1992, IV/33.814 *Ford Volkswagen*, OJ [1993] L20/14/

⁵⁹ Commission Decision, 15 April 2002, *Laurent Piau vs. FIFA*, paras 60-61.

⁶⁰ Petit (2009).

⁶¹ Schweitzer (2007).

Wit- en Bruingoed show that, while benefits for the environment were acknowledged, they were only taken into account in combination with economic benefits.⁶²

In the cases Stichting Wit- en Bruingoed and Stibat the statement is made that it is cheaper to prevent damage to the environment, than to recover damage to the environment. The collection, storing and recycling of environmentally harmful white and brown goods and batteries, prevents that high costs of recovering environmental damage are passed on to future generations. This in essence is how the restrictive agreements limit negative external effects.

Stichting Papier Recycling Nederland intended in 2003 to levy a waste management fee on to be recycled paper and cardboard when their prices are low.⁶³ The goal was to ensure a stable collection rate of old paper and cardboard for recycling purposes. The NMa did not explicitly state that the restrictive agreement decreased the negative external effects on the environment by reducing the production of new paper. But it did acknowledge that the creation of a closed production cycle would lead to an improvement of the environment.⁶⁴ Combined with other benefits such as a better distribution of old paper these environmental benefits could be seen as an element contributing to production or distribution and the promotion of technical or economic progress. And hence the first criterion of article 101(3) TFEU was fulfilled.

While neither the economic benefits nor the public interest considerations were quantified, the NMa stated that users of paper and cardboard receive a share of these benefits (whether this share is fair seems to be left unanswered).⁶⁵ From a welfare perspective, the environmental benefits would not only benefit the users of the products but also consumers that do not purchase paper or cardboard. The NMa only considers the environmental benefits for users. In this particular case the narrow term of users would encompass a large group of consumers because paper and cardboard is a very common product.

In the case Bloemenvelingen it is not likely that most of society are users of the product. Here, the NMa states that users will benefit from the use of less environmental harmful package material. This would lead to a more sustainable economic development. While also consumers that never purchase flowers benefit from a more sustainable economic development, the NMa neglected the benefit for non-users. It is therefore in line with the EC guidelines.

In Stibat and Stichting Wit- en Bruingoed, the environmental effect were taken into account as gains from the agreements but they were not mentioned at all when discussing the fair share for consumers. This is the same in the European case Carbon Gas Technologie. Here several companies founded a joint venture for coal gasification. This joint venture would offer benefits in terms of improved exploitation of community coal deposits. Furthermore using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal.⁶⁶ But these environmental benefits are not mentioned by the EC when analyzing the fair share for consumers. Instead only the greater

⁶² NMa, Besluit Stichting batterijen, zaaknummer 51, 18 december 1998; NMa, Besluit Stichting Wit- en Bruingoed. NMa, bloemenvelingen; NMa, Besluit Vereniging van Bloemenvelingen in NederlandZaaknummer 492, 9 juli 1999; NMa, Besluit Stichting Papier Recycling Nederland, zaak 3007 / 33.O316, 10 december 2003.

⁶³ NMa, Besluit Stichting Papier Recycling Nederland, zaak 3007 / 33.O316, 10 december 2003.

⁶⁴ NMa, Besluit Stichting Papier Recycling Nederland, zaak 3007 / 33.O316, 10 december 2003, rnr 74

⁶⁵ NMa, Besluit Stichting Papier Recycling Nederland, zaak 3007 / 33.O316, 10 december 2003, rnr 75

⁶⁶ Commission Decision, Carbon Gas Technologie, December 8, 1983, IV/29.955 L376/17. II B, 1.

stability in terms of quantities supplied and prices of energy supplies is stated as a benefit to users.⁶⁷

Two decisions by the Commission are somewhat different from the ones described afore. The first case KSB/Goulds/Lowara/ITT from 1991 concerns a new water pump.⁶⁸ The benefit from the agreement is purely based on economic elements like the use of better quality material. In discussing the share for consumers environmental benefits are claimed, be it in combination with the quality improvement which can be seen as beneficial to consumers. It seems strange that the environmental benefits are not mentioned when assessing the first criterion, like has been done in the afore mentioned cases but also in cases such as Philips – Osram and Exxon – Shell.

The second case is ARA, ARGEV, ARO from 2003.⁶⁹ Environmental benefits from the collection and recycling system were taken into account but, it seems, only because the restrictive agreement implemented environmental requirements laid down in a national ordinance and a Community Directive. The environmental benefits were not discussed within the fair share for consumers criterion.

Without defining the term ‘consumers’, the Commission had in 1992 concluded that preventive measures contribute to the protection of the environment.⁷⁰ It involved the setting up of a co-insurance pool for environmental damage liability insurance. Next to economic benefits, the agreement led to the development of industrial production techniques less hazardous to the environment.⁷¹ It seems as if the Commission in this case acknowledged the effects on society as a whole.

Two years later, the Commission granted exemption for agreement between Exxon and Shell. It involved a joint venture that would produce polyethylene. Besides economic benefits also non-competition concerns were taken into account. The result of the joint venture would be that ethylene would no longer have to be transported between the two producers. This would avoid health and environmental risks.⁷² The avoided risks, together with a reduction in use of raw materials and of plastic waste would be “*perceived as beneficial to many consumers when limitation of natural resources and threats to the environment are of increasing public concern*”. (par 71) This quote opens the door to valuation methods quantifying the consumer value of a better environment (see section 4). It is unclear whether the concept of ‘consumers’ involves only users or all people which may perceive the avoided risks and reduction of materials as beneficial.

In Philips – Osram two companies form a joint venture for the manufacturing and sale of lead glass tubing for incandescent and fluorescent lamps. Using lead glass is damaging to the environment, unless expensive filters are installed. The production facility of the joint venture has these filters to decrease the emission of lead, nitrogen oxide and antimony. Next to economic benefits such as a lower risk of breakdown and a higher production capacity, the agreement leads to “*a lower total energy usage and a better prospect of realizing energy reduction and waste emission*”

⁶⁷ Commission Decision, Carbon Gas Technologie, December 8, 1983, IV/29.955 L376/17, II B, 2

⁶⁸ Commission Decision 91/38/EEC, IV/32.363 – KSB/Goulds/Lowara/ITT, [1991] OJ L 19/25 at paras 26 and 27.

⁶⁹ Commission Decision of 16 October 2003, ARA, ARGEV, ARO, OJ 2004 L 75/59, para 268, 269.

⁷⁰ Commission Decision 92/96/EEC, IV/33.100 Assurpol, [1992] OJ L 37/16 at para 39.

⁷¹ Commission Decision 92/96/EEC, IV/33.100 Assurpol, [1992] OJ L 37/16 at para 38.

⁷² Commission Decision Exxon/Shell, 94/322, O.J. 1994, L 144/20, paragraph 68

programmes’.⁷³ This clearly reduces the negative externalities on the environment. Unlike the aforementioned Dutch cases, the European Commission does quantify some of the benefits. Savings will amount to circa 10% of the total year production of the separate undertakings (before the agreement). These cost efficiencies will be passed on to consumers but these efficiencies are only listed second in line, after the environmental benefits that will be passed on to consumers. The use of cleaner production facilities will lead to less air pollution and hence, direct or indirect result in benefits for consumers from reduced negative externalities.⁷⁴ The Commission thus acknowledges the existence of negative externalities and the possibility to resolve those by means of cooperating but also acknowledges that indirect effects benefit the consumer. Furthermore, from the order of presentation it appears that the environmental benefits are even, or maybe more important than the cost efficiencies from economic benefits. It is however unclear whether, in the absence of the economic benefits, the agreement would also have been exempted by the Commission.

All cases discussed so far were (temporarily) (partly) exempted from article 101(1) TFEU or the national equivalent because the four criteria of article 101(3) were fulfilled.

To conclude, the case law shows that the Commission and the ACM have on many occasions taken environmental benefits into account. In four cases these benefits are not included in the analysis of fair share for consumers. In the cases in which environmental benefits are accepted as beneficial to consumers, only two (Assurpol and Exxon/Shell) seem to use a broader definition for consumers than the guidelines.

It is questionable whether the EC and the ACM took the effects on the environment into account because of the cross sector clause in article 11 TFEU, or whether they acknowledged those effects as public interests. Either way, in all cases discussed so far the environmental benefits were always accompanied by economic benefits. Hence, the public interests concerns were never the most important or the sole reason to grant the exemption of article 101(3) TFEU.

5.1.2 Political public interests

One category of exempted agreements under article 101(3) TFEU is the so-called crisis cartels. In a contribution from the Commission to a session of the OESD it stated that industrial restructuring agreements were exempted from article 101(1) TFEU if efficiency gains are achieved by removing inefficient capacity from the market. This was the case for Stichting Baksteen⁷⁵ and Synthetic Fibres⁷⁶. The document does not mention anything on the social terms in which redundant employees were handled.⁷⁷ However these cases are mentioned in literature as cases in which non-competition concerns were taken into account in the assessment of article 101(3) TFEU.⁷⁸ In both the Dutch brick sector as in the synthetic-fibres industry a part of the production capacity was going to be closed. Employees who were disadvantaged because of that, were supported by schooling and retraining. In phrases used by the Commission, the “*coordination*

⁷³ Commission Decision, Philips – Osram, December 21, 1994, IV/34.252, L378/37 at para 25.

⁷⁴ Commission Decision, Philips – Osram, December 21, 1994, IV/34.252, L378/37 at para 27.

⁷⁵ Commission decision of 29 April 1994 in Case IV/34.456 Stichting Baksteen (Dutch Bricks) (OJ 1994, L 131/15), paragraph 26

⁷⁶ Commission decision of 4 July 1984 in Case IV/30.810 Synthetic Fibres (OJ 1984, L 207/17), paragraph 39

⁷⁷ OECD (2011).

⁷⁸ Among others Semmelman (2008) and Petit (2009).

[...] *make it easier to cushion the social effects of the restructuring*” (par 37). However, in both cases these social benefits were not included in the analysis of the fair share for consumers. The same can be said about Stichting Saneringsfonds Varkensslachterijen (SSV) (pork sector)⁷⁹.

Two other cases involving employment concerns are Metro and Ford Volkswagen. Starting with the oldest case, in Metro the Court ruled that the *“provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article 8[1] (3)”*.⁸⁰ This was repeated by the ECJ a few years later in Remia.⁸¹

This quote implies that positive effects on employment can be identified as an improvement of conditions of production and hence qualifies as benefits under the first criterion. The second case, Ford Volkswagen involves agreements to establish a joint venture.⁸² This joint venture would lead to the creation of 5,000 jobs and to indirectly 10,000 jobs. It would furthermore attract investments. *“It therefore contributes to promotion of harmonious development of the Community and the reduction of regional disparities”* (par 36). These employment effects are not discussed under either benefits from the agreement or fair share for consumers. Instead it is noted by the Commission when discussing the criterion of indispensability. The Commission itself states that *“This would not be enough to make an exemption possible unless the conditions are fulfilled, but it is an element which the Commission has taken into account”*.

The case EBU/Eurovision System seems like a regular case with economic benefits in the form of a better functioning because of joint negotiation and acquisition. The fair share for consumers are more and higher-quality sport programmes and cost savings that are passed on.⁸³ However, the agreement also offers *“minority sports and sports programmes with educational, cultural and humanitarian content”* (para 62). Apparently this is not only a benefit for consumers, but also for the *“organizers of minority sports, which often find it difficult to secure television coverage and thereby attract interest in their events”* (para 62). Compared to the afore described cases about employment concerns, in the EBU/Eurovision System case the non-competition concerns are both present at the analysis of the first and second criteria of article 101(3) TFEU.

One interesting last case that does not see to article 101(3) TFEU but is an abuse of dominance case, is Laurent Piau vs. FIFA.⁸⁴ This case shows that professional ethics are considered to be in *“the general interest, are proportionate and compatible with competition law”* (para 61). Hence, there is no reason to believe that professional ethics would not be accepted in cartel cases.

5.2 Public interests as rationes decidendi in 101(3) cases

Monti (2002) seems to imply that there is a shift by the European Commission to putting more weight on environmental elements in deciding whether to exempt or not. While in cases such as

⁷⁹ NMa, Besluit, Stichting Saneringsfonds Varkensslachterijen, Zaaknummer 374/31, 23 maart 1999.

⁸⁰ ECJ, C-26/76, 1977 ECR 1875 Metro v Commission.

⁸¹ ECJ, C-42/84, Remia BV vs. Commission, ECR 2545 [1985] at para 42.

⁸² Decision 93/49/EE of 23 December 1992, IV/33.814 Ford Volkswagen, OJ [1993] L20/14/.

⁸³ Commission Decision EBU/Eurovision System, OJ 1993 L179/23, at paras 58 and 68.

⁸⁴ Commission Decision, 15 April 2002, Laurent Piau vs. FIFA.

Philips - Osram and Exxon/Shell the environmental benefits have been relevant in the decision, they were also accompanied by economic benefits. In more recent cases however, especially CECED it is shown that the Commission is more willing to exempt restrictive agreements if they contribute to the environment. According to Monti (2002) this means that environmental benefits now weigh equally as productive efficiency in terms of the effect on consumer welfare. Next to CECED, which will be discussed shortly, he mentions the case DSD as an example of the increased significance that achieving environmental goals got from the Commission. However, the assessment in DSD can, in my opinion not be seen as much different from, for example Philips – Osram. While the Commission states that the restrictive agreement in DSD “gives direct practical effect to environmental objectives”⁸⁵, the fair share for consumers does also include costs savings that are passed through. Hence, the public interest does not form the *rationes decidendi* of this case.

In the following two cases public interest considerations do form the *rationes decidendi*, although in two different ways.

CECED

The CECED case was handled by the European Commission in 1999. It was judged to be a restrictive agreement because it decreased consumers’ choice of washing machines, since not energy efficient washing machines were removed from the market. This would lead to a price increase for washing machines. Two type of benefits were acknowledged; one for individual consumers and one on a collective level. Because only energy efficient washing machines remained on the market, consumers profited from a lower energy bill. This lower energy bill would cause the consumers to compensate for the price increase in less than a year.⁸⁶ This clearly fulfills the criterion of a fair share for consumers since the lifespan of a washing machine is often much longer than one year.

The environmental benefits on a collective level were caused by savings of avoided damages to the environment. The agreement allegedly resulted in a decrease of emission of 3.5 Mton carbon dioxide (CO₂), 17 Kton sulfur dioxide (SO₂) and 6Kton nitrogen per year by 2010. The savings on damages would be worth 41 to 61 euro per ton CO₂, 4000 to 7000 euro per ton SO₂ and 3000 to 5000 euro per ton nitrogen (on European level). This led the European Commission to conclude that social benefits from the agreement are seven times larger than the price increase of washing machines. Hence, the criterion of efficiency gains and a fair share for consumers are satisfied. The Commission also concluded that the last two criteria were fulfilled and exempted the agreement of article 101(1) TFEU.

The decision by the Commission does not state anything on effects in different markets. Both effects (individual consumers and collective benefits) seem to be placed in market for washing machines. While a reason is not given, it is probably because the energy efficiency of a washing machine is an important element in the consumers choice to select a machine. It is therefore noteworthy that the new guidelines on the applicability of Article 101 include one example (no. 5 of environmental standards) that seems remarkably the same as the CECED case but which does

⁸⁵ Commission Decision 2001/837/EC of 17 September 2001 (*DSD*), OJ [2001] L319/1, para 144.

⁸⁶ Commission Decision, *CECED*, IV/F.1/36.718, January, 24, 1999, L 187/47 at para 52.

mention the distinction of effects on the relevant market and on other markets.⁸⁷ The conclusion of the Commission in the CECED case would however have been the same if this distinction was applied. The markets would have been related because it involves largely the same group of consumers (the consumers of energy, water and washing machines are most likely overlapping).

The individual benefits are only considered for users. This makes sense since only the energy bill of washing machines is affected by the agreement. The guidelines speak of collective benefits if there is a more efficient allocation of resources or if less resources are used. (par 85) In CECED, the Commission uses the environmental damage avoided as a collective benefits. Strange enough, the Commission did not see reason to mention this argumentation in their guidelines a few years later.

Closure of five coal plants in the Netherlands

A recent Dutch case that involved environmental effects is the analysis about the closure of five coal plants.⁸⁸ This agreement, part of the Energy Agreement for Sustainable Growth was found not to satisfy all four criteria of article 101(3) TFEU because the benefits of the agreement did not compensate for the price increase caused by the agreement.⁸⁹ The assessment of the ACM is very interesting because both the positive and negative effects of the agreement are quantified. It takes as starting point that positive effects on the environment caused by a more sustainable energy supply can be seen as benefits in the sense of the first criterion of article 101(3) TFEU. But instead of valuing the environmental benefits by the appreciation Dutch citizens have for a better environment and/or a more sustainable energy supply, the ACM sees the reduction of emission as savings. It therefore chooses to use the prevention cost method (PCM, see figure 1) and the damage cost methodology to quantify the effects.

The environmental benefits are formed by the reduction of the emission of sulfur dioxide (SO₂), nitrogen oxide (NO_x) and fine dust which results in a less polluted air (carbon dioxide (CO₂) emission is discussed below). According to the ACM this could be seen as savings “*in relation to the measures that should be taken otherwise in order to realize the same improvement*”. It is strange that this point has not been brought up in earlier (Dutch) cases. This is probably the case because of the National Emissions Ceilings that are in place for SO₂ and NO_x. To stay below these ceilings, measures need to be taken. The closure of the coal plants and the following reduction in emission ensures that less measures need to be taken. Therefore, the reduction in emission can be expressed in terms of avoided costs (by means of the prevention cost method (PCM)).

The question arise whether, if there would not have been any emission ceilings to be satisfied, the environmental benefits would have been considered at all in the assessment and in which manner. The analysis of the emission of fine dust provides some insight since there is no ceiling for fine dust. The ACM quantifies the effects of this emission by means of the damage cost approach. This approach estimates the value of the decreased emission for Dutch citizens. This

⁸⁷ European Commission (2011), Example 5 (Environmental standards), paragraph 329.

⁸⁸ This is not a decision or an informal opinion but a memo. Although this has less legal status than the former two, it still offers interesting insight in the way the ACM handles the assessment of article 101(3) TFEU where it involves public interest.

⁸⁹ ACM (2013b).

value is mainly in terms of health and life expectations and not in terms of willingness to pay for a better environment.

In total, the reduction of emission of the three components amount to 30 million euro per year and 180 million euro over the whole period of 2016-2021.

This needs to be weighed against the negative effect of the agreement, the expected price increase. A price increase of 0.9 percent is expected for 2016-2021, combined with an increase of the use of electricity of 1.15 percent each year. This amounts to a price increase of 75 million euro per year and 450 million euro for the whole period.

The ACM did the math and concluded that the positive effects did not compensate the price increase. Hence, while the first criterion of article 101(3) was fulfilled, the second criterion failed.

The closure of the coal plants also results in a reduction of the emission of carbon dioxide (CO₂). But by emitting less CO₂, less emission rights are needed. This means that these rights will be purchased by other parties through the ETS market. Hence, a decrease in CO₂ by the coal plants may result in an increase of CO₂ emission somewhere else. Lavrijssen (2013) rightly poses the question whether the ACM would have changed her opinion if the closed coal plants decided not to sell their CO₂ rights and guaranteed that consumers would not have paid for this.⁹⁰ If this was the case, the restrictive agreement would indeed lead to a CO₂ emission reduction and also this effect would have been taken into account, next to the emission of SO₂, NO_x and fine dust.

Another question about the assessment of the ACM is why she choose not to follow the CECED approach. As described before, in the CECED case, the Commission acknowledges the benefits to individual consumers from the more energy efficient washing machines together with the collective cost savings of avoided damage because emission was limited by the agreement. In the Dutch coal plants case only the collective costs savings of other measures were taken into account. While there will always be discussion about which quantification method to use, the use of only the prevention cost method seems unjust. In essence, this approach turns the emission reduction into economic benefits in the form of costs savings. This lower government expenditure may be passed on to consumers in lower taxes or may be spend on other valuable policies. However, this economic benefit is not the only benefit experienced by consumers. Consumers can benefit from a more sustainable energy supply and a better environment. As suggested by Tieben (2013) this effect can be quantified by looking at the willingness to pay for green energy.⁹¹ By removing the energy generated by coals off the market, the total energy supply will be more sustainable. A report by the ACM of the energy market shows that consumers are willing to pay 11.80 euro more per month for green energy (142 euro per year).⁹² This provides an indicator of the consumer value for energy that does not damage the environment by its way of generating. Since 25 percent of the 7.5 million Dutch households are willing to pay more, this gives a total value of 265 million euro per year. Since the price increase is 75 million a year, already accepting a small part of this willingness to pay as a benefit to consumers, will flip the decision from not exempted towards exempted from article 101(1) TFEU.

⁹⁰ Lavrijssen (2013).

⁹¹ Tieben (2013).

⁹² ACM (2013c).

This assessment of the ACM is a clear difference with the guidelines that only accept economic effects in terms of PQRS offerings but is in line with the position paper of the ACM and the policy rules of the Minister of Economic Affairs. This position paper states that sustainable production can be welfare enhancing.⁹³ The difference between users and non-users is not relevant in this case since all Dutch citizens use electricity and hence bear the higher costs but also profit from a better environment.

⁹³ ACM (2013a) p. 12.

Conclusion

This paper has looked at the analysis of public interest in article 101(3) from multiply angles: the legal framework published by the guidelines of the Commission; the welfare perspective that uses cost and benefit analysis to determine whether a restrictive agreement is beneficial or negative for society as a whole and; case law from the Commission, the Dutch Competition Authority and Community Courts.

The main difference between the guidelines and the welfare perspective is that the latter includes not only economic effects and enlarges the concept of consumers to include non-users. These are important differences in the case of public interest concerns. The prevention or limiting of negative externalities affects not only the users of the relevant product but also other non-users. Furthermore, solving negative effects cannot be seen as direct economic effects and hence are ignored in the guidelines approach. While these effects can be significant from a welfare perspective.

A disadvantage of the welfare approach is the distribution problem of effects. Should a restrictive agreement that benefits society as a whole but negatively affects one group of consumers be accepted? It is argued that this choice should not be made by the competition authority but by the government. The guidelines imply that at a minimum the effect for the users of the relevant product must be neutral. With that, it offers minimum requirements for the competition authorities to decide on the agreement.

Hence, the legal framework by the Commission and the welfare perspective differ. But how does case law relate to either of these? Cases from before 2004 are analysed, hence they cannot be influenced by the guidelines, rather the other way around.

Case law shows that the Commission and the ACM have on many occasions taken economic public interest, mostly environmental benefits into account. It is questionable whether the EC and the ACM took the effects on the environment into account because of the cross sector clause in article 11 TFEU, or whether they acknowledged those effects as public interests. In the majority of cases with economic public interest, the limiting or prevention of externalities was taken into account complementary to economic benefits. In some cases, the public interest benefit were not included in the analysis of the fair share for consumers. Only two cases (Assurpol and Exxon/Shell) seem to use a broader definition for consumers than the guidelines.

Political public interest are taken into account in decisions from the European Commission and are accepted by the ECJ. The majority of these cases involve public interest that are included in the TFEU (so called cross section clauses). However, in only one of the discussed cases the public interest was included in both the first and second criteria of article 101(3) TFEU, This happens to be the case in which the public interest is not formulated in one of the cross-section clauses (EBU/Eurovision System).

In sum, in most cases the public interest (either economic or politic) only played a complementary role in the assessment of article 101(3) TFEU. The restrictive agreement would, most likely, not have been exempted if the economic benefits did not exist.

There are however two cases in which economic public interest was the *rationes decidendi*. These are the European case CECED and the recent Dutch analysis of the closure of five coal plants. Both cases show that negative external effects on the environment can be quantified and weighed against the expected price increase.

In the CECED case, the Commission acknowledged that social benefits (from the emission reduction) were higher than the price increase. It concludes on that based on benefits for the individual consumer and collective benefits. It makes, contrary to their later guidelines, no distinction between the relevant market and other markets.

The Dutch case also no distinction is made between users and non-users but this makes sense since practically everyone in the Netherlands uses energy. The ACM considers the reduction in emission as a cost savings for measure that should be taken otherwise in order to realize the same improvement. It therefore quantifies most of the negative external effects using the prevention cost method (PCM). Hereby it identifies negative externalities as economic benefits. The ACM however largely ignores the value consumer attach to a more sustainable energy supply. If they would have included the willingness to pay by consumers, the balancing would have been positive, while with the current approach it is not. Nonetheless, the approach of the ACM is in line with the welfare perspective.

Hence, it seems that the two cases in which public interest were a determining factor have been analysed from the welfare perspective instead of the legal stance the guidelines offer.

The expectation is that future Dutch cases will be assessed from the welfare perspective. This follows from the policy rules by the Dutch Minister of Economic Affairs that acknowledges the effect on consumers on the relevant market, future consumers and society as a whole.

The Commission analysed the CECED case from a welfare perspective but apparently it saw no need to bring the guidelines of 2004 in line with that decision in 1999. Hence, it is unclear in what manner public interest will be taken into account in future European cases.

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