

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

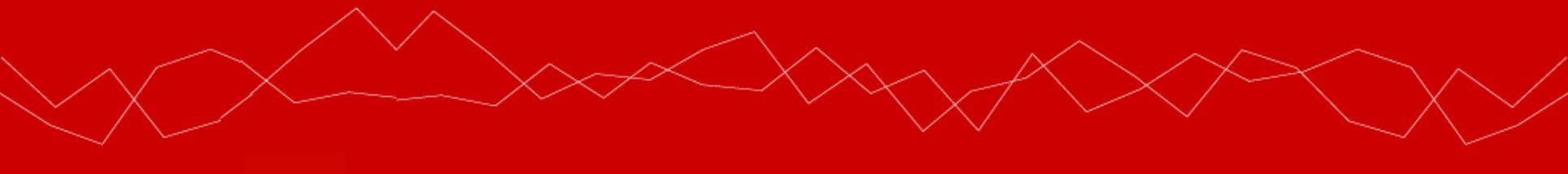
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Only the spoken word applies

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seo economisch onderzoek



Content

- **Cartel exemption and why public interest are relevant**
- **Public interest**
- **EC guidelines & welfare perspective**
- **Social cost and benefit analysis (including quantification methods)**
- **Case law that involved public interest**
- **Conclusion**

Source: Rosenboom, N.S.R. (2013), How does article 101(3)TFEU case law relate to EC guidelines and the welfare perspective? Working paper.

Public interest

- **Economic public interest**
 - **Market power;**
 - **Externalities;**
 - **Public goods;**
 - **Asymmetric information.**
- **Political public interest**
 - **Paternalism**
 - **Redistribution of income**

Source: Rosenboom, N.S.R. (2013), How does article 101(3)TFEU case law relate to EC guidelines and the welfare perspective? Working paper.

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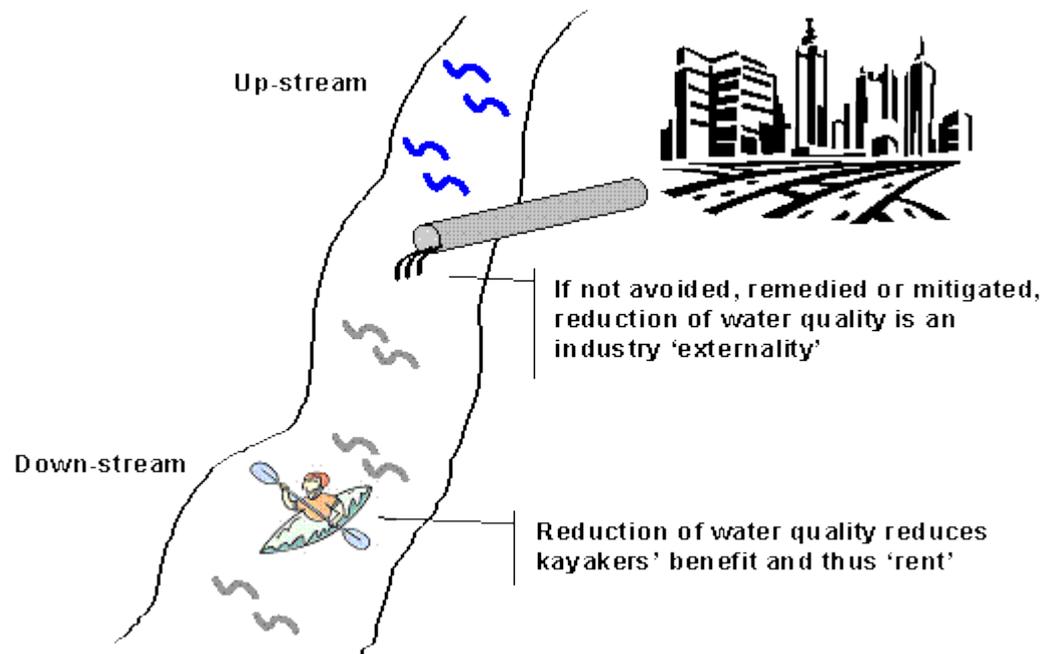
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Externalities

An externality is a cost or benefit that is experienced by someone who is not a party to the transaction that produced it



The exemption of article 101(3) TFEU

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

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The EC guidelines 2004

- “When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules.” (par 33)
- Criterion 1: “The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective economic efficiencies.” (par 59)
- “The causal link between the agreement and the claimed efficiencies must normally also be direct.” (par 54)
- Criterion 2: “The concept of ‘consumers’ encompasses all *direct or indirect* users of the products covered by the agreement [...]. In other words, [...] the customers of the parties to the agreement and subsequent purchasers.” (par 84)

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The EC guidelines 2004 (2)

- How to determine whether the positive effects outweigh the negative ones:
- “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” (par 85)
- “Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market.” Unless markets are related. (par 43)

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Guidelines conflict with how public interest would be handled in the welfare perspective

	Guidelines	Welfare perspective
Direct effects	Economic efficiencies	Economic benefits + Non-economic benefits
Indirect effects	On same market	On other markets
Market	Relevant + related market	All markets
Consumers	Users (direct + indirect)	All actors
Balancing	Only when markets are related	Effects are aggregated for each actor and for all actors together
Distribution of effects	At least net neutral effect for users	Does not provide minimum requirements

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But some room for public interest in the guidelines

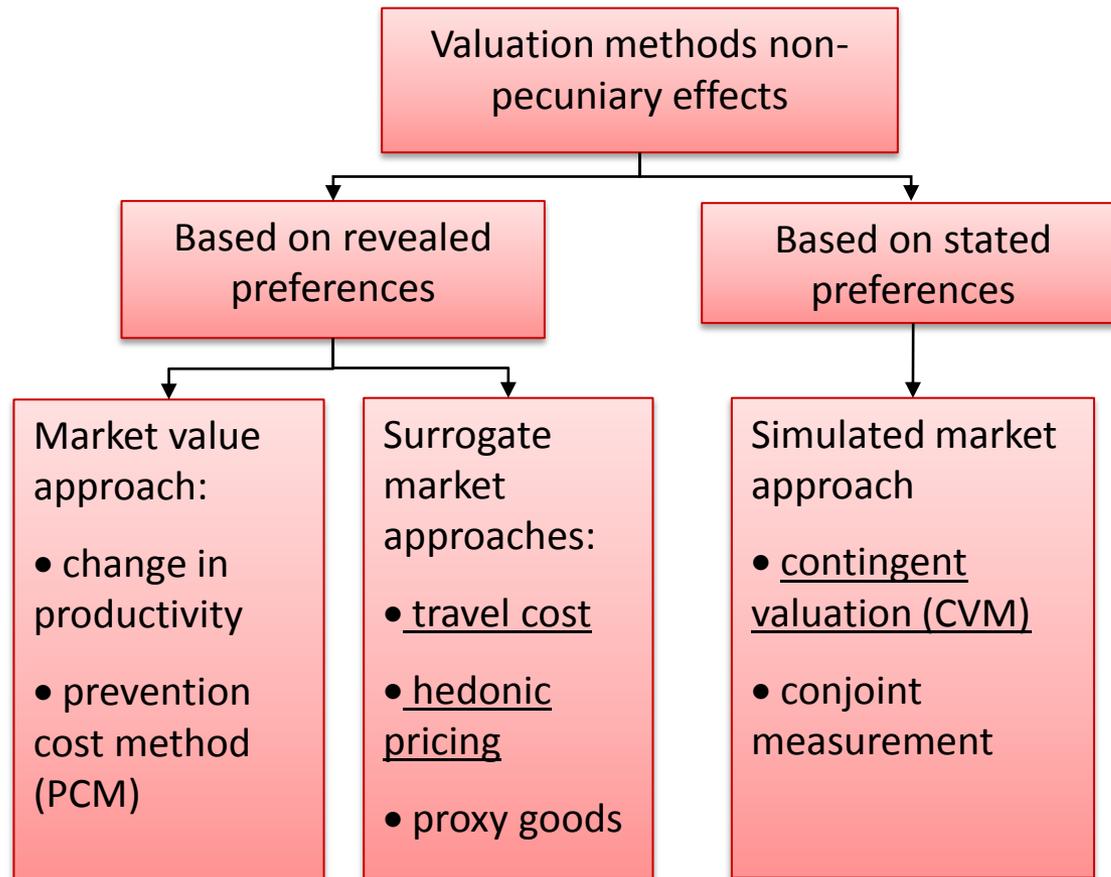
- **“Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.” (par 85)**
- **“Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)” (par 42)**
 - **effects on the environment (article 11 TFEU);**
 - **protection of employment (article 147 TFEU);**
 - **cultural diversity (article 167 TFEU);**
 - **consumer protection (article 169 TFEU);**
 - **economic and social cohesion (article 175 TFEU).**

Social cost and benefit analysis

- **This method is often used to determine the effect of a certain investment or government policy for society**
- **Characteristics**
 - **Both positive and negative effects are simultaneously taken into account.**
 - **Direct, indirect and external effects**
 - **Intergenerational**
 - **No distinction between markets**
 - **If benefits exceed cost, the project under research is attractive for society**
 - **Actor analysis (distribution problem)**

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How to quantify non-pecuniary effects



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Quantification methods

- **Based on revealed preferences:**
 - Hedonic pricing method
- **Based on stated preferences:**
 - Contingent valuation (CVM)

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Case law – economic public interest

Cases	Criterion 1		Criterion 2		
	Economic effects	Non-economic effects	Non-economic benefits	Only for users	For all consumers
Papier Recycling	X	X	X	X	
Stibat	X	X			
Wit/Bruingood	X	X			
Bloemenveiling	X	X	X	X	
Carbon Gas Technologie	X	X			
Philips –Osram	X	X	X	X	
Exxon-Shell	X	X	X		X
KSB/Goulds/Lowara/ITT	X		X	X	
Assurpol	X	X	X		X
ARA, ARGEV, ARO	X	?			

Source: Rosenboom, N.S.R. (2013)

Case law – political public interest

- **Employment concerns**
 - **Stichting Baksteen**
 - **Synthetic Fibres**
 - **Stichting Saneringsfonds Varkensslachterijen (SSV)
(pork sector)**
 - **Ford Volkswagen**

- **Other non-competition concerns**
 - **EBU/Eurovision System**
 - **Laurent Piau vs. FIFA**

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Case law with public interest as determining factor

- **CECED**
 - **Distinction between direct and indirect effects**
 - **Effects were quantified**
 - **Distinction between individual benefits (only users) and collective benefits**
 - **Collective benefits quantified as avoided damage of emission**
- **Closure of five coal plants**
 - **Benefits to environment can be seen as fulfilling criterion 2**
 - **Effects were quantified using prevention cost method**

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Conclusion

- **The EC guidelines and welfare perspective conflict**
- **Welfare perspective offers full picture but entails some problems**
- **Negative external effects on environment most frequent in case law**
- **Non competition concerns complementary to economic effects**
- **Cases in which public interests are determining factor are more in line with welfare perspective**
- **Future expectations**

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