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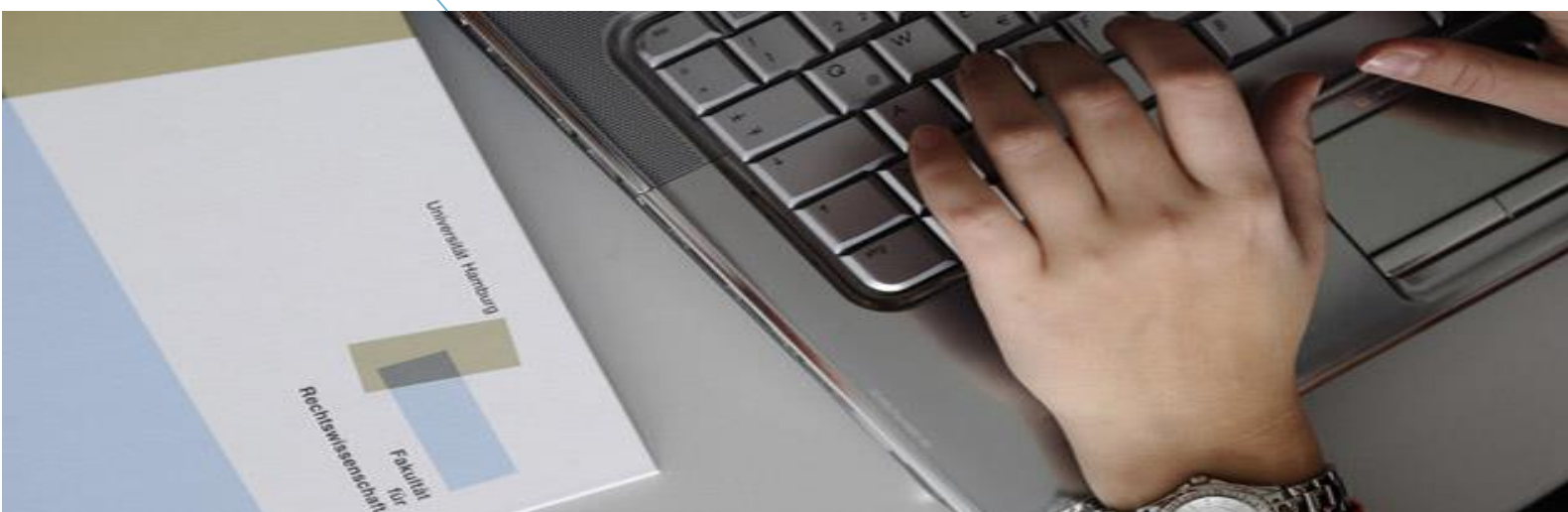
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Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in terms of Human Well-Being.

Eva van der Zee*

Keywords: competition law, European law, human well-being

JEL Codes: K21, L4.

Abstract The main aim of this paper is to examine how the current European Commission guidelines issued in 2004 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) (hereinafter: Commission guidelines) could be improved to allow undertakings to assess their agreements under Article 101(3) TFEU in a way that is quantifiable but that goes beyond an economic approach focusing solely on monetary well-being. This research is timely, as the Commission is currently reviewing the Horizontal Block Exemption Regulations and the Horizontal Cooperation Agreements Guidelines.

To achieve this aim, I will first give a brief overview of Article 101 TFEU and the Commission guidelines, pointing out where further guidance is needed. Then, I will show that based on communications by the Commission, as well as based on case law by the Court of Justice of the European Union (CJEU), the term “benefits” under Article 101(3) TFEU should be interpreted as a wide notion of well-being (ie not solely related to monetary well-being), also known as HWB. Based on the legal analysis, this paper explores different methods to estimate HWB (economic cost-benefit analysis, well-being analysis, resourcism, and the capabilities approach), arguing that a combination of these methods would provide the most accurate estimation of HWB. It is concluded that, in the right hands with the proper understanding of the strengths and weaknesses, statistical data derived from HWB methods can provide important insights. To improve guidance as to how to use these insights, national agencies or the European Commission are advised to answer normative questions. These questions include which discount rate should be chosen and which capabilities society deems important.

1. Introduction

In recent years, agreements between undertakings to stop the sale of unsustainable products or production processes have been discouraged by national competition authorities (NCAs) in the EU. NCAs argued in these cases that the objective benefits (meaning quantifiable benefits and not the

subjective opinion of the undertakings¹ to the consumers of the product were lower than the costs of the agreement.²

The NCAs seemingly based their decision on their interpretation of the European Commission (hereinafter: Commission) guidelines issued in 2004 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) (hereinafter Commission guidelines).³ The Commission guidelines are often interpreted as that only benefits that can be subsumed within the notion of economic efficiency can be taken into account, meaning that non-economic justifications cannot (with the term “economic” seemingly only referring to monetary values).⁴ Such an interpretation of the Commission guidelines seems to be logical at first sight. For example, the Commission observed in other documents that the purpose of Article 101(3) TFEU is to provide a legal framework for the economic assessment of restrictive practices.⁵ In addition, the Commission states that the purpose of the guidelines is to develop a method for the application of Article 101(3) TFEU based on the economic approach introduced and developed in the guidelines on vertical restraints, horizontal co-operation agreements, and technology transfer agreements.⁶ With this more “economic approach” the Commission refers to its interpretation of the aim of EU competition rules: enhancing consumer welfare and ensuring an efficient allocation of resources,⁷ which are two concepts derived from economic theory.

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¹ The term “objective” has different connotations depending on who uses the word. The Commission sees “objective” benefits as meaning empirically quantifiable, and not the subjective opinion of undertakings. “Objective” benefits are used in a different way by economists, psychologists, and moral philosophers as will be apparent in this paper. Economists, psychologists, and moral philosophers see “objective” benefits as resources or capabilities that are determined to be important by a society as a whole (often laid down as fundamental rights, or as material resources). These “objective” benefits are, therefore, not necessary quantifiable – although great progress have emerged in this regard. “Subjective” benefits are, however, quantifiable, as they are empirical data derived from asking or studying individual’s subjective perception of happiness or subjective preferences.

² Autoriteit Consument en Markt, ‘Analyse ACM van Duurzaamheidsafspraken ‘De Kip van Morgen’ (2015) <<https://www.acm.nl/nl/download/publicatie/?id=13758>> accessed 16-08-2019; Conseil de la Concurrence. Avis relatif à l’examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A- 07 du 22 mars 2006, para 97.

³ European Commission, “Notice: Guidelines on the application of Article 81(3) of the Treaty” [2004] OJ C 101/97, 2004, at 84.

⁴ See for a discussion on the matter R. Whish and D. Bailey, *Competition Law* (Oxford University Press 2015), 140; G. Monti and J. Mulder, ‘Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives’, (2017) 42 *European Law Review*; Article 81(3) Guidelines, n 3; O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006); O. Odudu, ‘The Wider Concerns of Competition Law’, (2010) 30 *Oxford Journal of Legal Studies*, 599; S. Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012); C. Townley, *Article 81 EC and Public Policy* (Hart Publishers 2009); D. Casey, ‘Disintegration: Environmental Protection and Article 81 EC’, (2009) 15 *European Law Journal*; A. Gerbrandy, ‘Competition Law and Private-Sector Sustainability Initiatives’, in Aurelia Colombi Ciacchi, et al. (eds), *Law & Governance - Beyond the Public-Private Divide?* (Eleven International Publishing, 2013); J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016).

⁵ European Commission, ‘White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty’, (1999). The approach has been confirmed in the European Commission, ‘Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements’ (2011) OJ C11/ and the European Commission, ‘Guidelines on Vertical Restraints’, (2010) 2010/C 130/01.

⁶ *Ibid*, at para 5.

⁷ *Ibid*, at para 33.

However, the Commission is far from clear on what it means with the term “efficiency”⁸ nor what it means with the concept of “consumer welfare”⁹. This is problematic because the definition of these terms determines whether and to what extent considerations that cannot be (easily) monetized (such as some aspects of sustainable development) can be taken into account under the analysis. It has often been argued that only benefits with a clear monetary value can be taken into account under Article 101(3) TFEU.¹⁰ However, the Commission never made it explicit in its guidelines that only benefits with a clear monetary value could be taken into account. In fact, the Commission has provided minimum guidelines. These guidelines do not clarify how to quantify benefits under the competition rules at all, or that it should be quantified solely in monetary terms. However, due to this lack of clarity of the guidelines and due to the resulting interpretation by NCAs,¹¹ undertakings have been hesitant to set up new sustainability agreements out of fear of competition rules.¹²

The main aim of this paper is to examine how the current Commission guidelines could be improved to allow undertakings to assess their agreements under Article 101(3) TFEU in a way that is quantifiable but that goes beyond the economic approach focusing solely on monetary well-being (hereinafter: welfare economic approach). Defenders of the welfare economic approach have long argued that, despite its flaws, a welfare economic approach is the best available means for determining the efficiencies and benefits of anti-competitive agreements.¹³ That may no longer be the case. This paper will propose an alternative method for analysing the efficiencies and benefits of a public or private policy: human well-being (HWB).

To achieve this aim, I will provide a brief overview of Article 101 TFEU and the Commission guidelines, pointing out where further guidance is needed (Section 2). Section 3 will show that based on communications by the Commission, as well as based on case law by the Court of Justice of the European Union (CJEU), the term “benefits” under Article 101(3) TFEU should be interpreted as increasing a wide notion of well-being (ie not solely related to monetary well-being), also known as HWB. Section 4, will discuss different methods to estimate HWB (ie economic cost-benefit analysis, well-being analysis, resourcism, and the capabilities approach), arguing that a combination of these methods would provide the most accurate estimation of HWB. Section 5 will provide further information on how to incorporate HWB in the analysis under Article 101 TFEU.

⁸ There are various sources of efficiency gains: Pareto, static (allocative or productive), and dynamic. These sources of efficiency gains may potentially conflict. See for more information on sources of efficiency gains Van den Bergh, Roger J., (2017), *Comparative Competition Law and Economics*, Edward Elgar Publishing.

⁹ V. Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?', (2015) 11 *The Competition Law Review*, 131-160.

¹⁰ See for a discussion on the matter Whish and Bailey, 140; Monti and Mulder; Article 81(3) Guidelines, n 3; Odudu; Odudu; Kingston; Townley; Casey; Gerbrandy; Nowag.

¹¹ Autoriteit Consument en Markt (2014), n 2; Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A- 07 du 22 mars 2006, para 97.

¹² The author conducted semi-structured interviews with several companies and NGOs that indicated their hesitance to take steps towards more sustainable production out of fear of competition rules. More details can be obtained from the author.

¹³ This has especially been argued for economic cost-benefit analysis. See eg M. D. Adler and E. A. Posner, *New Foundations of Cost-Benefit Analysis* (Harvard University Press 2006).

2. Article 101 TFEU and its possible exceptions

Article 101(1) TFEU prohibits agreements between undertakings which may affect trade between Member States and which have as their objective or effect the prevention, restriction or distortion of competition within the internal market. For an agreement to be caught by Article 101(1) TFEU depends firstly on whether the agreement is between undertakings. According to the CJEU ‘the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’.¹⁴ The main controversial criterion when determining whether the actors involved in the agreement are undertakings, is that an undertaking needs to carry out the activity in order to make profits.¹⁵ This criterion would in any case exclude sustainability agreements between undertakings that carry out activities as a task in the public interest typical of public authority,¹⁶ or when they fulfil a social function that is predominantly based on solidarity.¹⁷

Promoting sustainable development is often not the sole objective of undertakings as ultimately they aim to make profits by the agreement, eg by preventing that consumers would switch to the competitor for cheaper, less sustainable, products.¹⁸ Therefore, only agreements between undertakings that ultimately aim to make profits by the agreement will be considered in this paper. As such, the solidarity argument or the useful effect doctrine is assumed not to apply in these cases.¹⁹

Undertakings need to assess themselves whether their agreement infringes Article 101(1) TFEU and, if so, whether the exemption conditions of Article 101(3) TFEU are met. Four conditions set forth in Article 101(3) TFEU must be met to justify agreements caught by Article 101(1) TFEU: the agreement should (1) contribute to the improvement of the production or distribution of goods, or to promote technical or economic progress, (2) while allowing consumers a fair share of the resulting benefits and (3) which does not impose non-indispensable restrictions on the undertakings concerned and (4) which does not afford these undertakings the possibility of eliminating competition. A fifth condition, added by the CJEU, requires that the benefits that the agreement yields must be greater than its costs.²⁰

The Commission issued guidelines in 2004 on the conditions for exception contained in Article 101(3) TFEU, to guide undertakings in their assessment.²¹ The Commission guidelines to Article 101(3) TFEU do not specifically clarify which method to use to quantify the claimed efficiencies and the resulting

¹⁴ Case 41/90 *Höfner and Elser v Macrotron*, ECLI:EU:C:1991:161, at 21; Case 280/06 *ETI and Others*, ECLI:EU:C:2007:775, at 38; Case 350/07 *Kattner Stahlbau*, ECLI:EU:C:2009:127, at 34; see also Odudu, n 4, 26 and 214; Whish and Bailey, n 4, 88-9.

¹⁵ Case 343/95 *Diego Cali & Figli*, ECLI:EU:C:1997:160.

¹⁶ Case 107/84 *Commission v Germany*, ECLI:EU:C:1985:332, at 14-15; Case 364/92 *SAT Fluggesellschaft v Eurocontrol*, ECLI:EU:C:1994:7, at 27-30; Case 67/96, Joined Cases 115/97 to 117/97, and Case 219/97 *Albany, Brentjens, Maatschappij*, ECLI:EU:C:1999:28; Case 159/91 and 160/91 *Poucet and Pistre*, ECLI:EU:C:1992:358 at 12.

¹⁷ A. Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law', (2017) 40 *World Competition*.

¹⁸ It should be noted that supermarkets do not always embark on horizontal co-operation agreements to stop the sale of unsustainable alternatives. For example, Dutch supermarkets individually agreed to stop the sale of battery eggs. "Supermarkten weren eieren uit legbatterij", *De Volkskrant*, June 6, 2003, p. 15. Arguably, the reason why in this case a horizontal co-operation agreement was not deemed to be necessary was because consumers do not select a supermarket based on the price of eggs, but they do select a supermarket based on the price of meat. As such, supermarkets may be more affected when increasing the price of meat. See eg P. DeGraba, 'The Loss Leader is a Turkey: Targeted Discounts from Multi-product Competitors', (2006) 24 *International Journal of Industrial Organization* 613-28.

¹⁹ It goes beyond the aim of this paper to discuss the solidarity argument or the useful effect doctrine. For further information on how the solidarity argument and the useful effect doctrine could apply to sustainability agreements under Article 101 TFEU, see Gerbrandy, n 17.

²⁰ G. Monti and Mulder, n 4, 647 referring to Case 56/64 *Etablissements Consten Sàrl v Commission*, ECLI:EU:C:1966:41 at 348-349.

²¹ Article 81(3) Guidelines, n 3.

benefits to the consumers of an agreement. Some guidance could be found in the 2001 Horizontal Cooperation Guidelines in which the Commission held that:

“Environmental agreements caught by Article 81(1) [now Article 101(1)] may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs.

Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.”²²

The 2001 Horizontal Guidelines have been replaced by the 2010 Horizontal Guidelines that do not longer include a similar reference to environmental agreements and cost-benefit analysis (CBA).²³ The Commission has explained this is not to be seen as a change of its policy.²⁴ As such, the 2001 Horizontal Guidelines provide some guidance, namely that a CBA is warranted, although it does not clarify what type of CBA should be conducted and whether it should only be assessed in monetary terms.

Some scholars argue that sustainability benefits that go beyond monetary gains have no place in the legal analysis under Article 101(3) TFEU.²⁵ These scholars point to the *Wouters* doctrine to nonetheless allow sustainability benefits that go beyond monetary gains in the assessment under Article 101 TFEU.²⁶ In *Wouters* the CJEU drew upon its jurisprudence on internal market law, arguing that the decision of an association of undertakings (the Dutch Bar Association) which restricted competition (banning multi-disciplinary practices²⁷) was necessary to achieve a public interest objective (the proper practice of the legal profession). In *Wouters*, the CJEU held that the restriction of competition was suitable (the restriction could reasonably be considered necessary to achieve its public interest objective²⁸), necessary (the Netherlands was entitled to consider that the objectives pursued by the restriction cannot be attained in less restrictive means²⁹), and did not have a disproportionate effect

²² Article 81(3) Guidelines, n 3, at 179.

²³ Commission Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Co-Operation Agreements, [2001] OJ C 3, 6 Jan. 2001; European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" [2011] OJ C11/.

²⁴ Commission, Competition: Commission Adopts Revised Competition Rules on Horizontal Cooperation Agreements – Frequently Asked Questions 4 (2010), https://europa.eu/rapid/press-release_MEMO-10-676_en.htm?locale=en (accessed 15-08-2019).

²⁵ Case 309/99 *Wouters*, ECLI:EU:C:2002:98.

²⁶ Whish and Bailey, n 14, 140; Monti and Mulder, n 4; Article 81(3) Guidelines, n 4; European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" [2011] OJ C11/1; Odudu, n 14; Monti and Mulder, n 4; Kingston, n 4; Townley, n 4; Casey, n 4; Gerbrandy n 4; Nowag, n 4.

²⁷ Case 309/99 *Wouters*, ECLI:EU:C:2002:98, at 100.

²⁸ *Ibid*, at 107.

²⁹ *Ibid*, at 108.

on other interests (the effects of the restriction does not go beyond what is necessary to ensure the public interest objective³⁰). As such, in effect, the CJEU conducted a proportionality test.³¹

An often mentioned advantage of the Wouters doctrine is that, contrary to Article 101(3) TFEU, the agreement does not have to benefit the individual consumer.³² However, in the pursuit of sustainable development, individual consumer and societal interests are often aligned.³³ For example, an individual consumer may immediately benefit from cheaper product prices, but these cheaper product prices may undermine broader social welfare (relocation of production to less expensive labour markets, increasing environmental pollution due to longer distance these goods must travel), and ultimately circles back to the detriment of the consumer (unemployment; environmental pollution).³⁴ In other words, an agreement that may be exempted following, for example, the Wouters doctrine when it pursues societal goals, would often also come to benefit the consumer in the long term, especially as, as held by the Commission in CECEd, these benefits to the consumer may be rather small.³⁵

Second, some argue that the Wouters doctrine should be preferred over an analysis under Article 101(3) TFEU when assessing sustainability agreements since it does not require a quantification of benefits.³⁶ However, this argument leaves aside the general trend in the internal market case law of the CJEU to leave open the possibility for Member States to use statistical evidence or any other suitable type of evidence when conducting the proportionality test.³⁷ As the Wouters doctrine is based on the CJEU's jurisprudence on internal market law,³⁸ it possibly warrants a similar approach. Further clarity on how to select and weigh statistical evidence under the Wouters doctrine would, therefore, also be useful for NCAs, governments, and courts to quantify the benefits of an agreement.

To provide undertakings and governments with some further guidance, I propose that undertakings conduct a CBA based on human well-being to quantify the claimed efficiencies and the resulting benefits to the consumers of an agreement. HWB is a complex concept as it embraces many different ideas and perspectives and many discussions on HWB take place within philosophy, psychology, and economics. There are generally two approaches underlying HWB: subjective well-being or utility (ie happiness, preferences) and objective well-being (ie material resources, capabilities). For a long time,

³⁰ Ibid, at 109.

³¹ For a proportionality test to be satisfied the restriction must (1) be a useful, suitable, or effective means of achieving a legitimate aim; (2) not be more restrictive than necessary to achieve that legitimate objective; (3) not have an excessive or disproportionate effect on the other interests. G. De Burca, 'The Principles of Proportionality and its Application in EC law', (1993) 13 *Yearbook of European Law*.

³² Monti and Mulder, n4; Case 439/09 *Pierre Fabre*, ECLI:EU:C:2011:113 at 35; C. Jansen and E. Kloosterhuis, 'The Wouters Case Law, Special for a Different Reason', (2016) 37 *European Competition Law Review*.

³³ D. Glen, et al., 'Transformative Consumer Research for Personal and Horizontal Collective Well-being', in (Routledge 2012, 2012), 257.

³⁴ G. Hardin, 'The Tragedy of the Commons Science', (1968) 162 *Science*; J. Platt, 'Social traps', (1973) 28 *American Psychologist*; T. Schelling, 'Self-command in Practice, in Policy, and in a Theory of Rational Choice', (1984) 74 *American Economic Review*; U. Beck, *Risk Society. Towards a New Modernity* (Sage Publications 1992); U. Beck, *The Brave New World of Work* (John Wiley & Sons 2014 2014).

³⁵ CECEd, OJ 2000 L 187/47, at 53.

³⁶ See eg K. Mortelmans, 'Towards Covenrgence in the Application of the Rules on Free Movement and Competition?', (2001) 38 *Common Market Law Review*; G. Monti, 'Article 81 EC and Public Policy', (2002) 39 *Common Market Law Review*; Townley, n 4; Casey, n 4; Kingston n 4; L. J. Ankersmit, *Green Trade and Fair Trade in and with the EU. Process-based Measures within the EU Legal Order* (Cambridge University Press 2017); 194; Nowag, n 4; Monti and Mulder, n 4.

³⁷ Case 333/14 *Scotch Whiskey*, ECLI:EU:C:2015:845, at 64-5 in conjunction with Case 148/15 *Deutsche Parkinson Vereinigung*, ECLI:EUC:2016:776, at 35-6.

³⁸ Monti and Mulder, n 4, 645.

it was only possible to measure HWB in terms of preferences or material resources. So, subjective well-being was often measured by asking individuals about their preferences in monetary terms (stated preferences) or by distilling these preferences through their revealed behaviour (revealed preferences). Objective well-being was measured by assessing solely material resources that come with a price tag (such as income and resources). However, scholars have developed techniques to measure happiness and capabilities as well in comparable units that go beyond mere preferences or material resources.³⁹ As such, it is now possible to measure HWB more precisely and balance the different aspects of well-being against each other in a CBA.

HWB gives tremendous opportunities in law, where balancing conflicting norms and case-specific circumstances are often pivotal to reaching acceptable outcomes.⁴⁰ In addition, HWB would be very helpful in EU competition law as it provides more detailed guidance to undertakings in their self-assessment under Article 101 TFEU. Moreover, as will be shown in the next paragraph, using HWB as a tool to measure benefits under Article 101(3) TFEU is more in line with the welfare standards proposed by the Commission and the CJEU.

3. The welfare standard under EU competition law

According to the Commission the aim of EU competition law is to enhance consumer welfare and ensuring an efficient allocation of resources.⁴¹ The consumer welfare standard could either be narrowly defined (where only price increases are considered) or more broadly (where efficiencies as well as non-price considerations, eg those related to product quality, choice, and innovation, can be taken into account to offset an ex post price increase).⁴² While consumer welfare is often understood as a welfare economic notion only taking into account price considerations,⁴³ this has never been clarified as such by the Commission.⁴⁴ There are, in fact, two reasons to assume that the Commission applies a broad consumer welfare standard.

First, the Commission explicitly recognises the role that dynamic efficiencies can play in assessing anti-competitive agreements.⁴⁵ Dynamic efficiency involves improving allocative efficiency (ensuring resources are allocated between alternative uses in a way that maximises wellbeing) and productive efficiency (output is produced at its lowest possible average costs) over time.⁴⁶ This can be done, eg, by developing new or better products and finding better ways of producing goods and services. Following this rationale, anti-competitive agreements can achieve dynamic efficiency when they yield lower-cost or higher-quality outputs to the benefit of total welfare. These lower-costs or higher-quality outputs can, then, benefit the consumer. This means that anti-competitive agreements that may raise prices but improve quality, may still be justified under Article 101(3) TFEU according to the Commission, when increased quality benefits the consumer. This is important for sustainability

³⁹ See eg Anand, P., & van Hees, M. (2006). Capabilities and achievements: An empirical study. *Journal of Socio-Economics*, 35(2), 268–284.

⁴⁰ Gerbrandy, n 4, at 553, referring to R. Alexy, 'Constitutional Rights, Balancing, and Rationality', (2003) 16 *Ratio Juris*; M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012).

⁴¹ *Ibid*, at para 33.

⁴² See on the consumer welfare standard more generally E. Browning and M. Zupan, *Microeconomics: Theory & Applications* (John Wiley & Sons 2009).

⁴³ See for example: C. Townley, 'Which goals count in Article 101 TFEU? Public policy and its discontents: the OFT's roundtable discussion on article 101(3) of the TFEU', (2011) 32 *European Competition Law Review*; Kingston, n 4.

⁴⁴ See eg Daskalova, n 9, 131-160.

⁴⁵ Article 81(3) Guidelines, n 3.

⁴⁶ Browning and Zupan, n 42.

agreements, as they often increase the quality of the output (eg less pesticide residue, increased animal welfare, better labour conditions).

Second, the Commission argues in its Better Regulation Guidelines (2015) that not every situation calls for a narrow assessment to measure consumer welfare, ie measured by the amount a consumer is willing to pay (WTP) for a good minus the amount a consumer actually pays for it. The Commission argues that sometimes it is difficult to quantify impacts and sometimes further information is needed on how consumer welfare may change over time.⁴⁷ Consumer WTP is particularly difficult to measure for goods that do not have a clear price tag, such as sustainable development. In cases where it is difficult to quantify impacts, the Commission proposes to survey the personal experience of consumers through surveys on financial and non-financial detriment such as time losses and psychological detriment.⁴⁸ Hereby, the Commission acknowledges the weakness of resorting solely to price considerations to assess consumer welfare by emphasizing the importance of using behavioural insights in the assessment of consumer welfare, acknowledging that consumers' limited, potentially biased, and socially influenced decision-making affects how they make choices in the marketplace. In addition, by stating that also psychological detriment should be surveyed,⁴⁹ the Commission hints that in some cases a well-being analysis (WBA), where the happiness of consumers is assessed, is appropriate than solely resorting to a narrow assessment of consumer welfare.

Although the Better Regulation Guidelines (2015) are developed to guide the Commission in preparing and evaluation public policy, it may still be useful as a guidance for our current purpose as it provides the current understanding by the Commission on how consumer welfare should be measured.

The CJEU also seems to apply a broad welfare standard. In its 2011 judgment in *Telia Sonera*, the CJEU held that the function of competition rules is 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.'⁵⁰ The CJEU thereby referred to earlier case-law in *Roquette Frères* from 2002 in which it stipulated that the function of competition rules is to ensure the 'economic well-being in the Community'.⁵¹ The judgment of the CJEU in *Telia Sonera* should be read as not referring solely to 'standard of living', but also including quality of life. *Roquette Frères* concerned a referral for a preliminary ruling concerning the EEC Treaty. At the time of the EEC Treaty, the aim of the Community was limited to promoting a standard of living.⁵² *Telia Sonera* concerned a preliminary ruling concerning the Treaty of Lisbon, in which the overall aim of the European Union was expanded to promote not only the standard of living but also quality of life.⁵³ The term 'standard of living' (Article 2 ECSC Treaty, later Article 2 EEC Treaty) is solely a measure of monetary well-being or "the degree of wealth and

⁴⁷ European Commission, "Better Regulation Guidelines", Strasbourg, 19.5.2015, toolbox #32, at 253-4.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Case 52/09 *TeliaSonera Sverige*, ECLI:EU:C:2011:83, at 22.

⁵¹ Case 94/00 *Roquette Frères*, ECLI:EU:C:2002:603, at 42.

⁵² Art. 2 EEC Treaty.

⁵³ Art. 3(1) TEU emphasises that the overall aim of the European Union is "to promote (...) the well-being of its peoples." It should be noted that the term 'well-being' in Art.3(1) TEU should be understood in a broader sense than the economic and formerly used term 'standard of living' (Art. 2 ECSC Treaty, later Art. 2 EEC Treaty) for two reasons. First, Recital 9 of the Preamble of the TEU clearly states that the EU is determined to promote economic and social progress for their peoples. Second, Art. 3 TEU is based on the former Art. 2 EC which states that the aim is not only to raise the 'standard of living' but also to raise the 'quality of life'. As such, the term 'well-being' should be understood in a broader sense including quality of life.

material comfort available to a person or a community”.⁵⁴ ‘Quality of life’ is “the standard of health, comfort, and happiness experienced by an individual or group”.⁵⁵ Quality of life is defined by Eurostat, the directorate-general of the Commission responsible for providing statistical information to the institutions of the European Union, as a broad concept encompassing objective well-being (such as a standard of living, income, health) and the subjective perception one has of them.⁵⁶

As the Commission and the CJEU favour a broad welfare standard that goes beyond monetary well-being, HWB could provide important insights to quantify the benefits of anti-competitive agreements under Article 101 TFEU in a way that goes beyond monetary well-being. The methods underlying such analysis will be explored in the next section.

4. Methods to estimate human well-being

“What we measure affects what we do; and if our measurements are flawed, decisions may be distorted”.⁵⁷

To estimate HWB, researchers have combined welfare economics, social psychology, and moral philosophy.⁵⁸ This approach adds to the approach by welfare economics (where benefits are estimated in monetary terms) by adding objective and subjective factors of well-being that do not have a clear monetary value. The remainder of this paper will address the different aspects of measuring HWB, its strengths and weaknesses, and how statistical data derived from this approach could be helpful in the analysis under Article 101 TFEU.

4.1. Subjective well-being

Subjective concepts and measures of HWB view well-being in terms of utility, ie happiness or the satisfaction of preferences. It is based on classic utilitarianism, of which the roots are often traced back to moral philosopher and legal reformer Jeremy Bentham. Bentham observes that:

“Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do...”⁵⁹

As such, well-being is measured according to the duration and intensity of pleasure and pain. There have been many attempts to measure utility in economics and psychology. The two most well-known methods are economic CBA and subjective well-being analysis (WBA).

4.1.1. Economic cost-benefit analysis

Economic CBA surveys the utility individuals derive from markets or policy measures by measuring whether individual preferences are satisfied. They derive information about individual preferences

⁵⁴ C. Soanes and A. Stevenson, *Oxford Dictionary of English* (Oxford University Press 2005).

⁵⁵ Ibid.

⁵⁶ Eurostat, Quality of Life Indicators – Measuring quality of life, http://ec.europa.eu/eurostat/statistics-explained/index.php/Quality_of_life_indicators_-_measuring_quality_of_life (accessed 16-08-2019).

⁵⁷ J. Stiglitz, et al., 'Report by the Commission on the Measurement of Economic Performance and Social Progress', in, Paris 2009).

⁵⁸ Ibid.

⁵⁹ Originally published in 1789, J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover Publications Inc. 2007).

from stated preferences and revealed preferences. Stated preferences, also known as contingent valuation, is a questionnaire based technique that asks individuals what they would be willing to pay (WTP) or what they would be willing to accept (WTA) to undergo or to avoid a specific change of the status quo.⁶⁰ Revealed preferences are available when individuals have had the opportunity to choose between a change of the status quo and an amount of money to retain the status quo, such that it can be simply observed which option they chose. Stated or revealed preferences is said to reveal whether the individual prefers, for example, having more money or reduced environmental pollution. Both stated and revealed preferences are converted into a uniform metric, monetary value.⁶¹

An important strength of economic CBA is the possible gain in transparency by forcing decisions to be based on rigorous analysis made available to the public.⁶² Another strength is that businesses likely emphasize the costs of the agreement in monetary terms. When sustainability benefits, then, cannot be compared with these costs, as there is no similar (monetary) unit of comparison, this will lead to a lower protection of those values.⁶³

Economic CBA is, like any methodology, subject to limitations.⁶⁴ An important limitation of economic CBA is that all costs and benefits need to be converted in monetary value. This may be difficult for benefits that do not have a clear market price,⁶⁵ such as future and societal benefits of sustainability agreements. The outcome of a CBA in which future and societal benefits are considered may therefore differ depending on the value given to future benefits over present benefits, and the extent to which human beings are considered to be subject to biases. Awareness of these limitations is essential to accurately interpret the outcome of an economic CBA and its value to inform legal analyses under EU competition law.

To estimate future benefits in monetary terms, welfare economists convert future costs and benefits to present value to make them comparable with each other.⁶⁶ To convert future costs and benefits to present value, welfare economists use a discount rate.⁶⁷ This is realised through the mechanism known as discounting. Discounting means that lower weight is put on future costs and benefits than on present costs and benefits.⁶⁸ The choice of a discount rate remains a highly political matter as it reflects society's preferences between present and future consumption. For example, the higher the discount rate the more the costs of environmental degradation are shifted to future generations. Statistical data based on the use of a discount rate should, therefore, be interpreted with awareness of which discount rate is applied and for what underlying reasons.⁶⁹

⁶⁰ Browning and Zupan, n 42.

⁶¹ J. Bronsteen, et al., 'Well-being analysis vs. Cost-benefit analysis', (2013) 62 *Duke Law Journal*.

⁶² J. Wiener, 'Better Regulation in Europe', (2006) 59 *Current Legal Problems*, 447-518, 447

⁶³ J. Buchanan, 'Opportunity Cost', in, *The New Palgrave: A Dictionary of Economics* 1987), 718–21.

⁶⁴ Cass Sunstein, *The Cost-Benefit Revolution* (Cambridge: Mit Press, 2018); Wiener (2006), n 62, 447.

⁶⁵ *Ibid.*

⁶⁶ See eg M. Feldstein, 'The Social Time Preference Discount Rate in Cost Benefit Analysis', (1964) 74 *The Economic Journal* 294, 360-379; B. Keating and M. Keating, *Basic Cost Benefit Analysis for Assessing Local Public Projects* (Business expert press, 2nd edn, 2017) chapter 3; T. Nas, *Cost-Benefit Analysis: theory and application*, (Lexington Books, 2016), Chapter 12.

⁶⁷ M. Olson and M. Bailey, 'Positive Time Preference', (1981) 89 *Journal of Political Economy*.

⁶⁸ Keating and Keating, n66.

⁶⁹ For further reading: E. Padilla, 'Intergenerational equity and sustainability', (2002) 41 *Ecological Economics* 1, 69-83; C. Gollier, 'Time Horizon and the Discount Rate', (2002) 107 *Journal of Economic Theory* 2, 463-73; R. Norgaard, and R. Howarth, *Sustainability and discounting the future. Ecological economics: the science and management of sustainability* (Columbia University Press, 1991), 88-101.

In addition, economic CBA is based on the idea that how much money a person is willing to pay or accept for a commodity shows how much the commodity increases their well-being. But this may not always be true. Studies have demonstrated that individuals are not very good at predicting how their choices will affect their well-being in the future.⁷⁰ Insights from subjective WBA may, therefore, further add to our understanding of the utility an individual derived from a change of the status quo.⁷¹

4.1.2. Well-being analysis

Social psychologists use subjective WBA to survey the utility individuals derive from markets or policy measures by measuring the happiness of individuals. They derive information from hedonic psychology data to measure the effects of a change of the status quo on people's happiness. The data is derived from individuals' personal assessments of how they feel at a particular moment in time. Psychologists and economists have developed surveying and statistical methods that enable the collection and analysis of hedonic data on a large scale.⁷² The effects of different factors on people's life satisfaction or happiness are not converted in monetary values but into subjective, hedonic, cardinal, and interpersonally comparable units.⁷³

WBA encompasses different aspects, such as cognitive evaluations of one's life, positive emotions such as joy and pride, and negative emotions such as pain and worry.⁷⁴ When a sustainability agreement results in less pollution but higher prices, WBA can compare people's happiness with less pollution with their happiness with decreased buying power.

The main strength of WBA is that WBA is less subject to cognitive biases that may occur in economic CBA, such as people's difficulty to predict the impact of their choices or life events on the future.⁷⁵

An important pitfall of WBA is that it uses evaluative judgments of a person's positive and negative feelings in real time (ie hedonic experiences). Therefore, WBA excludes preferences of future consumers or, similarly as in economic CBA, discounts these preferences. Another pitfall of WBA is that it fails to consider what is necessary to live a human life as people may adapt to their life-circumstances.⁷⁶ Studies show, for example, that individuals who lose limbs often adapt to their new condition, recovering most of their lost happiness with a few years.⁷⁷ As such, a change of the status quo that may be considered problematic from a moral point of view (eg people will use limbs due to environmental pollution), could be considered less problematic from the perspective of WBA.

4.2. Objective well-being

⁷⁰ D. Gilbert and T. Wilson, 'Prospection: Experiencing the Future', (2007) 317 *Science*; T. Wilson and D. Gilbert, 'Affective Forecasting: Knowing What To Want', (2005) 14 *Current Directions in Psychological Science*.

⁷¹ C. R. Sunstein, *The Cost-Benefit Revolution* (MIT Press 2018).

⁷² D. Kahneman, et al., *Well-being: The Foundations of Hedonic Psychology* (Russell Sage Foundation 1999).

⁷³ Bronsteen, et al., n 61, 1618.

⁷⁴ J. Stiglitz, et al., 'The Measurement of Economic Performance and Social Progress Revisited', (2009) 33 *OFCE*.

⁷⁵ M. Adler and E. Posner, 'Happiness Research and Cost-Benefit Analysis', (2008) 37 *The Journal of Legal Studies*.

⁷⁶ Gilbert and Wilson, n 70.

⁷⁷ See eg M. Luhmann, et al., 'Subjective Well-being and Adaptation to Life Events: A Meta-analysis', (2012) 102 *Journal of Personality and Social Psychology*.

⁷⁷ For a summary of the initial research on hedonic adaptation, see S. Frederick and G. Loewenstein, 'Hedonic Adaptation', in D. Kahneman, et al. (eds), *Foundations of Hedonic Psychology: Scientific Perspectives on Enjoyment and Suffering* (Russell Sage Foundation, 1999) at 302.

Although subjective well-being is an important factor of well-being, it should not be treated as 'general-purpose guides to all aspects of well-being'.⁷⁸ The objective well-being approach assumes that people have basic needs and rights, ranging from adequate income to being able to play. Using this approach, HWB can be assessed through the analysis of objective indicators (meaning not the subjective preferences or feelings of individuals subject to the change of the status quo). There are two theories underlying objective well-being: resourcism and the capabilities approach.

4.2.1. Resourcist approach

The resourcist approach defines welfare by looking at each person's possession of specific resources.⁷⁹ An example of a resourcist approach is gross domestic product (GDP) per capita where progress of society's are defined by the average resource bundle per person.⁸⁰ Resourcism has been widely criticised as it fails to take into account resources that do not have a clear price tag (eg natural resources) and it fails to take into account that given differential personal, social, and environmental conversion factors, people may require different resources to achieve a similar outcomes of well-being.⁸¹

Welfare economists and psychologists have attempted to circumvent the latter problem, by measuring well-being more directly by estimating the utility individuals derive from specific resources. As described above, subjective well-being methods, although valuable, are limited in the sense that individuals are not very good at predicting how their choices will affect their well-being in the future,⁸² and because it can miss the urgency of specific consequences when certain resources get lost as people may adapt to their life-circumstances.⁸³

4.2.2. Capabilities approach

Amartya Sen and Martha Nussbaum have developed the capability approach to propose an alternative view of welfare that goes beyond utilitarian and resourcist theories.⁸⁴ A capability is the ability or opportunity to function in a certain way.⁸⁵ The capability approach compares a person's well-being to

⁷⁸ A. Sen, *The Idea of Justice* (Harvard University Press 2009), at 286.

⁷⁹ See on resourcism more generally: J. Rawls, 'Primary Goods', in Amartya Kumar Sen and Bernard Arhur Owen Williams (eds), *Utilitarianism and Beyond* (Cambridge Univesrity Press, 1982) at 86-7; T. Pogge, 'World Poverty and Human Rights', (2005) 19 *Ethics & International Affairs*.

⁸⁰ R. Claassen and A. Gerbrandy, 'European Competition Law: From a Consumer Welfare to a Capability Approach', (2016) 12 *Utrecht Law Review* at 5.

⁸¹ See eg M. Nussbaum, *Woman and Human Development: The Capabilities Approach* (Cambridge University Press 2000); Sen, n 78; E. Anderson, 'Justifying the Capabilities Approach to Justice', in Harry Brighouse and Ingrid Robeyns (eds), *Measuring Justice. Primary Goods and Capabilities* (Cambridge University Press, 2010).

⁸² Daniel T. Gilbert & Timothy D. Wilson, 'Prospection: Experiencing the Future', 317 *SCI. 1351, 1354* (2007); Timothy D. Wilson & Daniel T. Gilbert, 'Affective Forecasting: Knowing What To Want', 14 *CURRENT DIRECTIONS PSYCHOL. SCI.* 131, 131 (2005).

⁸³ See eg Luhmann, et al., n 76.

⁸⁴ A. K. Sen, *Commodities and Capabilities* (Oxford University Press 1999); A. Sen, *The Standard of Living* (Cambridge University Press 1987), 17; M. Nussbaum, 'Nature, Function, and Capability: Aristotle on Political Distribution', (1988) *Oxford Studies in Ancient Philosophy*; M. Nussbaum, 'Aristotelian Social Democracy', in R. Bruce Douglass, et al. (eds), *Liberalism and the Good* (Routledge, 1990). The approach has also been used in development studies and quality of life studies (see: I. Robeyns, 'The Capability Approach: a theoretical survey', (2005) 6 *Journal of Human Development*; I. Robeyns, 'The Capability Approach in Practice*', (2006) 14 *Journal of Political Philosophy*. The United Nations Development Programme (UNDP) has also used the capability approach to rank countries in a Human Development Index, which is an alternative to standard GDP rankings.

⁸⁵ Nussbaum, n 81, 5.

that of others based on those capabilities that are considered important in human life according to a predetermined list, instead of on preferences or happiness.⁸⁶

The capability approach may provide additional insights to conduct a more thorough analysis of the impact of an agreement on objective well-being. The strength of including the capability approach is that it includes important values for well-being besides material recourses, and what people desire or that what they consider to make them happy.

To use the capability approach, we need projections or prior responses to normative questions as to what capabilities are considered important in human life. The selection of relevant capabilities is a value judgment of which capabilities we consider important. Different ideas as to how such capabilities should be determined include a pre-existing list of central capabilities⁸⁷ and leaving the selection of capabilities to democratic processes.⁸⁸ Often, statisticians use the list of central capabilities provided for by Nussbaum to develop statistical indicators.⁸⁹ These central capabilities include the capability to live to the end of human life of normal length, have good health, and live with and concern for and in relation to animals, plants, and the world of nature.⁹⁰ These central capabilities seem in line with the sustainability-related objectives stipulated by the EU legislature.⁹¹

One of the main objections to the capability approach is the possibility that different people(s) may place different weights on the capabilities. To deal with this problem, academics have showed that the capabilities proposed by Nussbaum can be supported by empirical evidence derived from data on preferences and happiness.⁹² As such, capabilities can be measured. Such measurements allow capabilities to be weighed with preferences, happiness, and resources in a quantitative form based on the model of a CBA. I will discuss this weighing act further in the following section.

5. Incorporating HWB analysis in Article 101(3) TFEU

To conduct a CBA in terms of HWB, clarity is needed regarding the choice of a discount rate, the choice of what values society deems important (capabilities), and how the outcome of the analysis should be weighed and balanced. It should be noted that these questions are not unique to the HWB analysis, as similar questions need to be answered as under any other method that assesses welfare or well-being. However, for purpose of this paper, I will focus more specifically on providing clarity regarding these issues with respect to the HWB analysis.

5.1. Choice of a discount rate

As the choice of a discount rate, ie the value society puts on future benefits over present benefits, has far reaching consequences on the outcome of any analysis that assesses interventions that may affect

⁸⁶ Ibid at 71.

⁸⁷ Nussbaum, n 81.

⁸⁸ Sen, n 78, 286.

⁸⁹ P. Anand and M. v. Hees, 'Capabilities and Achievements: An Empirical Study', (2006) 35 *Journal of Socio-Economics*; P. Anand, et al., 'The Development of Capability Indicators', (2009) 10 *Journal of Human Development and Capabilities*.

⁹⁰ Nussbaum, n 81, 78-80.

⁹¹ Eg Article 3 TEU (well-being of EU peoples); Article 2 Charter of Fundamental Rights (CFR) (right to life), Article 4 CFR (prohibition of torture); Article 35 CFR (health care); Article 37 CFR (environmental protection); Article 13 TFEU (animals are sentient beings); Article 11 TFEU (high level of environmental protection).

⁹² Anand, et al., n 89.

future generations, it should be determined who has the legitimacy to decide on the choice of a discount rate, and whether using a discount rate is legitimate.⁹³

The judgments by the CJEU seem to suggest that the use of a discount rate could be legitimate. In *Asnef-Equifax v Ausbank* the CJEU held that persons who are unable to obtain a service (getting loans) as a result of an anti-competitive agreement (disclosing credit history of potential customers of banks) obtained a benefit (avoid over-indebtedness).⁹⁴ As such, “the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers.”⁹⁵ This could be interpreted as that the beneficial nature of consumers in current and future markets must be considered. Such an interpretation is strengthened by the CJEU in *GlaxoSmithKline* where the CJEU held that a restriction on competition today could be exempted when it would provide future benefits.⁹⁶ In addition, the CJEU argued in *MasterCard* that when restriction of competition is found on one side of the market, some of the advantages must also fall on that side of the market.⁹⁷ Applying this rationale to an agreement that affects present and future markets, restrictions on competition in present markets providing advantages to future markets can only be exempted when present markets have some advantages by the agreement. As such, the application of a discount rate to future benefits may be warranted: not applying a discount rate to future benefits would imply the impoverishment of current generations.⁹⁸

Although the judgment of the CJEU suggests that the use of a discount rate could be legitimate, the CJEU is not clear on which discount rate to apply, and whether either a constant discount rate should be applied (ie all future costs and benefits are discounted at the same rate) or a time declining discount rate (ie the discount rate for future costs and benefits declines by time). The Guidelines to Article 101(3) TFEU, also do not specify the choice of a discount rate.⁹⁹ However, in the Better Regulation guidelines, the Commission recommends the use of a constant discount rate of 4% for short time frames.¹⁰⁰ The Commission finds it appropriate to have a time declining discount rate for longer time frames.¹⁰¹ In its toolbox to better regulation, the Commission gives the UK government as an example, who uses a 3.5% discount rate for periods up to 50 years which declines to 1.0% when the time horizon exceeds 300 years.¹⁰² The choice of a discount rate is a highly political matter as it reflects society’s preferences between present and future consumption. For that reason, the choice of a discount rate should be left to the individual Member States. To allow undertakings to conduct an HWB assessment of their agreements under Article 101 TFEU, Member States should clarify which discount rate undertakings should apply.

5.2. Choice of capabilities

To include capabilities in the CBA, it should be determined who has the legitimacy to decide which capabilities are important. Although those who may be quick to point out that a similar decision does

⁹³ Some scholars even question the legitimacy of discounting altogether. C. Philibert, 'The Economics of Climate Change and the Theory of Discounting', (1999) 27 *Energy Policy*.

⁹⁴ Case 238/05 *ASNEF-EQUIFAX*, ECLI:EU:C:2006:734.

⁹⁵ Case 238/05 *ASNEF-EQUIFAX*, ECLI:EU:C:2006:734, at 70.

⁹⁶ Case 501/06P *GlaxoSmithKline*, ECLI:EU:C:2009:610.

⁹⁷ Case 382/12 P *MasterCard*, ECLI:EU:C:2014:2201, at 242; Monti and Mulder, n 4, 650.

⁹⁸ Olson and Bailey, n 67.

⁹⁹ Article 81(3) Guidelines, n 3, at 88.

¹⁰⁰ Better Regulation, n 47.

¹⁰¹ *Ibid.*

¹⁰² J. Hall, et al., 'A Framework to Measure the Progress of Societies', (2010) 5 *ECD Statistics Working Papers*, OECD Publishing.

not need to be made under a welfare economics approach, fail to acknowledge that a welfare economic approach is also far from neutral or free from moral considerations as it is based on the idea that the only thing of value in life is preference satisfaction.

To decide on the capabilities, Martha Nussbaum has provided an elaborate and extensive list on which abilities or opportunities are necessary to enable individuals to function in a specific way.¹⁰³ This list could be used as guidelines to conduct the HWB analysis, leaving room for Member States to deviate from the list, if they so desire, allowing the list to be part of a democratic process.¹⁰⁴

5.3. Weighing and balancing

The HWB analysis produces separate indicators on preferences, happiness, resources, and capabilities. These indicators will have to be weighed and balanced against each other to allow a decision to be made on whether the sustainability agreement benefits the consumer. The practice of weighing and balancing is already quite common in law where different norms and practices are often balanced to reach acceptable outcomes.¹⁰⁵

When the legitimacy to conduct such a balancing exercise is not delegated to undertakings,¹⁰⁶ the authority that has the legitimacy to weigh and balance the separate indicators should construct composite indicators. Composite indicators combine individual indicators with different units of measurement into a single measure.¹⁰⁷ To produce a composite indicator, component indicators must be selected and weighted. As such, the information provided by composite indicators varies according to the weighing and balancing used for their construction making them more sensitive and more susceptible to manipulation.¹⁰⁸ For that reason, it is important that composite indicators are constructed by the legitimate authority with appropriate checks and balances.

6. Conclusion

This paper starts from the premise that further guidance is needed to allow undertakings to conduct an analysis under Article 101(3) TFEU of sustainability agreements that yield benefits that have no clear market price. It is argued that, based on communications by the Commission as well as CJEU jurisprudence, benefits under Article 101 TFEU should be estimated by taking a wider notion of well-being into account that goes beyond purely monetary well-being. This paper proposes the method of HWB to estimate the benefits of an agreement under Article 101(3) TFEU in a way that is quantifiable but goes beyond the economic approach focusing solely on monetary well-being. In addition, it is argued that when EU or national authorities want to exempt agreements aimed at achieving public policy under Article 101(1) TFEU, best practices demand that they make an accurate estimation of the impact the agreement has on a wider notion of well-being.

This paper argues that to allow undertakings to assess whether their agreement fulfils the conditions of Article 101 TFEU, the relevant legitimate authority should answer questions regarding

¹⁰³ Nussbaum, n 81.

¹⁰⁴ As suggested by Sen, n 78.

¹⁰⁵ Gerbrandy, n 4.

¹⁰⁶ Claassen and Gerbrandy argue that such legitimacy could also be delegated to undertakings, R. Claassen and A. Gerbrandy, 'Doing Good Together: Competition Law and the Political Legitimacy of Interfirm Cooperation', (2018) 28 *Business Ethics Quarterly*.

¹⁰⁷ Eurostat, 'Towards a harmonized methodology for statistical indicators. Part 1: Indicator typologies and terminologies' (2014).

¹⁰⁸ *Ibid.*

the choice of a discount rate, the choice of the capabilities, and how the separate indicators of the HWB analysis should be weighed and balanced. When the legitimacy to conduct such a balancing exercise is not delegated to undertakings, it is suggested that the authority that has the legitimacy to weigh and balance the separate indicators should combine the individual indicators with different units of measurement into a single measure (also known as composite indicators) that can then be used by undertakings to assess their agreement.

In sum, this paper shows the value of HWB indicators as (1) an addition to the information base of the legal authority and (2) a guidance to undertakings in their self-assessments under the competition rules. Using these indicators could result in a more accurate and transparent analysis under Article 101 TFEU. In the right hands, with the proper understanding of their strengths and weaknesses, the HWB indicators, can provide important insights in to what extent an agreement between undertakings aimed at public policy goals can be justified or exempted from Article 101 TFEU. As such, HWB analysis can provide otherwise unattainable insights on the benefits of agreements and provide appropriate guidance to undertakings in their self-assessment under the EU competition rules. Misused or misunderstood, HWB analysis, as any other type of analysis, can be misleading and result in unjustified outcomes.