Similarities and differences between Art. 101 para. 3 TFEU and the "rule of reason"

A. Introduction

. USA – Sec. 1 of Sherman Act- The rule of reason

According to Sec. 1 of Sherman Act 1890 "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal". Although this section can be interpreted to proscribe all contracts with a restrictive effect, the US courts applied a less literal approach of its language and therefore construed the section in a way to outlaw only unreasonable restraints. In order the reasonableness or not of a restraint to be determined, antitrust law has adopted the 'rule of reason' test, the application of which requires the weighing of pro- and anticompetitive effects of the restraint in question. Specific information about the relevant business and the restraint’s history, nature and effect are substantial factors taken into account by the court in order to distinguish between a) restraints with anticompetitive effect, detrimental to consumers and b) restraints stimulating competition, in favor of the consumer.

. European Union - Art. 101 para. 3 TFEU

Art. 101 para. 3 TFEU contains an exemption of restrictive agreements included in Art. 101 para. 1 TFEU. It substantially promotes the notion that any agreement which restricts competition, whether by its effect or by its object, may in principle benefit from an exemption if the exhaustive conditions listed in Art. 101 para. 3 TFEU are cumulatively satisfied. It provides a structural framework for assessing the economic benefits generated by restrictive agreements and balancing them against anticompetitive effects, considering the efficiency gains that may result from this agreement.

B. Methodological differences applying Art. 101 para. 3 TFEU and rule of reason

I. Structure

Under Art. 101 TFEU a two-part analysis should be conducted. On the first place the agreement in question should be scrutinized under Art. 101 para. 1 TFEU in order to be determined whether or not has as its object or effect the distortion of competition. If it does not, the analysis stops. If it does, then Art. 101 para. 3 TFEU is "activated" providing the legal basis for a further examination of the benefits that can be derived from that agreement. In a nutshell, Art. 101 para. 1 TFEU can be used to identify presumed, actual or likely anticompetitive effects, whereas Art. 101 para. 3 TFEU enables the parties to establish that the agreement may achieve efficiency gains or procompetitive effects. In the US law, merely Sec. 2 of Sherman Act provides the legal basis for a similar analysis; however it does not contain any explicit legal exception to the prohibition. This means that not only the unlawfulness of an agreement but also the assessment of its pro- and anticompetitive effects (an analysis similar to the one of Article 101 (3) TFEU) should be conducted under the same provision.

II. Requirements

Under Art. 101 para. 3 TFEU, extensive requirements of an agreement must be fulfilled, in order an exemption to be granted. Evidence should be brought proving that the agreement improves distribution or production or promotes technical or economic progress and focuses on whether consumers are being allowed a fair share of the benefits resulting from such improvements. The indispensability of this agreement has to be demonstrated.
US agencies, on the other hand, may consider factors in their analysis such as those listed in Art. 101 para. 3 TFEU but the US rule of reason is less rigid than the EU exemption system because no factor is dispositive in that analysis. Under the rule of reason, a restrictive agreement may escape the prohibition of section 1 of the Sherman Act merely when its procompetitive effects outweigh its anticompetitive effects, therefore without being indispensable to improving distribution or production and without giving consumers a fair share of the benefits. The rule of reason doctrine provides a more flexible and abstract inquiry. Usually the courts consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable.

III. **Per se illegal agreements**

Art. 101 para. 3 TFEU does not exclude a priori certain types of agreement from its scope. In European law a list of per se unlawful rules do not longer exist. Even a restriction which is qualified as “hardcore” (price and quantity fixing, market sharing) may be weighed against its anticompetitive effects under Art. 101 para. 3 TFEU and be exempted, if the respective requirements are fulfilled.

On the other hand, US agencies and courts distinguish between restraints that are per se illegal and those that merit a rule of reason analysis. Focusing only on whether the conduct took place and not on its effect, some agreements are automatically presumed to distort competition unreasonably. The need of a further study of reasonableness of these per se unlawful types of agreement is eliminated.

C. **Methodological similarities applying Art. 101 para. 3 TFEU and rule of reason**

I. **Vertical agreements**

Both in European Union and US law, vertical agreements are considered to be less harmful than horizontal agreements.

II. **Nature of benefits taken into account**

When weighing the pro- and anticompetitive effects of an agreement, European and US courts in principle take into consideration the objective economic benefits resulting from the agreement in question. According to the rule of reason, antitrust authorities are not induced to consider non-economic factors in the antitrust analysis, while a similar approach was explicitly revealed on par.32 of Commission’s Guidelines on the application of Arti. 81 para. 3 EC-T [now Art. 101 para. 3 of the TFEU].

D. **Conclusion**

Unlikely US, EU case law seem to refrain from the acceptance of the doctrine of rule of reason, even though one can definitely argue that Article 101 (3) contains all the elements of this doctrine.

Leegin v. PSKS Inc. 551 U.S 5, 6


Continental TV Inc v. GTE Sylvania, U.S 433, (1977)


See also ECJ Case 26-76 Metro SB v. Commission, ECR 1977, 1875, para. 43. Case T-17/93 Matra Hachette SA v. Commission, ECR 1994, II-595, para. 139, where the ECJ confirmed that objective economic benefits should be taken into consideration when an assessment under Art. 101 para. 3) TFEU is conducted.