Het begrip mededingingsbeperking zoals neergelegd in artikel 101(1) VWEU : een beslismodel

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Summary

The notion of 'restriction of competition' as laid down in Article 101(1) TFEU: a decision tree

Subject and objective

This dissertation attempts to develop a clear-cut definition of the notion of 'restriction of competition' as laid down in Article 101(1) TFEU. The idea is to translate in a consistent manner the more economic approach into a legal decision tree. The aim thereby is to present a 'full' decision tree. A decision tree contains an analytical framework that can be considered full if it provides an insight into how a legal norm can be applied in all circumstances. Firstly, this requires that the decision tree includes all relevant economic tests. These tests concern the allocative, productive and dynamic efficiencies. Secondly, this requires that all legal parameters contribute to the analysis without overlapping whilst none of these would be superfluous to need.

The basis for the decision tree is formed by Article 101 TFEU in its current form, i.e. including its characteristic dual structure as laid down in its paragraphs 1 and 3. It should be noted, however, that this dual structure triggers a certain amount of tension between competition economics and competition law. According to economic theory, competition is restricted only when *on balance* an agreement leads to a decrease of competition. In legal terms this would require that both analyses, further to Article 101(1) TFEU as well as Article 101(3) TFEU, would have been made. The dual structure, however, entails that a restriction of competition as a legal concept is already determined halfway the competition analysis. As a result, a restriction of competition in economic terms corresponds with a restriction of competition in legal terms which does not comply with the conditions of Article 101(3) TFEU.

It will be pointed out that the decision tree as set out in this dissertation is based on economic theory rather than on case law. The decision tree as presented is based on a functional interpretation of the notion of a restriction of competition, meaning that this concept is interpreted according to its economic fundamentals. With regard to the requirement of sound proof this implies that, given the specific legal and economic context of an agreement, the presence of a legal parameter will have to be demonstrated according to economic

standards. The case law referenced will merely illustrate the operation of the decision tree. When interpreted functionally, most landmark cases will show a more or less fluid line between the classic legal interpretation and the more economic approach of the notion of a restriction of competition. However, this fluid line follows a course which appears to be somewhat different from the one sometimes assumed. It is clarified, for example, that a functional interpretation of the concept of a restriction of competition does not imply the application of a rule of reason within the framework of Article 101(1) TFEU (a *rule of reason* is defined as a balancing of the negative and positive effects that an agreement may have on competition). Bar a few exceptions, it is demonstrated that the relevant landmark cases do not imply the application of a rule of reason. It is also submitted that a functional interpretation excludes the application of a public rule of reason within the framework of Article 101 TFEU (a *public rule of reason* is defined as a balancing of competition and non-competition interests). It will be contended that, within the framework of Article 101 TFEU the application of a public rule of reason would not be in conformity with the division of roles between state and business in a democratic market economy. According to prevailing economic and public administrative insights, the state is exclusively legitimized to decide what general interests should be taken on by the state on behalf of society as a whole. General interests that have been taken on by the state in a process of political decision-making are qualified as public interests in this dissertation. As a corollary, it is for the state only to decide when and to what extent the public interest of effective competition as defined in Article 101 TFEU should yield to another, non-competition interest. It is argued that most relevant landmark cases do not imply any balancing between competition and non-competition interests, since the agreements concerned did not lead to an increase in allocative inefficiency to begin with. As to the case law in which such balancing actually did occur (the agreements concerned actually did create an increase in allocative inefficiency), it is explained why the benefit of an exemption is contrary to a functional approach of the notion of restriction of competition.

The decision tree as proposed in this dissertation aims at simplifying the legal framework currently in use. To start with, the concepts of 'restriction by object' and 'restriction by effect' are separated from the concept of restriction of competition. It is proposed to connect both concepts solely to the object of an agreement between undertakings, decisions by associations of undertakings or concerted practices (hereafter these notions are all referred to as 'agreements'). 'Hard core restrictions' and other restrictions by object are differentiated from each other by the scope of the investigation required to establish an adequate theory of competitive harm, i.e. convincing evidence that is reasonably well motivated according to economic standards. However, the concept of *appreciability* is understood as usual. It concerns an investigation into the effects of an agreement on actual market conditions, i.e. the relative market position of the parties concerned. At the same time, appreciability is no longer understood to enjoy a separate role alongside the concept of restriction

of competition. Instead, it is understood to form part of that latter concept. Appreciable restrictions by effect will qualify as a restriction of competition; non-appreciable restrictions by effect will not.

The concept of 'inherent restriction' is used no longer, the reason being that words like *inherent* and *necessary* are used in the context of a variety of analyses under Article 101 TFEU. Within the framework of Article 101(1) TFEU, for example, both words reflect an agreement lacking a restrictive object. At the same time, these words also cover the necessity of an ancillary agreement for the functioning or coming about of a main agreement, or for guaranteeing the observance of a non-competition interest. Within the framework of Article 101(3) TFEU, the word *necessary* comes up time and again in the context of that paragraph's third condition. In order to prevent misunderstandings, the concepts used in this dissertation are those of 'ancillary restraint' and 'public ancillary restraint'. It should be noted that both concepts are only used in relation to provisions that are necessary for the functioning or coming about of an agreement or, in the latter case, for agreements that are necessary for guaranteeing the observance of a non-competition interest that qualifies as a public interest. It is submitted that all other situations do not require specific definitions: an agreement either does not qualify as a restriction (by object or by effect as a result whereof it does not qualify as a restriction of competition within the meaning of Article 101(1) TFEU), or an agreement does constitute a restriction of competition, but may nevertheless be assumed to be welfare-driven (within the meaning of the conditions laid down in Article 101(3); see below).

Hereafter, it will be first set out how the economic efficiencies are categorised within the framework of Article 101 TFEU. Next, the decision tree will be explained briefly. It goes without saying that the decision tree is motivated in greater depth in the dissertation itself.

Categorisation of the economic efficiencies

Within the framework of Article 101 TFEU the economic efficiencies will be allotted as follows: *allocative efficiency* is subsumed under Article 101(1) TFEU; *productive* and *dynamic efficiency* under Article 101(3) TFEU. Allocative efficiency is understood as the optimal allocation of production factors over an optimal production and distribution of goods and services. Productive efficiency is understood as the production of goods and services at the lowest possible cost (though broadly interpreted, i.e. also covering qualitative efficiencies as well as specific innovation aimed at by a specific agreement). Dynamic efficiency is understood as the possibility to innovate at longer term.

Two preliminary observations should be made with regard to the use of the economic efficiencies in this dissertation. First, it is of course understood that

productive and dynamic efficiency affect allocative efficiency. Nevertheless, these efficiencies are described separately, not only because of the dual structure of Article 101 TFEU, but foremost in order to obtain a sound grasp on the way agreements may affect competition. Second, it should be noted that the economic efficiencies are used as an analytical benchmark. Allocative efficiency whereby the *Lerner-index* amounts to 0 is, after all, the result of an ideal situation – i.e. perfect competition – which does not occur in real markets very often. Most of the time and compared to a situation of perfect competition, real markets will be characterised by the presence of some form of market power. Consequently, prices of products will be higher than their marginal costs of production as a result whereof the Lerner-index will be positive already in the situation preceding the agreement under examination. This implies that Article 101(1) TFEU is concerned with the question as to whether an agreement leads to a further lessening of competitive constraints such that the Lerner-index may be increased even further. Allocative inefficient should therefore be understood as price-increasing as compared with the situation existing before the agreement, without taking other efficiency-effects into account. The same goes for the concept of productive efficiency: key to an antitrust-analysis is to establish whether the agreement in issue leads to a decrease of costs as compared to the situation existing before the agreement.

The above implies that a restriction of competition as laid down in Article 101(1) TFEU is defined as a decrease of allocative efficiency as described above. However, such a restriction of competition should not be prohibited if the agreement in issue – further to the criteria of the first three conditions of Article 101(3) TFEU – increases productive efficiency, without harming dynamic efficiency or the possibility of market entry – as defined in the fourth condition of Article 101(3) TFEU. Put differently, whilst an investigation further to Article 101(1) TFEU aims at establishing whether an agreement leads to market power, an investigation pursuant to Article 101(3) TFEU aims at establishing whether that agreement nevertheless leads to an increase in welfare.

The decision tree

The way the decision tree has been construed is based on the assumption that agreements mostly consist of various terms and conditions that affect competition differently depending on their specific role in an agreement. In its Guidelines on the application of Article 81(3) EC (now 101(3) TFEU), the Commission differentiates between the assessment of an agreement as such and the assessment of its individual provisions. In slight deviation thereof, the decision tree in this dissertation is based on a categorisation of functionally different provisions and the different kinds of competition analysis required as a result thereof. This approach leads to the following four categories of provisions.

The first category (A) includes provisions that form the competitive heart of an agreement in the sense that they aim at the latter's external functioning. They aim at influencing the competitive situation in the market concerned. These provisions may affect the economic efficiencies and trigger the need for a full competition analysis. A full competition analysis serves to clarify whether an agreement leads to a restriction of competition within the meaning of Article 101(1) TFEU, and if so, whether this agreement should nevertheless be exempted from that prohibition since it qualifies as welfare-driven pursuant to the conditions of Article 101(3) TFEU.

The second category (B) includes provisions that are ancillary to an agreement in that they 'merely' aim at the latter's internal functioning. Their aim is to guarantee the coming about or the functioning of that agreement. Ancillary provisions are subjected to a limited competition analysis which focuses on their necessity for the functioning or coming about of the agreement in issue. It is submitted that ancillary provisions meeting the requirements of objective necessity do not affect the economic efficiencies any more than the agreement itself. Provisions which (i) are ancillary to an agreement that does not lead to allocative inefficiency itself, and (ii) meet the requirements of objective necessity, constitute ancillary restraints and are as such excepted under Article 101(1) TFEU.

The third category (C) includes provisions which are ancillary to a non-competition interest in that they aim at ensuring the compliance with such an interest. These ancillary provisions are also subject to a limited competition analysis which in this case focuses on their necessity for the compliance of the non-competition interest in issue. It is argued that provisions that (i) are ancillary to a non-competition interest qualifiying as a public interest, and (ii) meet the requirements of objective necessity, do not affect the efficiencies any more than the public interest in issue itself. Consequently, these provisions qualify as public ancillary restraints and are not to be prohibited pursuant to Article 101(1) TFEU.

The fourth category (D) includes provisions which by virtue of their nature and purpose do not restrict competition. Such provisions fall outside the scope of Article 101(1) TFEU and are not subjected to any competition analysis whatsoever.

Category A: investigations into the presence of a restriction of competition and its welfare-orientation

As mentioned before, provisions aiming at the external functioning of an agreement are subject to a full competition analysis. A full competition analysis consists of two separate investigations. The first investigation (A.I.) aims at finding the coming about or the enlarging of market power further to Article 101(1) TFEU. The second investigation (A.II.) aims at finding whether

or not an agreement leading to (an increase of) market power, may, at the end of the day, lead to an increase in welfare pursuant to Article 101(3) TFEU. If an agreement is understood to be welfare-driven, it must be excepted from the application of Article 101(1) TFEU. However, if an agreement cannot boast to be welfare-driven, it must be prohibited according to Article 101(1) TFEU.

A.I.: investigations into the presence of restrictions of competition

In principle an investigation into the existence of market power aims to establish whether an agreement contains both qualitative and quantitative restrictive power. The presence of qualitative restrictive power implies that considering its object, i.e. its content and objectives, an agreement may lead to allocative inefficiency. The presence of quantitative restrictive power implies that an agreement may lead to allocative inefficiency taking into account the effects thereof on the relative market position of the parties concerned.

The investigation into the qualitative restrictive power of an agreement will result in either one of three possible outcomes: agreements may be found to (i) restrict competition by object, (ii) restrict competition by effect, or (iii) lack any restrictive object. Applying a functional approach, restrictions by object can be identified to aim at a (further) increase of the Lerner-index. This means that an adequate theory of competitive harm in a specific case requires that given the legal and economic context it may be deduced from the object of an agreement alone that it leads to allocative inefficiency (this would cover classic cartels having horizontal effects). As a corollary, vertical restraints cannot qualify as a restriction by object when interpreting the notion of a restriction of competition in a functional manner. There is one exception to this rule: the presence of absolute territorial protection. Within the framework of Article 101(1) TFEU, this vertical restraint does qualify as a restriction by object, since the Union's competition rules not only aim at protecting effective competition, but also serve to enhance market integration. However, the Dutch Competition Act does not contain a similar objective. Consequently, absolute territorial protection is not apt to qualify as a restriction by object further to Article 6(1) of that Act.

As mentioned before, it is furthermore proposed to differentiate between hard core restrictions and other restrictions by object. An agreement should be qualified as hard core restrictive when its terms and conditions unambiguously show a classic cartel as would be the case in price fixing, output limitation or market-sharing agreements having horizontal effects. Other restrictions by object include those agreements whose terms and conditions do not unambiguously show that their object is *per se* restrictive, but where a closer examination of those terms and conditions against their specific background (i.e. the facts underlying the agreement and the specific circumstances in which it operates) firmly establish that those agreements aim at an increase of prices.

It is also argued that proof of a restriction by object implies proof of a restriction of competition. Because characteristic for restrictions by object is that it can be derived from the agreement's object alone that competition will be restricted. As a corollary, the presence of a restriction by object implies that the actual market conditions need no further investigation. It is submitted that the (rather superficial) investigations into quantitative restrictive power that do take place within the context of (i) the concept of interstate trade as meant in Article 101(1) TFEU, or (ii) Article 7(2) of the Dutch Competition Act, should be explained as alternatives for a cost-profit analysis that both Article 101(1) TFEU as well as Article 6(1) of the Dutch Competition Act do not provide for. Accordingly, both analyses are applied up-front, i.e. before the actual investigation into the effects of an agreement on competition is made.

Once again and considering their object alone, non-restrictions are defined as agreements which will not lead to any allocative inefficiency. Such agreements do not constitute a restriction (by object or by effect) let alone a restriction of competition. This means that an analysis based on Article 101 TFEU is completed once the presence of a non-restriction has been established. Such proof is presented if it can be deduced unambiguously from the content and objectives of an agreement that market power will not increase. The presence of a non-restrictive object may be established also as the outcome of a counterfactual-analysis. A *counterfactual* is defined as a full analysis of the competition situation before and after the agreement. Such an analysis may lead to the finding of either a structural or a temporary commercial necessity. A structural commercial necessity occurs when an increase in competition requires permanent cooperation between the undertakings concerned. A temporary commercial necessity occurs when an increase in competition only requires cooperation which is limited in time only. It will be set out why the application of a counterfactual does not imply a rule of reason.

Once more considered by their object alone, restrictions by effect are defined as agreements which do not aim at allocative inefficiency, but which depending on the actual market conditions may well lead to allocative inefficiency. In fact, from a point of view of convincing evidence, this category constitutes a rest category: agreements which do neither constitute a restriction by object nor contain any restrictive object, constitute a restriction by effect.

Unlike restrictions by object, restrictions by effect do not by definition qualify as restrictions of competition. Therefore, an investigation into appreciability is required as well, the reason therefore being that it cannot be established from the object of an agreement alone that competition will be restricted. An investigation into appreciability implies an examination of the effects of an agreement on the relative market position of the parties concerned. Again, it has to be established that an agreement triggers a change in actual market conditions as a result whereof an increase in market power may be expected. As mentioned before, non-appreciable restrictions by effect do not qualify as

a restriction of competition. Appreciable restrictions by effect do qualify as a restriction of competition, which triggers a subsequent investigation into the welfare-orientation of the agreement pursuant to Article 101(3) TFEU.

It is pointed out that not all restrictions by effect need be subjected to an appreciability-analysis. First, this is not necessary when the market shares of the undertakings concerned stay within the limits of the *De Minimis*-Guidelines. In that case it may be presumed that an agreement does not further increase market power. Second, there is no need to investigate appreciability when the market shares of the undertakings concerned stay within the limits of an applicable block exemption regulation. In that case it may be presumed that an agreement is welfare-driven further to Article 101(3) TFEU.

A.II.: investigations into the presence of welfare-effects

Next, there should be an examination of the welfare effects of an agreement leading to market power. This applies to restrictions by effect; in principle also to restrictions by object. Convincing evidence of actual welfare effects requires the following conditions to be met. First of all and according to economic standards it should be established that an agreement will lead to an increase in productive efficiency. If this condition (which is provided for in the first paragraph of Article 101(3) TFEU) is met, it should then be examined whether or not those positive effects outweigh the agreement's negative effects (the increase of allocative inefficiency established earlier on). In theory and based on the scheme developed by Williamson, it may be established rather easily whether or not an agreement may be expected to lead to an increase in welfare. Unfortunately, in practice this exercise is not that simple. As a result, the positive and negative effects of an agreement on competition should in fact be weighed up in accordance with the conditions of the last three paragraphs of Article 101(3) TFEU.

Thus, it should first be established according to the second paragraph of Article 101(3) TFEU whether consumers will obtain a fair share of the resulting benefits. This constitutes a twofold requirement. First, the nature of the efficiency gains concerned should be such that consumers are likely to receive their fair share. Second, there has to be sufficient residual competition in order to ensure that a fair share will be passed on to consumers in real terms.

Next, it should be established in accordance with the third paragraph of Article 101(3) TFEU, whether a restriction of competition is necessary for the attainment of the efficiencies proven earlier. This requirement of necessity is, once again, twofold and implies both objective suitability and objective proportionality. In case of provisions aiming at the external functioning of an agreement, the presence of objective suitability will in fact have been analysed within the framework of the first paragraph of Article 101(3) TFEU already. As a result, it remains to examine only whether the restrictive provision is objectively proportionate to the attainment of the efficiency gains. However, this is different in case the necessity test laid down in the third paragraph of

Article 101(3) TFEU is applied to provisions aiming at the internal functioning of an agreement leading to allocative inefficiency. Provisions which aim at the internal functioning of an agreement are subjected to a necessity test in the context of Article 101(1) TFEU only if the main agreement concerned does not lead to allocative inefficiency (see category B below). If the main agreement does lead to allocative inefficiency, the necessity test has to be executed in accordance with the third paragraph of Article 101(3) TFEU. Since ancillary provisions are only subjected to a necessity test, the third paragraph of Article 101(3) TFEU in this case implies an investigation into both their objective suitability and their objective proportionality.

Finally, it should be established in accordance with the fourth paragraph of Article 101(3) TFEU that a restriction of competition does not harm the competitive process as such. This requires that the possibility of market entry by actual and potential competitors as well as the possibility of innovation in the longer term is not excluded as a result of the agreement. It is herewith argued that a positive finding of welfare effects does not require for an agreement to lead to an instant improvement of consumer welfare. Instead, it is deemed sufficient when such an improvement cannot be excluded in the longer term.

Restrictions of competition meeting all four conditions of Article 101(3) TFEU may be assumed to be welfare-driven. As a result, these should remain free from the prohibition laid down in Article 101(1) TFEU. Restrictions of competition which do not meet all four conditions cannot be assumed to be welfare-driven. As a result, these should be prohibited by virtue of Article 101(1) TFEU.

Category B: investigations into the presence of ancillary restraints

Category B deals with provisions aiming at the internal functioning of an agreement. These provisions are subject to a limited competition analysis consisting of three separate investigations. The first investigation concerns the qualitative restrictive power of a provision. It must be established that further to its object a provision can lead to allocative inefficiency. After all, there is no need for the exception to apply when these provisions will not lead to allocative inefficiency in the first place. The second investigation concerns the ancillarity between a provision and the agreement of which it forms a part. For a start, it should be established that the provision concerned aims at the proper internal functioning of an agreement only. In case this condition is not met, the provision should then be submitted to a complete – as it were independent - competition analysis (see category A. above). Thereafter, it has to be established that the provision in issue is ancillary to an agreement which itself does not lead to allocative inefficiency. Whenever an agreement does lead to allocative inefficiency, ancillary provisions are to be examined under the third paragraph of Article 101(3) TFEU. The third investigation concerns

the objective necessity of an ancillary provision to ensure the coming about and the functioning of an agreement of which it forms part. This requirement is twofold. In accordance with current economic standards it has to be established that a provision is both suitable for and proportionate to the coming about or functioning of the agreement in issue. When both conditions are met, such provisions are qualified as ancillary restraints. Ancillary restraints are to fall free from the prohibition of Article 101(1) TFEU since such restraints may not be assumed to lead to allocative inefficiency. Lack of allocative inefficiency implies lack of applying a rule of reason.

Category C: investigations into the presence of public ancillary restraints

Category C comprises agreements aiming to guarantee the compliance with a non-competition interest. Also those agreements should be submitted to a limited competition analysis consisting of three separate investigations. The first investigation concerns the qualitative restrictive power of the agreement in issue. Again, it is not necessary to have recourse to the legal exception of Article 101(3) TFEU if the agreement is not capable of restricting competition in the first place. The second investigation concerns the ancillarity of the agreement. In case of public ancillary restraints, the requirement of ancillarity above all serves to ensure that the non-competition interest in issue concerns a public interest. Thus it is guaranteed that no public rule of reason is applied within the framework of Article 101(1) TFEU. Furthermore, the requirement of ancillarity ensures that the agreement concerned does not form an integral part of the public interest as such but should be seen as an independent agreement between the undertakings involved instead. Generally, this will have been ascertained earlier on in the proceedings already, i.e. with regard to the analysis as to whether one is actually dealing with an agreement between undertakings or a decision of an association of undertakings. The third investigation concerns the objective necessity of an ancillary agreement to the public interest in issue. This may be seen as the second guarantee that there is no application of a public rule of reason. Again, this requirement is twofold. According to prevailing economic standards an ancillary agreement should be suitable to guarantee the compliance with the public interest concerned and it should be proportionate thereto. If both conditions are met, an agreement qualifies as a public ancillary restraint. Public ancillary restraints are to be excepted from the prohibition laid down in Article 101(1) TFEU since it may be assumed that these lead to no more allocative inefficiency than the public interest itself. Lack of independently created allocative inefficiency also means that such enforcement does not imply the application of a public rule of reason.

Category D: investigations into the presence of agreements that do not restrict competition by virtue of their nature and purpose

Agreements within this category are not submitted to any competition analysis: they fall outside the scope of Article 101(1) TFEU. To that end, two conditions have to be met: an agreement may restrict competition neither by virtue of its nature nor purpose. So far this category has been used in the context of agreements entered into as a result of collective negotiations between management and trade unions representative to the sector of industry concerned. Consequently, the first condition implies that the agreement has to be concluded as the result of such collective labour negotiations. The second condition implies that the agreement should contribute directly to improving the working conditions of the workers concerned. Agreements which do not meet both conditions, do fall within the scope of Article 101(1) TFEU and should be submitted to any one of the competition analyses set out here above.