

ANTI-COMPETITIVE CONDUCT IN THE PUBLIC INTEREST: A DEMOCRATIC LEGITIMACY APPROACH

ACLE 9TH ANNUAL COMPETITION & REGULATION MEETING

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LOOKING FURTHER

INTRODUCTION

1. Arguments **against** permitting anti-competitive conduct in the public interest
2. Arguments in **favour**
3. **When** and **how** can the public interest be taken into account?

EXAMPLE: GARMENT INDUSTRY

A	B	C	D
Anti-competitive conduct <i>not</i> in the public interest	Anti-competitive conduct in the public interest	Anti-competitive conduct <i>but</i> economically efficient	Conduct which is not anti-competitive
<u>Prohibited</u>			<u>Allowed</u>

PART I: ARGUMENTS AGAINST TAKING THE PUBLIC INTEREST INTO ACCOUNT

- 1) The 'modesty' argument
- 2) The 'legislator should act' argument
- 3) The 'independence' argument
- 4) The 'usurpation of democracy' argument
- 5) The 'legal certainty' argument

PART II: ARGUMENTS IN FAVOUR

- 1) An ECJ argument
- 2) A Lisbon Treaty argument
- 3) A legal obligation argument
- 4) A good governance argument
- 5) An argument based on the aims of the EU

PART III: WHEN AND HOW?

1. When?

Guidance by and deference to the legislator

2. How?

Proportionality test

WHEN?

- a) Exhaustive regulation in place
Enforcement of exhaustive regulation 
- b) Minimum standards 
- c) No exhaustive regulation, but goals and obligations have been formulated 
 - 1) EU Treaties
 - 2) International agreements
 - 3) Secondary legislation
 - 4) National legislation
- d) No goals and obligations have been formulated and no legislation 

HOW?

Proportionality test

Factors which can be taken into account:

- Importance of the goal at issue
- Endorsement by stakeholders
- Quality of regulation
- Effectiveness

CONCLUDING REMARKS

- No need to prohibit anti-competitive conduct in the public interest
- Suggestions for when and how the public interest can be taken into account by adjudicators