

Anti-Competitive Conduct in the Public Interest: A Democratic Legitimacy Approach

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The prevailing view among competition lawyers, and even competition authorities, is that judges should not take public interests other than consumer welfare and efficiency into account when applying competition law. Competition law, so it is argued, has only 'modest' aims and should not seek to achieve goals that lay properly outside its scope. This false modesty can end up punishing undertakings and prohibiting conduct that contributes to laudable public interest goals, such as environmental protection, the protection of fundamental rights, animal welfare and social protection. Despite the fact that the EU aspires fundamentally to realize these goals, the logic of competition law requires the EU to prevent other actors from taking steps to achieve them. Competition law appears, then, to be a jealous form of law that seeks to safeguard and monopolize the EU's and Member States' own legislative prerogatives.

This paper will argue that competition law's myopic focus on consumer welfare is misguided and contrary to the EU's own fundamental objectives. Instead, it will argue that if anti-competitive conduct is in the public interest, competition law should not prohibit it. This reading is in line with the ECJ's definition of the goal of competition law as preventing competition from being distorted *to the detriment of the public interest*, individual undertakings and consumers, thereby ensuring the well-being of the European Union. In making this argument, the paper will propose an analytical tool for determining when anti-competitive conduct is to the detriment of the public interest based on democratic legitimacy theory. To the extent that a particular public interest goal is not exhaustively regulated by public authorities, undertakings should be permitted to engage in anti-competitive conduct *necessary* to achieve the public interest. Judges can assess whether anti-competitive conduct meets this threshold by verifying whether it respects certain procedural and substantive criteria. The use of this tool would allow judges to determine when anti-competitive conduct is in the public interest and when it is not, and thereby decide in which cases the conduct can and should be prohibited and the undertakings involved punished.