Abstract

Competition Policy and the Public Interest Defence – perfect complements or contradiction in terms?

Regardless of whether competition should be protected because it guarantees static efficiency in resource allocation, whether it is considered a process of discovery or one of creative destruction in the dynamic sense, or whether it is seen as an embodiment and warrantor of a free democratic society, competition policy is concerned with the question of how competition law has to be designed in order to reach these goals in an efficient way. Thus, it can be said that competition policy is concerned with the public interest, namely with the question of how to promote public goals by a competitive environment for economic activities. But for the purpose of this contribution the final aim of competition law can be considered as secondary. The question rather is whether competition agencies should deal not only with topics that are directly linked with the characteristics of competition but also with problems from other areas like environmental or social policy.

In specific and usually clearly defined legal exemptions, the anti-competitive effects of a particular conduct can be balanced against other beneficial effects of the prima vista harmful conduct. German competition law, for example, foresees a balancing clause in merger control, which allows the weighing of specific anti-competitive effects arising from the merger against potential benefits to competition on other markets. Furthermore, a transaction that was prohibited by the Bundeskartellamt can be overruled by a ministerial authorisation if public interest considerations override competition concerns. Also in cartel cases, based on German or European competition law, not only pro-competitive effects are taken into account when evaluating both positive and negative the effects of a certain conduct. A restriction of competition can also be balanced against benefits arising from the improvement of production or distribution of goods or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit. However, in such cases it is mandatory that the restrictions of competition are indispensable to the attainment of these objectives and that they do not eliminate competition for the products in question. In unilateral conduct (abuse) cases, the analysis considers whether the respective anti-competitive conduct is objectively justified, for example by the necessity to take different cost-structures into account or to adhere to legal obligations. These examples have in common that they attempt to reach specific goals in markets, which are generally assumed to be of a competitive nature. However, the introduction of a "public interest defence" seems to go far beyond such generally accepted considerations. For example, according to the Dutch Ministry of Economics, the Dutch competition authority (ACM) shall in future cases analyse, whether a restraint of competition, for example an agreement between competitors to only use one specific production technology, can be exempted from the cartel prohibition if the agreement fosters the general goal of "sustainability". Thereby, the competition authority shall solve the conflict between the public interest of protection of competition and other public interests – namely the goal of a sustainable development of economy and society.

In our contribution, we intend to add some relevant points from a practitioner's point of view to the certainly intriguing discussion. In particular, we will address the following issues:

1. Under the disputable assumption that a competition authority would be the adequate body in a democracy to find the right balance between conflicting goals of society, we will highlight the problems that would have to be overcome in practice to foster conduct

beneficial to specific public interests while at the same time avoiding under-enforcement of cartel prohibitions, which would be detrimental to society.

2. We will present and evaluate alternative options for the German legislator, the Ministry of Economics and the Bundeskartellamt to protect specific public interests in cases where there may be a conflict with the protection of competition.
3. We will to provide practical examples for these issues by discussing several legislative achievements and competition law cases in which public interest considerations played a role - with very different outcomes.

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