European Competition Law in the Force Field of the Cross-Sectional Clauses

A High Level View on the ACM Position Paper “Competition & Sustainability”

Abstract

The cross-sectional clauses, an innovative element of European Union Law, induce “purposive programming” of the European Union’s actions. In spite of their varying wording, all cross-sectional clauses set the same types of requirements. On the one hand, they serve as guiding principles for the making of secondary EU law. On the other hand, they show their true dynamic nature when it comes to the application of law. The “general cross-sectional goal-oriented” interpretation and development of law and the corresponding use of administrative margins of discretion are the key levers for the impact of the cross-sectional clauses. Their scope *ratione materiae* and *ratione personae* is remarkably broad. In particular, it encompasses the application of EU competition law by European and national courts and competition authorities. Thus, the modernisation of EU competition law has largely shifted the task of giving effect to the cross-sectional clauses to national courts and competition authorities.

Neither competition authorities nor courts can dismiss this task on the grounds that the cross-sectional-clauses lack justiciability. Actually, the justiciability of the cross-sectional-clauses is just an emanation of the intensity of the judicial review and, consequently, forms the flip side of the legislative and administrative freedom in decision-making. Therefore, the justiciability of the cross-sectional-clauses is not static and unchangeable but differs with regard to the various situations of constitutional, administrative, and civil court proceedings.

In its decision-making practice, the European Commission has frequently made recourse to non-competition interests. However, a closer look reveals that the Commission has repeatedly tried out new approaches, constantly changing the methods of assessing public interest arguments. The “traditional approach” of the Commission attempts to find an appropriate solution in the framework of Article 101, paragraph 3 of the Treaty on the Functioning of the European Union (TFEU). The traditional approach fans out into three different versions:

1) The “simple integration” of non-competition interests describes a method that seeks to achieve non-competition goals precisely by taking into account cost efficiencies or qualitative efficiencies. However, this method is pushed to its limits when negative externalities are present.

2) In these situations, the Commission often resorted to a strategy that might be dubbed “two-tracked mock integration”. The strategy is based on a warm appreciation of public interest gains. But when it comes to the crucial question of whether a restriction of competition can be justified exclusively by benefits for the general public, the Commission retreats to a second track, claiming traditional efficiency gains that are poorly justified.

3) In the late stage of its decision-making practice, the Commission also occasionally embraced the "inherent restrictions approach" developed by the European Court of Justice (ECJ) in the *Wouters* case in a veiled manner, using the framework of Article 101, paragraph 3 TFEU.

Moreover, the "progressive approach" transfers the principle of inherent restrictions developed by the ECJ in its jurisprudence on the fundamental freedoms to EU competition law. So far, the ECJ's *Wouters* doctrine had only a limited impact on the Commissions decision-making practice. However, the Commission has tentatively applied the ECJ's *Wouters* doctrine and the ECJ has clarified in two recent decisions that it holds on to the *Wouters* doctrine.

Considering the force field created by the cross-sectional clauses, it is evident that public interests must have a place in the application of EU competition law. However, the decision-making practice demonstrates a profound ambiguity on the appropriate means to achieve that goal. Likewise, scientific research on this topic has produced a wide range of conflicting views.

To isolate the EU competition law against public interests would run counter to the requirements set up by the cross-sectional clauses. The notions of sectoral exemptions, a broad interpretation of Article 106, paragraph 2 TFEU, or tolerance by competition authorities do not convince. Any attempt to interpret the exception criteria of Article 101, paragraph 3 TFEU so broadly that public interests can be considered adequately must bear in mind that EU law has opted for an economics-based interpretation of Article 101, paragraph 3 TFEU. The only viable solution is to "translate" the public interest gains into efficiencies. This concept is ambivalent. To meet the requirements set up by the cross-sectional clauses efficiency would have to be understood as "social efficiency" geared towards the maximization of social welfare. This does not only pose a challenge for the clarity of the economic approach but also results in extremely high information needs. Therefore, the *Wouters* doctrine turns out to be most viable approach when it comes to the weighing of non-competition interests in complex situations where negative externalities are present and hard to quantify in economic terms.

Against this background, there are several propositions of the ACM position paper "competition & sustainability" that deserve closer attention.

From a general point of view, the condition that there must be proof that the agreement in practice achieves the public interest concerned seems to be self-evident. However, when one recalls the ECJ's jurisprudence on the fundamental freedoms, it becomes clear that, in situations involving the need to assess risks under uncertainty, the verifiability of public interest gains may be pitted against the precautionary principle. A thorough analysis of the few cases in which the ECJ applied the *Wouters* doctrine demonstrates that the precautionary principle is a special privilege and prerogative of the state. Thus, as a rule, undertakings cannot invoke the precautionary principle and must base their proof on the prevailing opinion in science. However, the ECJ seems to derogate from that rule where undertakings, in particular public-law bodies engaged in economic activities, have been entrusted with the pursuit of those public interest goals that are coupled with the precautionary principle.

The second condition that the collusion between competitors must have been necessary to produce the public interest gains refers either to the suitability or to the necessity of the agreement in practice. When markets fail, collusion is needed to overcome the tension between individual and collective rationality. In some cases, game-theoretic approaches may turn out to be an effective tool for establishing whether competitors really have to collude. However, the second condition will sometimes lead to an odd problem: often, the state encourages self-regulation and threatens to enact laws protecting the public interests if the envisaged self-regulation should fail to produce satisfactory results. In these situations, it could be argued that collusion is not necessary to produce the public interest gains since the failure of all self-regulation efforts would trigger state intervention and thereby promote the public interest concerned. However, there are good legal reasons to conclude that this argument must be excluded from the outset. In particular, it is not up to courts and competition authorities to predict the outcome of legislative procedures.

The condition that consumers of the cartelized product should get a fair share of the gains poses the main problem of the ACM position paper. When the public interest-defence is invoked, negative externalities are often present. By definition, externalities affect otherwise uninvolved parties and, in particular, negative externalities imply that the use of a product imposes a negative impact on third parties. When the use of a product is detrimental to the interests of the general public, it is hard to understand why the vested interests of a small number of users should be treated as a sacred cow. Many efforts have been made to gloss over this fundamental problem. However, these efforts are not convincing. When one supposes that users are well-informed and rational, the users' willingness to pay reflects e.g. future operating costs and future costs caused by environmental degradation. But if users are willing to pay more for goods that produce such future user gains, undertakings are not forced to collude. For example, agreements between manufacturers to no longer produce certain energy inefficient machines only reduce users' choices and thereby users' gains. Actually, the claim that users gain from such agreements is based on the assumption that users are not able to make the right choice maximizing their utility. This paternalistic attitude is not based on sufficiently well-founded evidence. At the end of the day, these efforts are a half-hearted attempt to disguise public interest gains as users' gains rather than admitting that a public interest defence often entails the weighing up of the interests of the general public against the interests of the users. Only a total welfare standard that allows taking into account the welfare of consumers, producers, and third parties affected by the production or use of the product in question fulfils the requirements set up by the cross-sectional clauses. There are substantial arguments that the inherent restriction approach first applied in the *Wouters* case is better suited for this task than the framework of Article 101, paragraph 3 TFEU.