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

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

Ludger Breuer

Organisation

- The concept of the force field of the cross-sectional clauses: shedding some light on the requirements set by these provisions
- A brief look at the conflicting views on the role of public interests in competition law and their impact on the decision-making practice of the Commission and the ECJ
- Three aspects of the ACM position paper

For Additional Information

- This paper presents the results of my research on the influence of the cross-sectional clauses on European competition law in a nutshell
- For a more detailed analysis, please confer my doctoral thesis:
  - Ludger Breuer: Das EU-Kartellrecht im Kraftfeld der Unionsziele, Nomos/C.H. Beck, Baden-Baden 2013

The Force Field of the Cross-Sectional Clauses: (1) General Remarks

- The cross-sectional clauses are a young and innovative element of European primary law
- Adopting a descriptive approach we can state that:
  - Cross-sectional clauses address certain institutions setting out the task to consider certain public interests in their actions in all other policy areas
- The purpose of these norms is to mainstream public interests in a cross-cutting manner in order to induce a balancing of conflicting public interests

The Force Field of the Cross-Sectional Clauses: (2) Historical Development

- Single European Act (1987): Insertion of the first two cross-sectional clauses (regarding environmental protection and cohesion)
- After that, evaluated quantitatively, cross-sectional clauses took European primary law by storm:
  - Maastricht Treaty: 6 cross-sectional clauses in total
  - Amsterdam Treaty: 11 cross-sectional clauses in total
  - Lisbon Treaty: 14 cross-sectional clauses in total (4 such clauses were also inserted into the European Charter of Fundamental Rights)

The Force Field of the Cross-Sectional Clauses: (2) Historical Development

- At the time being, the cross-sectional clauses cover:
  - environmental protection, cohesion, culture, public health, industrial policy, development cooperation, employment, consumer protection, equality between men and women, animal welfare, the functioning of services of general economic interest, social policy, and anti-discrimination
  - in Article 7 TFEU there is now also a general coherence requirement

The Force Field of the Cross-Sectional Clauses: (3) The Scope of the Cross-Sectional Clauses

- Organisation
  - 3.1: „other Union policies“
  - 3.2: „definition and implementation“
  - 3.3: scope *ratione personae*
  - 3.4: requirements set up by the cross-sectional clauses
  - 3.5: justiciability

The Force Field of the Cross-Sectional Clauses: (3.1) „other Union policies“

- Public interests shall be considered in “**other Union policies**”
- The term “other Union policies” encompasses the rules on competition
- That can be concluded from Article 13 TFEU, the cross-sectional clause on animal welfare:
  - Article 13 TFEU uses the term “the Union’s internal market policies”
  - Protocol No. 27 clarifies that the rules on competition are part of the Union’s internal market policy
  - This finding applies a fortiori to all other cross-sectional clauses

The Force Field of the Cross-Sectional Clauses: (3.2) „definition and implementation“

- As regards the actions affected by the cross-sectional clauses, the usual wording is “**definition and implementation**” of the other Union’s policies
- The crucial question is:
  - Does “implementation” encompass the application of norms in individual cases, for example the application of Art. 101 TFEU in a cartel case?

The Force Field of the Cross-Sectional Clauses: (3.2) „definition and implementation“

- This notion is sometimes contested
- However, in case No. 16/88, the ECJ stated:
  - *“The concept of implementation [...] comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application. Since the Treaty uses the word "implementation" without restricting it by the addition of any further qualification, that term cannot be interpreted so as to exclude acts of individual application.”*
- Thus, the cross-sectional clauses affect the application of norms in individual cases, too

The Force Field of the Cross-Sectional Clauses: (3.3) Scope *ratione personae*

- Authorities and bodies of Member States often apply European law in individual cases
- Therefore, the question arises whether they are – along with the EU institutions – addressees of the cross-sectional clauses
- There are compelling reasons to answer that question in the affirmative:
  - For instance, some cross-sectional clauses were inserted into the European Charter of Fundamental Rights that entails in Article 51 paragraph 1 a corresponding provision
- 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

The Force Field of the Cross-Sectional Clauses: (3.4) Requirements

- 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 Force Field of the Cross-Sectional Clauses: (3.4) Requirements

- The key levers for the impact of the cross-sectional clauses are:
  - the interpretation of law
  - the development of law
  - the corresponding use of administrative margins of discretion

The Force Field of the Cross-Sectional Clauses: (3.4) Requirements

- However, it is important to note that not all cross-sectional goals can serve as a *rationale* for a balancing with the goals of competition policy
- A careful interpretation of the cross-sectional goals demonstrates that **some of them must be pursued through a strengthening of competition**, thus excluding any possibility to engage in balancing between these goals from the outset
- That applies in particular to the cross-sectional goals of **industrial policy and employment**

The Force Field of the Cross-Sectional Clauses: (3.5) Justiciability

- Neither competition authorities nor courts can dismiss the task set up by the cross-sectional clauses on the grounds that these clauses lack **justiciability**
- The justiciability of the cross-sectional-clauses is just an emanation of the intensity of the judicial review

The Force Field of the Cross-Sectional Clauses: (3.5) Justiciability

- Consequently, the justiciability 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

The Conflicting Views on the Role of Public Interests in Competition Law: (1/7)

- Considering the force field created by the cross-sectional clauses as outlined above, it is evident that public interests must have a place in the application of EU competition law
- To isolate EU competition law against public interests would run counter to the requirements set up by the cross-sectional clauses

The Conflicting Views on the Role of Public Interests in Competition Law: (2/7)

- However, in the decision-making practice and the scientific research on this topic there is a **wide range of conflicting views** on the appropriate means to achieve that goal:
  - Narrowing the scope of Article 101, paragraph 1 TFEU (*Wouters* doctrine)
  - Broad interpretation of the exception criteria of Article 101, paragraph 3 TFEU
    - "Semantic interpretation"
    - "Economic interpretation": translating public interest gains into efficiencies
  - Broad interpretation of Article 106, paragraph 2 TFEU
  - Sectoral exemptions
  - Tolerance by competition authorities

The Conflicting Views on the Role of Public Interests in Competition Law: (3/7)

- The notions of sectoral exemptions, a broad interpretation of Article 106, paragraph 2 TFEU, or tolerance by competition authorities are not convincing
- The solution must be found in Article 101 TFEU
- Indeed, in its decision-making practice regarding Article 101, paragraph 3 TFEU, the European Commission has frequently made recourse to non-competition interests

The Conflicting Views on the Role of Public Interests in Competition Law: (4/7)

- A closer look reveals that the Commission has repeatedly tried out different approaches
- In some cases, the Commission 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
- So far, the Commission has carefully avoided to answer the crucial question of whether a restriction of competition can be justified exclusively by benefits for the general public

The Conflicting Views on the Role of Public Interests in Competition Law: (5/7)

- In general, 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
- Therefore, the only viable solution is to "**translate**" the public interest gains into efficiencies
- This concept is **ambivalent**

The Conflicting Views on the Role of Public Interests in Competition Law: (6/7)

- 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**

The Conflicting Views on the Role of Public Interests in Competition Law: (7/7)

- Against this background, the "**inherent restrictions approach**" or "**rule of reason approach**" developed by the ECJ in the ***Wouters*** case deserves closer examination
- In a nutshell, this approach transfers the principle of mandatory requirements of public interests developed by the ECJ in its jurisprudence on the **fundamental freedoms** to EU competition law, narrowing the scope of Article 101, paragraph 1 TFEU
- So far, the ECJ's *Wouters* doctrine had only a limited impact on the Commission's 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

Three Aspects of the ACM Position Paper: Organisation

- Three aspects of the ACM position paper that deserve closer attention:
  - Proving public interest gains
  - Necessity of collusion
  - Fair share of the gains for consumers

Three Aspects of the ACM Position Paper: (1) Proving public interest gains

- The condition that there must be proof that the agreement in practice achieves the public interest concerned seems to be self-evident
- However, the ECJ's jurisprudence on the fundamental freedoms demonstrates that, in situations involving the need to assess risks under uncertainty, the verifiability of public interest gains may be pitted against the **precautionary principle**

Three Aspects of the ACM Position Paper: (1) Proving public interest gains

- This raises the question:
  - **May undertakings invoke the precautionary principle in order to shift the burden of proof?**

Three Aspects of the ACM Position Paper: (1) Proving public interest gains

- Answer:
  - The ECJ's case law 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, it seems possible that the ECJ will 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
  - For the time being, this issue is still an open question

Three Aspects of the ACM Position Paper: (2) Necessity of collusion

- The second condition outlined in the ACM position paper states that the collusion between competitors must have been necessary to produce the public interest gains
- Generally speaking, 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

Three Aspects of the ACM Position Paper: (2) Necessity of collusion

- 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
- This is sometimes called a "**Sword of Damokles**"-situation, since the threat of a state regulation is hanging over the undertakings

Three Aspects of the ACM Position Paper: (2) Necessity of collusion

- 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
- This raises the question:
  - **Are undertakings forced to cut the hair that holds the Sword of Damokles over their own heads?**

Three Aspects of the ACM Position Paper: (2) Necessity of collusion

- There are compelling legal reasons to conclude that this argument must be excluded from the outset:
  - A state regulation would only come into effect with a certain time lag that might be detrimental to the public interests concerned
  - The state regulation is *ex ante* unknown and it is not up to courts and competition authorities to predict the outcome of legislative procedures

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- The main problem of the ACM position paper is the condition that consumers of the cartelized product should get a fair share of the gains
- The example of **negative externalities** helps to illustrate the problem

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- When the public interest-defence is invoked, negative externalities are often present
- By definition, externalities affect otherwise uninvolved parties
- In particular, negative externalities imply that the production or use of a product imposes a negative impact on third parties

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- 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 sometimes small number of users should be treated as a “sacred cow”
- In these situations we have to weigh the welfare of consumers not only against that of shareholders but also against that of third parties
- In many situations involving negative externalities, consumers may loose due to higher prices or a reduction of consumer choices, but the general public wins because negative externalities are reduced

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- Many decisions concerning this problem have made substantial efforts to gloss over this fundamental problem
- They are usually based on the notion that consumers will somehow appreciate the public interest gains
- 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

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- 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

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- Therefore, 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
- However, such a revolution in the economic interpretation of Article 101, paragraph 3 TFEU will cause some confusion
- Moreover, taking into account the extremely high information requirements, this approach may **overburden** competition authorities and courts

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- Therefore, – in complex situations where negative externalities or other forms of market failure are present and costs and benefits are hard to quantify in economic terms – the approach first applied in the ECJ's *Wouters* case is better suited for the task of weighing users' interests against public interests than the framework of Article 101, paragraph 3 TFEU

Three Aspects of the ACM Position Paper: (3) Fair share of the gains for consumers

- The *Wouters* doctrine allows us to draw upon the wealth of experience gathered over a three-decade period in the case law on the fundamental freedoms
- The case law on the fundamental freedoms demonstrates that such a balancing is a difficult task, but not an impossible one
- Compared with a full-blown economic social-welfare analysis, the more modest approach of the Wouters doctrine does not bring about such excessive information requirements and is better to handle, especially with regard to national courts

Conclusion

- The cross-sectional clauses require inter alia that public interests shall be balanced with the goals of competition policy when authorities and bodies of the EU or the Member States apply EU competition law
- One possible solution is to “translate” the public interest gains into efficiencies in the framework of Article 101 paragraph 3 TFEU
- However, 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

Conclusion

- This would endanger the clarity of the economic approach and result in extremely high information requirements
- Therefore, in complex situations involving certain forms of market failure, it seems preferable to apply the – more modest – approach developed by the ECJ in the *Wouters* case

Conclusion

- The *Wouters* doctrine allows us to draw upon the wealth of experience gathered over a three-decade period in the case law on the fundamental freedoms
- Applying the *Wouters* doctrine is not an impossible task for national courts and competition authorities
- However, it should also be noted that such an application of the *Wouters* doctrine will not be an easy task

Conclusion

- *De lege ferenda*, a preferable solution might be the insertion of a new norm into European primary law that resembles the former Section 8 of the German Act against Restraints of Competition (GWB):
  - This new norm would allow a politically responsible person (as regards § 8 GWB: the German Minister for Economic Affairs) to decide on a case-by-case basis whether an agreement between undertakings that is claimed to generate public interest gains shall be granted an exemption from the prohibition of restrictive practices