

Part I

General Principles

Chapter 1

The Significance of Freedom of Competition in the European Union Law

1.1 Foundation for a Pan-European Market

1.1.1 *Competition as an Integrating Factor*

1.1.1.1 Connection to the Internal Market

Protecting competition from restrictions has now been made part of the objective of the Internal Market in Art. 3 (3) TEU as may be seen in Protocol 27 to the Treaty of Lisbon on the Internal Market and Competition.¹ This protection against distortions of competition, and thus a true competitive system, is reflected by the fact that it is based on ensuring equality of opportunity for all market participants.²

Art. 101 et seq. TFEU apply the rules on competition conversely to the Internal Market by giving prohibitory effect to incompatibility with the market and thus sets it out as the target. This applies to the prohibitions on cartels, abuse and the prohibition of state aid. The Internal Market, which lacks its own definition and the creation of which represents one of the primary tasks of the EU under Art. 3 (3) sent. 1 TEU, is based on the coalescence of the markets from the individual Member States into a uniform economic area through the free movement of goods, persons, services and capital as is clearly expressed in Art. 26 (2) TFEU. This concept then renders necessary the equal treatment of economic actors by the individual Member States. Art. 101 et seq. TFEU ensure the equality of opportunity

¹ ECJ, Case C-52/09, ECLI:EU:C:2011:83 (para 20)—*TeliaSonera Sverige*.

² ECJ, Case C-280/08 P, ECLI:EU:C:2010:603 (para 230)—*Deutsche Telekom*; Case C-49/07, ECLI:EU:C:2008:376 (para 51)—*MOTOE*; thus the Treaty of Lisbon changed nothing in this regard; Petzold (2012), p. 56 et seq.

for all market participants against barriers from private individuals; competition is thus an end in itself just as Art. 101 et seq. TFEU do not merely represent supplement to fundamental freedoms.³

- 3 The creation of a European market free of barriers to the greatest extent possible is an ongoing task independent of whether this goal is pursued under the guiding principle of a Common Market or the Internal Market. Both ideas are thus aligned and have the same focus.⁴ Thus the question of whether the Internal Market is the follow-on goal even without the prior realisation of the Common Market, and even though serious changes have not been seen as a result, is irrelevant just as is the case with the question of whether the creation of a Common Market resulted from the conclusion of the Maastricht Treaty and the associated repeal of Art. 3 lit. f) EC (prior version).⁵
- 4 The Common Market, which likewise represented the only common goal prior to the inclusion of the Internal Market goal in the Treaty on 1 July 1987 via the Single European Act, implies the “removal of all barriers to intra-Community trade with the objective of fusing all national markets into a common market.”⁶ The Common Market was thus, as is the case with the Internal Market, intended to remove all barriers to intra-Community trade.
- 5 This form of economic area would be prevented from being created from the outset if competition between economic undertakings did not have the opportunity to develop.⁷ However, the prerequisite for competition is the freedom of competition between market participants; i.e. their freedom to compete autonomously and independently. This freedom must be protected from distortions.⁸ This purpose is served by the system of distortion-free competition now set out in Art. 3 (3) TEU and realised in Art. 101 et seq. TFEU.⁹

1.1.1.2 Reciprocal Effects of Workable Competition

- 6 Thus in the words of the ECJ, what is needed for the realisation of distortion-free competition in the market is workable competition¹⁰ and thus that there is “so much

³ See below para 22.

⁴ For a detailed discussion on the relationship between the Common Market and the Internal Market, see Frenz (2012a), paras 34 et seq. with further citations.

⁵ Regarding this difference of opinion, see e.g. Eckard (2011), p. 207.

⁶ ECJ, Case 15/81, ECLI:EU:C:1982:135 (para 33)—Schul; Case C-41/93, ECLI:EU:C:1994:196 (para 19)—France/Commission; Case 32/65, ECLI:EU:C:1966:42 (407 et seq.)—Italy/Council and Commission; see also Zuleeg (1982), p. 27 with additional citations.

⁷ Cf. generally Hoppmann (1988), p. 132 et seq.

⁸ Günther (1968), p. 44; Blank (1991), p. 34 et seq. with additional citations; see also Zuleeg (1978), p. 76 et seq.

⁹ ECJ, Case 32/65, ECLI:EU:C:1966:42—Italy/Council and Commission. See also in detail id. paras 22 et seq.

¹⁰ See Busch (2010), p. 9 et seq. for a discussion of the term “workable competition”. See for the benchmark of perfect competition Lorenz, An introduction to EU Competition Law (2013), p. 5.

competition that the fundamental requirements of the Treaty are satisfied and its objectives, in particular the creation, or rather now the completion, of a single market ... are achieved.”¹¹ This once again emphasises the reference to competition as one of the overarching objectives of the Treaty. This represents a form of reciprocal effect: competition furthers the general objectives of the Treaty and they in turn influence the structure of competition. This applies in particular to questions of interpretation.¹²

The specific effect on competitive circumstances is that the form and intensity of competition in different segments may vary depending on the economic structure.¹³ However, the relationship between freedom of competition and the creation of a coherent market therefore, suggests that competitive conditions should be left as uniform as is possible even in different segments, unless the Treaty provides special rules as is the case for the classic segments such as agriculture or transportation and some other areas as well. Different factual situations may be addressed in Regulations which may establish more detailed competition rules, as Art. 103 TFEU suggests, and thus may take sector-specific circumstances into account. This is especially represented by the block exemption regulations.

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1.1.1.3 Institutional Character

Traditional View

Art. 101 et seq. TFEU are intended to eliminate barriers to competition and strengthen and ensure uniformity within the Internal Market.¹⁴ Freedom of competition thus serves to support the guarantee of a functioning market¹⁵ and ultimately European unity.¹⁶ It represents an essential integration factor. In particular in this respect, it is traditionally an institution.¹⁷

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Changes Through the More Economic Approach?

The more economic approach sees competition less as an institution but rather more as a means to an end. This corresponds to a consideration of the benefits and detriments of a measure that also includes higher-level aspects at the factual level

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¹¹ ECJ, Case 26/76, ECLI:EU:C:1977:167 (para 20)—Metro I.

¹² See fundamentally ECJ, Case 6/72, ECLI:EU:C:1973:22 (paras 22 et seq.)—Continental Can.

¹³ ECJ, Case 26/76, ECLI:EU:C:1977:167 (para 20)—Metro I.

¹⁴ ECJ, Case 14/68, ECLI:EU:C:1969:4 (para 5)—Walt Wilhelm for Art. 85 TEEC.

¹⁵ Bach (1992), p. 233; Weltrich (1992), p. 150.

¹⁶ Krimphove (1992), p. 46 with additional citations in fn 89; Greiffenberger, In: Schulte (2010), paras 66 et seq.

¹⁷ Schröter, In: Schröter et al. (2014), Vorbemerkungen zu Art. 101–109 AEUV para 16.

and a focus on the needs of the consumers so that competition no longer represents an end in itself.¹⁸

- 10** The TFEU namely guarantees competition through the repeal of Art. 3 (1) lit. g) no longer explicitly as a system and thus as an institution. At the same time, this characteristic is carried forward in Protocol 27 to the Treaty of Lisbon which refers to a system under Art. 3 TEU that protects competition from distortions.¹⁹ This thus represents an institution the purpose of which is to realise the overall objectives of the Treaty and thus in particular circumstances similar to the Internal Market.²⁰

Constitutional Status

- 11** Freedom of competition protected in this manner is therefore an essential component of the Internal Market²¹ and has constitutional status.²² It thus enjoys protection for its own sake. Competition is guaranteed as an institution. Protection of freedom of competition as an institution is thus the primary objective of European competition law²³ and not, as alleged in Commission Communications, increased efficiency and consumer welfare.²⁴ Of course, consumers receive indirect projection²⁵: “Because where competition as such is damaged, disadvantages for consumers are also to be feared.”²⁶

Public Interest

- 12** Against this background, freedom of competition is not only in the private but also the public interest.²⁷ This is reflected in the competition regulations by the fact that

¹⁸ See General Court, Case T-168/01, ECLI:EU:T:2006:265 (paras 118 et seq.)—Glaxo-SmithKline Services; however contra ECJ, Case C-501 inter alia/06 P, ECLI:EU:C:2009:610 (paras 63 et seq.)—GlaxoSmithKline Services; with additional citations and criticism paras 60 et seq., 70.

¹⁹ See ECJ, Case C-52/09, ECLI:EU:C:2011:83 (para 20)—TeliaSonera Sverige; para 1 above.

²⁰ Ipsen (1972), p. 607.

²¹ Cf. ECJ, Case 6/72, ECLI:EU:C:1973:22 (paras 18 et seq.)—Continental Can.

²² See Ipsen (1972), p. 608; Hossensfelder et al. (1996), p. 3; also ECJ, Case 240/83, ECLI:EU:C:1985:59 (para 9)—ADBHU: general principle of Community Law in addition to the principles of freedom of trade and the free movement of goods.

²³ Basedow (2007), p. 712.

²⁴ Von Weizsäcker (2007), p. 1078; Immenga and Mestmäcker, In: Immenga and Mestmäcker (2012) Einl EU D para 15 with additional citations: detailed discussion paras 76 et seq.

²⁵ Holzinger (2011), p. 115. Citing the source quoted below.

²⁶ AG Kokott, ECJ, Case C-95/04 P, ECLI:EU:C:2006:133 (para 68)—British Airways.

²⁷ See ECJ, Cases 46/87 and 227/88, ECLI:EU:C:1989:337 (para 25)—Hoechst; Case 136/79, ECLI:EU:C:1980:169 (para 20)—National Panasonic, where the public interest is listed before individual enterprises and consumers; accord. Bunte, In: Langen and Bunte (2014) Einf. EU-Kartellrecht paras 43 et seq.

they are violated if trade between the Member States may be impaired. By contrast, entrepreneurial freedom is not listed separately as a subject of protection. Providing direct protection for the interests of individual competitors or consumers is not the purpose of the rules on competition but rather protecting competition as such.²⁸ Ensuring private development is thus a means to an end or the consequence thereof. Competition is the critical point. The purpose of freedom of competition thus extends beyond the protection of private development and relates to an overarching integrating aspect in the public interest.

1.1.2 *Modified Focus on Integration*

1.1.2.1 Further Reinforcement Under the TEU

Although a primary focus of the Internal Market is on economic factors, other goals are intended to be realised as well. Art. 2 EC itself already unified a variety of, in some cases divergent, objectives and responsibilities of the Community which are now given greater specificity in Art. 38 et seq. TFEU. Pursuant to Art. 3 (3) TEU, this orientation on objectives beyond the economic sphere indeed continues the obligations of “balanced economic growth” and a “highly-competitive... market economy.” However, the market economy is explicitly tied to a social component; the objective is a “competitive social market economy.” The term “open market economy” employed in Art. 4 EC, as well as the planned Art. III-177 Treaty for a European Constitution, which reflects a rather liberal alignment was thus marginalised and substantively re-aligned.

Whereas social aspects had not previously been excluded, they have now been explicitly included in the Treaties as central objectives and thus rendered formative components of the aspired-for market economy system. In this respect, this does not merely represent an “emphasis”²⁹ but rather in part a substantive redefinition. This could result in profound effects on the interpretation and operation of competition law as is likewise the case from the reinforcement of overlapping areas.³⁰

Freedom of competition is thus no longer as dominant in the Treaties as had been the case earlier. The non-economic goals of Art. 3 EC had already had a relativising effect. These objectives were continued in Art. 3 (3) TEU and strengthened in part, for examples as the objectives “full employment and social progress.” What remains is to strive for “a high degree of environmental protection and improvement in environmental quality.”³¹ In keeping with their separate expression, these objectives have their own intrinsic value and jointly constitute the Internal Market

²⁸ ECJ, Case C-501 inter alia/06 P, ECLI:EU:C:2009:610 (para 63)—GlaxoSmithKline Services.

²⁹ See e.g. Schwarze (2004), p. 136.

³⁰ Terhechte (2004), p. 109, 113 et seq.

³¹ For further discussion, see Frenz (2011), para 2053.

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given precedence in Art. 3 (3) sent. 1 TEU. Art. 3 (3) sent. 2 TEU, which sets out specific objectives for the Internal Market, first refers to the “sustainable development of Europe based on balanced economic growth.” This links a priori economic goals with ecological and social concerns in that they are the characteristics of sustainable development.³²

- 16** In the preceding Art. 3 (2) TEU, the Internal Market is merely referred to with the additional phrase “with free and undistorted competition” and is now only listed alongside an area of freedom, security and justice without internal frontiers. However, this component specifically relates to external border controls, asylum, immigration and measures for preventing and combating crime. This provision may thus have no substance which derogates from or even modifies Art. 3 (3) TEU.

1.1.2.2 Introduction into Competition Law

- 17** This focus, which extends far beyond economic matters, must already be taken into consideration in the context of competition law because this is explicitly placed in the context of the Internal Market. Thus, greater emphasis is placed on non-economic matters in the Treaty as a whole, they consequently gain in importance and may over-arch the economic sphere of freedom of competition from their place in the Annex. In the most extreme case, the substance of freedom of competition is framed by non-economic concerns and is thus removed from its origin.³³ Great emphasis continues to be placed on economic matters under current Treaty law. By contrast, what is involved is only the introduction of other concerns into freedom of competition which continues to have an economic focus. This merely raises the question of the weight being given to these aspects. As the name implies, the more economic approach also presumes an economic view, however includes political objectives as part of an assessment of efficiency. At the same time, it enables a more flexible interpretation in line with the expanded goals of the Treaty than is possible from a formal legal perspective.
- 18** However, the ECJ demands a process in line with the system of rules on competition and viewed the more economic approach employed by the Commission and the General Court³⁴ as a breach of Community Law.³⁵ According to the ECJ, the area in which this issue to be discussed is concentrated at the level of justifying restraints on competition. The rules on competition themselves provide in part for the reconciliation of contradictory concerns, for example Art. 101 (3) and 107 (3) TFEU in particular. However, these do not include all aspects which play a role in assuring a functioning Internal Market. Namely, terms in need of analysis in

³² See e.g. Frenz and Unnerstall (1999), p. 111 et seq., 129 et seq.

³³ See Scherhorn (2005), p. 141, 149 et seq. on the issue of an ecological re-interpretation.

³⁴ Meanwhile also refused by General Court, Case T-286/09, ECLI:EU:T:2014:547—Intel.

³⁵ ECJ, Case C-501 inter alia/06 P, ECLI:EU:C:2009:610 (paras 64 et seq.)—Glaxo-SmithKline Services; further paras 58 et seq.

Art. 101 (3) TFEU such as technological and economic progress are open for inclusion in various non-economic concerns such as environmental protection.³⁶

1.1.3 *Increased Efficiency Through Distortion-Free Competition*

The primary objectives of the Internal Market remain increasing competition, attainment of production with optimum company size and to separate out inefficient enterprises via distortion-free competition.³⁷ Precisely this last aspect is thus not precluded, however may only be realised through lawful competition, in particular not by abusing a dominant market position.³⁸ Distortion-free competition, and thus subject of freedom of competition, makes it possible that unused energy may be tapped across Europe without restrictions and permits the ideal distribution and use of economic resources. It is thus also possible to offer goods and services to consumers on better terms and to drive enterprises to constant innovation in the sense of technical and economic progress. In this manner, competition realises its incentive and efficiency functions³⁹ and therefore serves as an economically beneficial institution⁴⁰ which ultimately benefits consumers in turn.⁴¹

Freedom of competition thus serves both individual enterprises as well as consumers⁴² whose standard of living is intended to be raised. However, according to the ECJ, this is an indirect effect; namely as a consequence of the adherence to a market and competitive structure.⁴³ By contrast, the Commission's current competition policy emphasises consumer welfare and improvements in resource allocation.⁴⁴ At the same time, freedom of competition ensures the adaptation of individual market participants needed to take changing circumstances and changes

³⁶ See most recently Ellger (2014), p. 127 et seq.; Frenz (2013c), 980 et seq.

³⁷ For additional detail, see e.g. Roth (1977), p. 6 et seq.

³⁸ See e.g. ECJ, Case C-209/10, ECLI:EU:C:2012:172—Post Danmark.

³⁹ ECJ, Cases 56 and 58/64, ECLI:EU:C:1966:41 (344)—Consten und Grundig; Birk (2000), p. 164, fn. 739 taking into account Hesiod (1990), Vers 17–26.

⁴⁰ Bunte, In: Langen and Bunte (2014), Einf. EU-Kartellrecht para 38.

⁴¹ AG Kokott, ECJ, Case C-95/04 P, ECLI:EU:C:2006:133 (para 68)—British Airways. Cf. Oppermann et al. (2014), § 20 para 19; Krimphove (1992), p. 44 et seq. with additional citations.

⁴² Explicitly referred to both side-by-side ECJ, Case C-46/87 and C-227/88, ECLI:EU:C:1989:337 (para 25)—Hoechst as well as Case 136/79, ECLI:EU:C:1980:169 (para 20)—National Panasonic.

⁴³ ECJ, Case C-501 inter alia/06 P, ECLI:EU:C:2009:610 (para 63)—GlaxoSmithKline Services; accord AG Kokott, ECJ, Case C-95/04 P, ECLI:EU:C:2006:133 (para 68)—British Airways; from the literature Immenga and Mestmäcker, In: Immenga and Mestmäcker (2012), Einl EU D para 15.

⁴⁴ Commission Communication—Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11, p. 1, last amended by OJ 2011 C 172, p. 22.

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in demand into account through constant changes in products offered without profound detrimental effects on employment or production. Adjustment to output by means of competition not only ensures improvement in individual circumstances but also in the economic as a whole.⁴⁵

- 21 Competition enables the concentration of production where it may be carried out most efficiently and thus has the allocation function as its central component.⁴⁶ It ensures the allocation of production factors amongst different purposes at the best-possible terms and conditions. Competition permits scarce resources to be used for those purposes which may most effectively be achieved at the place where they are located without the need to reduce production of another good in sum. Redistribution based on this standard results in an increase in welfare. This results in the so-called Pareto optimum.⁴⁷

1.1.4 *Distortion-Free Competition*

1.1.4.1 Independent Function

- 22 In this regard, the decisive factor is the protection of competition from distortions⁴⁸ which disrupt this natural, self-optimising process. This core component of the rules on competition not only has a supporting function with regard to market integration but has intrinsic value in the context of freedom of competition itself. Originally only intended as a supplement to the fundamental freedoms in order to protect them not only from state actions but also privately-erected market barriers and thus primarily in support of opening markets,⁴⁹ competition is coming to the fore as a defining characteristic in the face of increasingly open markets. It structures economic life within a consolidating market⁵⁰ and thus comprises an economic ordering principle in order to create a uniform framework across Europe.⁵¹ This has resulted in emancipation in this respect.⁵²

⁴⁵ Schröter, In: Schröter et al. (2014), Vorbemerkungen zu Art. 101–109 AEUV para 16 with a reference to the first report on the Commission's competition policy from 1971, introduction p. 11 et seq.

⁴⁶ See Schmidbauer (1974), p. 32 et seq.

⁴⁷ See I. Schmidt (2012), p. 9; on the issue of fairness and efficiency, see Rüthers et al. (2011), paras 38 et seq.; on the importance of fundamental freedoms, cf. Frenz (2012a), paras 12 et seq.

⁴⁸ See e.g. ECJ, Case C-209/10, ECLI:EU:C:2012:172—Post Danmark; ECJ, Case C-6/72, ECLI:EU:C:1973:22 (paras 25 et seq.)—Continental Can, referring to the objective of Art. 3 (then lit. f) EEC Treaty).

⁴⁹ For a detailed discussion, see Mestmäcker (1965), p. 363 et seq. In this context, see ECJ, Case C-56 and 58/64, ECLI:EU:C:1966:41 (343 et seq.)—Consten und Grundig.

⁵⁰ Schubert (1999), p. 217 as well as a similar interpretation Ullrich (1992), p. 613.

⁵¹ Caspari (1989), p. 16 et seq. cf. also Ehlermann (1992), p. 7.

⁵² Nowak (2004a), p. 80; additional discussion Baquero Cruz (2002), p. 98 et seq.



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