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How consistent is the policy of promoting an open market economy with free competition?

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Introduction

Article 119 TFEU:

The Union shall conduct an economic policy “in accordance with the principle of an open market economy with free competition.”

In a market economy, economic decisions are, as a matter of principle, made by free enterprises competing with each other.

Production of goods and services directed by laws of supply and demand.

All this sounds good to the ears of competition policymakers.

But how is said rule implemented in other fields of European law?

I. General

1. Two goal approach in the EU

Protection of competition.

Fostering market integration (impact on dealing with vertical restraints).

2. Harvard vs Chicago (and related theories)

Securing competitive market structures because they would lead to good results; preparedness to intervene rather easily.

Vs.

Trust in market forces, no short-term interventions, state as the worst distorter of competition, reliance on long-term development.

I. General

“Competition puts businesses under constant pressure to offer the best possible range of goods at the best possible prices, because if they don't, consumers have the choice to buy elsewhere. In a free market, business should be a competitive game with consumers as the beneficiaries.” (EU Commission.)

Competition is good for:

Economic growth,

Productivity,

Creativity and innovation,

Increased standards of living,

Poverty reduction, etc.



II. Market economy

1. Freedom of contract vs consumer protection

Freedom of contract leads to optimal allocation of risks and resources.

Theory of Walter Schmidt-Rimpler: “Guarantee of equity” of the contract if equal partners face each other.

Unjustified consumer protection is bad for competition.

Example: Trade in **second-hand life insurances policies**.

EFTA Court E-15/15 and E-16/15 *Swiss Life and Vienna Life*.

Commission and EFTA Surveillance Authority: Certain consumer protection rules of EEA law should apply.

EFTA Court: No; tax-motivated form of investment.

Cf. Austrian Supreme Court 7 Ob 226/09z.

II. Market economy

2. Image of man

German sleepy *Lieschen Müller* ('Lizzie Miller') who needs utmost protection against all sorts of risks?

English man on the Clapham omnibus, an ordinary person, reasonably educated and intelligent?

If Lizzi Miller: Tendency to restrict competition.

Example: Is a **sophisticated website** a "durable medium"?

EFTA Court E-4/09 *Inconsult*.

Yes, if

- customer can store relevant information;
- information is accessible as long as it is relevant to safeguard interests;
- website enables the stored information to be reproduced unchanged.

II. Market economy

2. Image of man

ECJ C-49/11 *Content Services*:

Consumer should be able to remain completely passive in the transmission of the information.

AG Mengozzi:

Clicking on a hyperlink is “an entirely commonplace action, within the capability of any internet user” [....].

However, “not all users are in a position to understand, when the contract is concluded, that they need to click on the link in order to be able, should the need arise, to protect their own rights better in the future.” (Para. 33.)

Risk of opening the gates to possible abuses.

ECJ C-375/15 *BAWAG*: Moves in the direction of *Inconsult*.

II. Market economy

3. Principle of liability – Avoiding moral hazard

(1) EFTA Court E-18/11 *Icesave I*

No liability of a State for inability of its Deposit Guarantee Fund to pay in a systemic crisis under Directive 94/19/EC.

Statutory interpretation.

Policywise: Reference to Rec. 16 of the preamble to the Directive, which states that deposit insurance could in some cases promote unsound management of credit institutions.

“This points to the concept of moral hazard. [...] Professor Joseph E. Stiglitz has formulated in this respect: ‘[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions’ [...]” (para 167).

II. Market economy

3. Principle of liability – Avoiding moral hazard

(2) ECJ C-62/14 *Gauweiler*

European Central Bank's OMT ("Outright Monetary Transactions") programme found to be lawful by the Grand Chamber.

Scheme to buy potentially unlimited amounts of government bonds.

First reference in history by the German Constitutional Court.

Constitutional Court gave detailed description of motives which had prompted them to make the reference and indicated misgivings in particular concerning the compatibility of OMT with German budgetary sovereignty.

II. Market economy

3. Principle of liability – Avoiding moral hazard

(2) ECJ C-62/14 *Gauweiler*

Mr. Gauweiler spoke of a “declaration of war”.

German Constitutional Court on 16 June 2015:

Judgment gives rise to weighty objections with regard to the collection of the facts, the principle of limited conferral, and the judicial control of the European Central Bank in determining its mandate.

There was a lack of an “overall view”, the ECJ generously accepted alleged objectives of the euro rescue operations of the ECB and other points remained “without an answer”.

The Constitutional Court nevertheless followed the ECJ’s ruling.

AG Cruz Villalon had discussed moral hazard in a cautious way.

II. Market economy

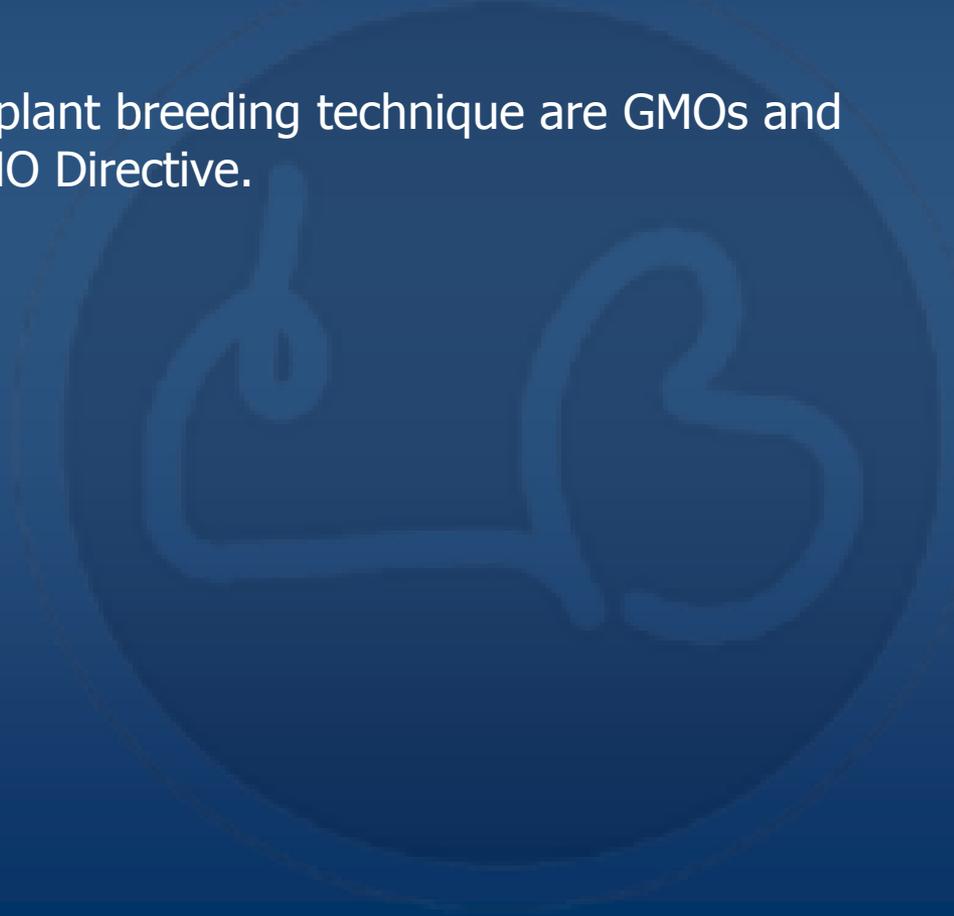
4. Obstruction of innovation

ECJ Grand Chamber of 15 July 2018 in C-528/16 *Confédération paysanne and Others v Premier ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt*:

Organisms obtained by mutagenesis plant breeding technique are GMOs and should, in principle, fall under the GMO Directive.

Contrary to AG Bobek's opinion.

Bad for innovation and investment.



III. State economy

To what extent do market economy principles apply?

Example **public procurement**

§ 337 (1) Austrian Public Procurement Act:

“Damage claims

In the event of a sufficiently qualified violation of this Federal Act or the ordinances issued on the basis of this Federal Act by bodies of the contracting authority or an awarding authority, a candidate or tenderer who has been passed over and to whom the conduct of the bodies is attributable shall be entitled to reimbursement of the costs of preparing the tender and the costs of participation in the award procedure.”

III. State economy

Example **public procurement**

ECJ C-314/09 *Strabag*:

A simple breach of European public procurement rules may be sufficient.

ECJ C-568/08 *Combinatie*:

A sufficiently serious breach is required; State liability rules apply.

UK Supreme Court *EnergySolutions v NDA* ([2017] UKSC 34): A sufficiently serious breach is required; no reference to the ECJ for a preliminary ruling.

EFTA Court E-16/16 *Fosen-Linjen*: A simple breach may be sufficient to trigger the liability of the contracting authority.

Walter Eucken: Principle of liability is a constituent principle of a market economy.

Avoiding moral hazard.

IV. Collective bargaining and industrial action

Where are the **limits to immunity** from competition law?

1. ECJ C-67/96 *Albany*

AG Jacobs: There are limits

ECJ: No limits discussed.

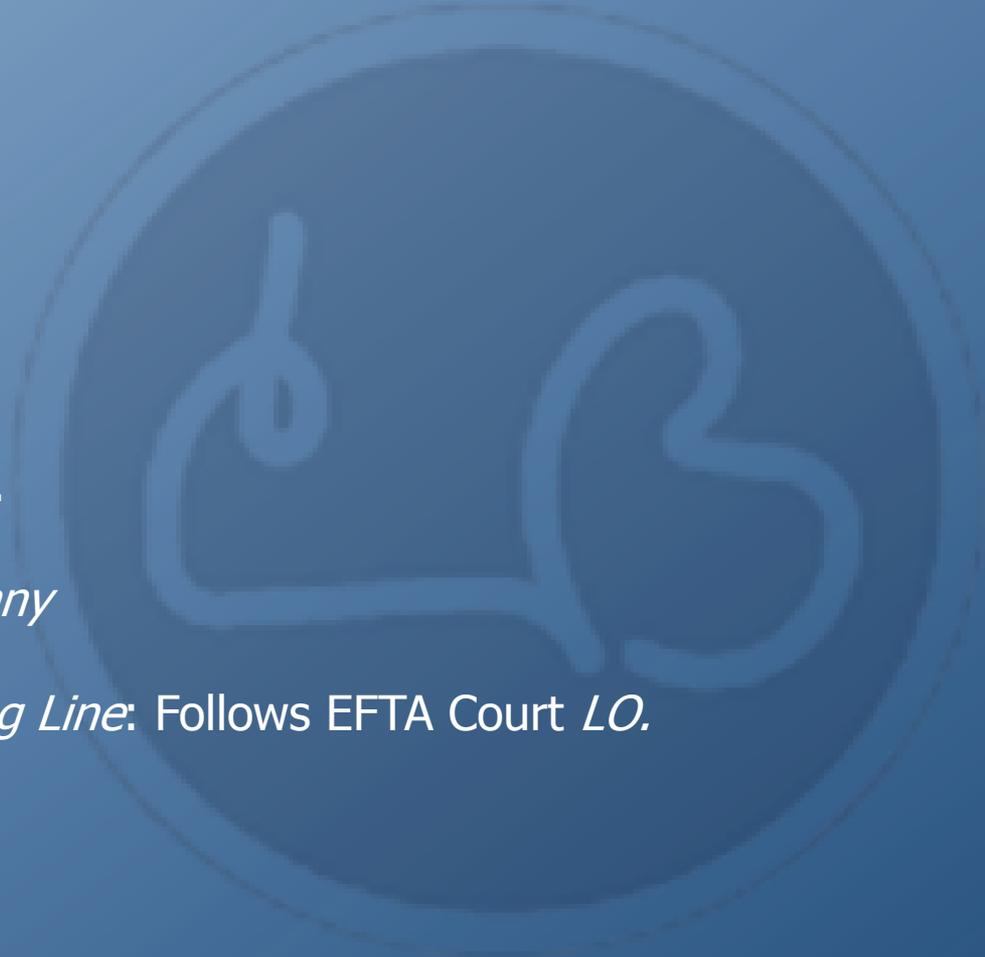
2. EFTA Court E-8/00 *LO*

Commission: Only marginal test.

EFTA Surveillance Authority: Full test.

EFTA Court follows AG Jacobs in *Albany*

3. AG Poiares Maduro C-438/05 *Viking Line*: Follows EFTA Court *LO*.



IV. Collective bargaining and industrial action

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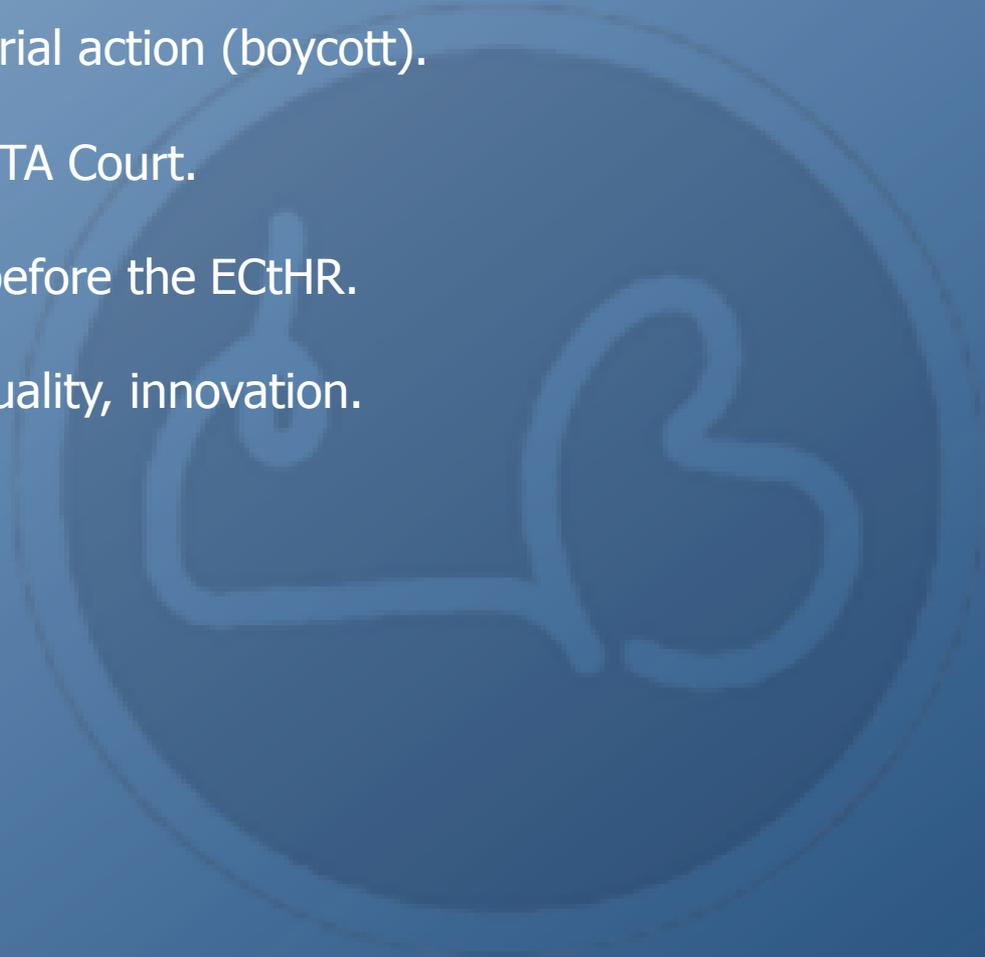
4. EFTA Court E-14/15 *Holship*

LO confirmed and extended to industrial action (boycott).

Norwegian Supreme Court follows EFTA Court.

Unions bring action against Norway before the ECtHR.

Restriction of trade, bad for prices, quality, innovation.



V. Fortress Europe vis-à-vis third countries

1. Market partitioning based on trade marks

Do Member States have the right to opt for **international exhaustion** of trade mark rights?

Before enactment of 1989 Trade Mark Directive: Yes.

After enactment of 1989 Trade Mark Directive:

- EFTA Court E-2/97 *Maglite*: Yes (free trade, competition, consumers).
- Grand Chamber ECJ E-355/96 *Silhouette*: No (protection of the single market).
- EFTA Court E-9/07 and 10/07 *L'Oréal*: No.

Restriction of trade, bad for prices, quality, innovation.

V. Fortress Europe vis-à-vis third countries

2. Excluding third country **financial operators** from the EEA market

Article 63 (1) AEUV prohibits all restrictions on capital movement between Member States and between Member States and third countries.

C-452/04 *Fidium Finanz*:

Swiss financial corporation offered credits in Germany.

Frankfurt court: Do provisions on free movement of capital apply?

AG Stix-Hackl: Yes.

Grand Chamber ECJ: Freedom to provide services and free movement of capital are affected.

Predominant consideration is freedom to provide services. No third country clause.

Third country operators excluded.

V. Fortress Europe vis-à-vis third countries

2. Excluding third country **financial operators** from the EEA market

C-630/17 *Milivojević* (pending):

Question of the Rijeka Court:

Are provisions of a 2017 Croatian law on the nullity of loan contracts with international features concluded in the Republic of Croatia with an unauthorised creditor precluded by the freedom to provide services and the free movement of capital?

Croatian nullity law directed against Austrian mortgage banks.

Freedom to provide services and free movement of capital?

Does *Fidium Finanz* apply?

No third country element in the case.

VI. Framework conditions of judging in Luxembourg

Focus on administrative enforcement with judicial review.

Adolf Menzel, 1894, 1902:

“The solution to the problem of noxious cartels cannot be found either in private law or in criminal law; in our opinion, it lies in an administrative regulation of business associations.”

Problem: Scope of judicial review.

Composition of the European courts (appointment for a term with the possibility of re-appointment; strong role of governments).

Currently pending: *Apple* and *Google* cases.

VI. Framework conditions of judging in Luxembourg

Roger P. Alford, U.S. Deputy Assistant Attorney General Antitrust, while being a Harvard professor:

When compared with the judgments of other international tribunals and of the US Supreme Court, the judgments of the ECJ are of inferior quality.

The ECJ “offers the worst of all worlds: short, deductive judgments rendered by a court with too many members [...] that prohibits concurrences or dissents.”

Accusations of US Presidents:

Trump: The Commission’s 4.3 billion fine imposed on Google is an unacceptable attack on an American company.

Obama: Europeans cannot keep up with the companies in Silicon Valley and therefore use the weapon of competition law.

VII. Competition advocacy

Antitrust law alone will not help unless regulation in general is competition-friendly; in other words, not all salvation comes from competition law.

Notion of competition advocacy.

Application outside of competition law.

Practical examples.

This very Competition Day serves this purpose.

Austria, like Switzerland, is not a country with a long-standing competition policy tradition.

Corporatism.

And yet there has been huge progress and a competition community has emerged.

