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Historical and contextual position of fairness in substantive EU competition law

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Historically, 'fairness' played an ambiguous role.



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- **Spaak Report** (1956): ensuring that undertakings observe the rules of '**fair competition**' is one of the necessary practical measures for the establishment and operation of the common market.
- In the interests of producers themselves and in order to afford them the necessary security, there has to be some direct method of enforcing the rules of '**fair competition.**' (ibid)
- But, see also: '[o]ne of the essential guarantees which must be given to enterprises is that there will be no **unfair competition** as a result of artificial advantages being given to their competitors. Any assistance given by governments must therefore be very closely examined. ... As a general rule, whatever form assistance may take, it will be incompatible with a common market if it is prejudicial to fair competition and the distribution of activity by favouring particular enterprises or branches of production.' (ibid)
- *Fair competition' is **not** about preventing **unfair competition** against competitors, but about undertakings not being disadvantaged due to advantages given to their competitors by governments. le **state aid.***

Drafters were well aware of difference between 'unfair competition' rules and 'competition law'.



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- 'It has been proposed within ... the rules for cartels and monopolies, to announce,, cartel or monopoly situations or practices as incompatible with the common market when they have the aim or could have the effect of hindering the exercise of competition in that they facilitate the **absorption or domination of the market** ... by a single or a group of undertaking(s). ... The proposed rule appears perhaps to be directed at practices by which the rival undertakings are **excluded** out of the market. Such practices, however, consist in not the restriction, but rather the **strengthening of competition** and therefore are to be combated only when it is a matter of unfair competition. However, if rules applying to **unfair competition** are to be included in the Treaty, ... they should be separated from the rules on the maintenance of competition.' (20/10/1956, Note of von der Groeben) (Akman, OJLS, 2009; Akman, Hart, 2012)

Fair competition versus free competition



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- *See also* von der Groeben (16/6/1965): undertakings require that competition is conducted ‘fairly’, that it is not distorted artificially by state aid, differential taxation and different commercial laws; they require that equality of opportunity is established and ensured.
- Basic duty of the EC is to accomplish such an economic order that would optimally advance **wealth and economic freedom, and thereby also serve the consumer** (ibid).

Fair competition versus free competition – the ordoliberal dilemma



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Boehm, Eucken and Grossmann-Doerth, *The Ordo Manifesto of 1936*:

‘**Free competition** must not be stopped on the erroneous grounds of alleged unfair practice. On the other hand, it must not be allowed to degenerate into truly **unfair competition** either. How the line is to be drawn between unfair and permissible competition, whether competition is restricted, whether competition is efficient or obstructive, whether or not price-cutting contradicts the principle of the system-all these issues can only be decided by investigations conducted by economists into the various states of the market. The collaboration of [law and economics], which in this respect still leaves much to be desired, is clearly essential.’

(Where) Has the line been drawn?

There is an underlying element of fairness in the prohibition of Article 102 TFEU.



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- Preamble of TFEU calls for removal of obstacles to guarantee ***fair* competition**.
- Article 102(a) TFEU explicitly prohibits ‘**unfair**’ prices and ‘**unfair**’ trading conditions.
- Article 102(c) TFEU prohibits **discrimination**, which can be viewed as ‘unfair’ on one understanding of ‘fairness’ (ie as equality).
- *Yet, we have a definition of neither ‘fair’ nor ‘unfair’ in this context.*

Decisional practice interprets 'fairness' in different ways in different situations.



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- Restrictions going beyond what is absolutely necessary to achieve one party's objectives and unfairly encroaching on the copyright holder's freedom to exercise the right (*SABAM*) – fairness requires **balancing of rights and obligations**;
- Imposing conditions on competitors not imposed on one's self for the same operations - **discrimination** (*Telemarketing*);
- Commercial term that fails to comply with the principle of **proportionality** (EC *DSD*);
- **Oppressiveness and one-sidedness** of contract term (*Alsatef*);
- Michelin's discount system was unfair because, *inter alia*, '... not only because the dealers were placed in a **weak psychological position** during negotiations, but also because, during the negotiations, they were not able to base themselves on a reliable estimate of their cost prices and thus determine their **business strategy freely**.' (EC, *Michelin II*, [223])

‘Fairness’ – neither here nor there?



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- **Fairness to competitors?** Comes close to prohibition of ‘unfair competition’.
- CoJ: some rules of unfair competition law themselves may be anticompetitive (*Yves Rocher*, [22]).
- **Fairness to customers or consumers?** Interests not always aligned (Akman, JLS, 2010).
- **Fairness to competitors and to customers/consumers?** Might be impossible to achieve concurrently.
- **Fairness to customers?** Article 102 expressly aimed at ‘situations which clearly originate in contractual relations’ (*Hoffmann-La Roche*, [116]).
- **Unfair \approx exploitative?** (see Akman (Hart, 2012) for exploitation being a necessary requirement on top of exclusion and lack of an increase inefficiency).

Adopting fairness as a stand alone policy or enforcement goal should be avoided.



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- **Legal certainty** is a fundamental principle of EU law.
- ‘Principles of fairness and justice are extraneous to competition law: **the lion eats the deer**’ (van der Woude, 2008).
- **Fairness vs Welfare** - legal rules should be selected entirely with respect to their effects on the wellbeing of individuals and **notions of ‘fairness’ should receive no independent weight in the assessment** (Kaplow and Shavell, 2002).
- Potential clash with other policy goals – eg efficiency, competitiveness, etc.
- **Subjectivity & arbitrariness** – prone to manipulation to include political interests, populist views, etc.
- Potential for ‘fairness’ imperative to push competition law into ‘unfair competition law’.
- ‘Most of the time, we get **consumers a fairer deal** by keeping markets competitive...’ (Vestager, 2016)