

Economic Approach in Competition Cases

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Overview

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I. Ensuring freedom to compete or consumer welfare as purpose of competition law – does it matter?

Purpose of competition law

Traditional concept



**Ensuring the firms freedom to compete (purpose of law).
freedom to compete leads to**

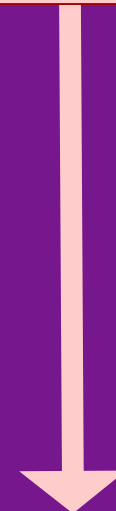


**Competition
competition leads to**



**an efficient allocation of
resources and by that to
consumer welfare**

**Concept of the
„more economic approach“**



**Ensuring efficiency and by
that consumer welfare**

Example

A manufacturer imposes Resale Price Maintenance on his dealers.

The authority/court needs to evaluate:

**Traditional
concept**



Will RPM lead to an illegal restriction of the dealers freedom to compete?

**Concept of the
„more economic
approach“**



Will RPM lead to an increase or a decrease of efficiency or consumer welfare?

II. Actual situation in U.S., EU and Swiss law

II. Actual situation in U.S., EU and Swiss law (1)

1. U.S., EU and Swiss law

According to constitutional as well as statutory law the purpose of competition law is to protect the freedom to compete and not to promote consumer welfare *directly by competition law*.

The decisive adjudication principle is an undue competition restriction and not consumer welfare.

II. Actual situation in U.S., EU and Swiss law (2)

2. Powers of the judiciary to change the law?

The legal situation in the U.S.A., the EU and Switzerland is clear.

Therefore the courts or other adjudicative bodies may not change the ruling law by interpreting or developing the law: competition restrictions as decisive adjudication principle may not be exchanged by consumer welfare.

III. Changing the ruling law?

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1. Enhancing consumer welfare as purpose of the law – consequences

- Only conduct of firms with a negative impact on consumer welfare would be outlawed
- Conduct of firms with a positive or neutral impact on consumer welfare would consequently be legal
- Restrictions of the freedom to compete would not necessarily be taken into account

III. Changing the ruling law?

2. Arguments in favour of protecting freedom to compete

a) **Freedom to compete is a fundamental right**

People want to have the freedom to compete. In practical cases infringements of this right have to be taken into consideration and eventually outlawed. Not to do this would be a denial of justice.

b) **Free competition is in the public interest**

Out of experience and "proven" by other economic theories¹ it is known that free competition on markets promotes the common welfare far better than a result-oriented approach.

A result-oriented approach was and still is applied in socialist societies!

III. Changing the ruling law?

1. Arguments against guaranteeing the standard of consumer welfare (1)

a) Instrumentalisation of freedom (1)

According to the more economic approach, the freedom to compete should be used in order to promote consumer welfare. Such instrumentalisations of fundamental rights have been practised in socialist countries. For example, the Constitution of the German Democratic Republic of 1968/74 stated:

In Article 19 § 3: Every "citizen has the equal rights and manifold opportunities to develop his abilities (...), in free decision, *for the welfare of society* and for his own benefit".

III. Changing the ruling law?

2. Arguments against guaranteeing the standard of consumer welfare (2)

a) Instrumentalisation of freedom (2)

Instrumentalisations are inconsistent with the concept of freedom: If competitors have to compete *in order to promote consumer welfare* they cannot compete as they want to.

In other words:

- If people are to be free, one cannot order them how to use their freedom; only a certain use of their freedom can be outlawed
- The use of fundamental rights may not be restricted by the setting of goals but only by outlawing certain kinds of conduct.

III. Changing the ruling law?

2. Arguments against guaranteeing the standard of consumer welfare (3)

b) Assessing the future impact of conduct on markets is not possible!

- On markets thousands of actors intervene. Their conduct is interdependent. Their reaction on the conduct of others varies.
- Sound economic theory therefore teaches that the impact of conduct of single firms on real markets cannot be foreseen (Hayek).
- The impact of single firms' actual conduct on consumer welfare in the future cannot be known at the time of adjudication.

III. Changing the ruling law?

2. Arguments against guaranteeing the standard of consumer welfare (4)

c) Consumer welfare as legal term lacks of precision.

Its use violates the legal doctrine of clearly definable legal terms.

It raises **business uncertainty** as decisions become less predictable.

III. Changing the ruling law?

2. Arguments against guaranteeing the standard of consumer welfare (5)

d) Limitations of the scope of competition law (1)

The scope of competition law will be limited because:
In the field of control of cartels and abusive practices

- welfare losses can be predicted and proved with „adequate certainty“ only in very few cases
- in all other cases there will be no decision

III. Changing the ruling law?

2. Arguments against guaranteeing the standard of consumer welfare (6)

d) Limitations of the scope of competition law (2)

Nondecisions

- Lead to problems, especially for 3rd parties.
- Are in favor of the firms that the rules were designed for, they are often in favour of big business.
- They mostly cause costs for 3rd parties, particularly for
 - obstructed competing firms
 - consumers.

III. Changing the ruling law?

2. Arguments against guaranteeing the standard of consumer welfare (7)

e) Raise of enforcement costs

The use of the concept of consumer welfare in legal practice started in the 1980s in the U.S.A.

Since then budgets and expenditures of competition authorities as well as consultant costs increased rapidly.

IV. Conclusion

The outlined reasons lead to the following conclusions:

- The protection of the freedom to compete should remain the purpose of the law;
- restrictions of the freedom to compete should remain the decisive adjudication principle;
- efficiency arguments should only have supporting function, especially in merger cases.