



# **E. Introduction to the Protection of Competition in German and European Law**

Vorlesung

Grundlagen des privaten Wirtschaftsrechts-

Grundbegriffe des Wettbewerbsrechts

Sommersemester 2024



## E. Protection of Competition – an Introduction

### I. Terminology

1. Competition law in a larger sense
2. Competition law and Law against Unfair Competition
3. Competition law and Antitrust law



## E. Protection of Competition – an Introduction

### I. Terminology

### II. Development of Competition law

#### 1. Combating unfair competition

- a) Act Against Unfair Competition 1896
- b) Act Against Unfair Competition 1909
- c) Act Against Unfair Competition 2004
- d) Amendments of 2008/2015/2021



## E. Protection of Competition – an Introduction

### I. Terminology

### II. Development of Competition law

1. Combating unfair competition
2. Combating restraints of competition
  - a) Cartel Regulation 1923



## E. Protection of Competition – an Introduction

### I. Terminology

### II. Development of Competition law

1. Combating unfair competition
2. Combating restraints of competition

**Case 1:** In the late 1920s the operator of a gas station in Benrath had refused to set his prices in line with the practice of the „Convention“, which was a cartel of suppliers of car fuels and operators of gas stations. As a consequence the „Convention“ reduced their prices and undercut the prices of the outsider, but only within the village of Benrath to force him to join the cartel. (RGZ 134, 342)



## E. Protection of Competition – an Introduction

### I. Terminology

### II. Development of Competition law

1. Combating unfair competition
2. Combating restraints of competition
  - a) Cartel Regulation 1923
  - b) Compulsory cartelization of German Economy 1933
  - c) Post-war Decartelization of German Economy
    - (1) „At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic powers as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements.“ (No. 12 of the Potsdam Agreement of 06-05-1945)
    - (2) Antitrust Law enforced by Allied Forces



## E. Protection of Competition – an Introduction

### I. Terminology

### II. Development of Competition law

1. Combating unfair competition
2. Combating restraints of competition
  - a) Cartel Regulation 1923
  - b) Compulsory cartelization of German Economy 1933
  - c) Post-war Decartelization of German Economy
  - d) Act Against Restraints of Competition (ARC) 1958
    - (1) Merger control since 1973
    - (2) Directly applicable prohibition of unilateral abuses since 1998
    - (3) Adaptation to EU procedural law in 2005
  - e) Articles 85 ff. Treaty Establishing the European Economic Community 1958
    - (1) Merger control since 1989
    - (2) Directly applicable exemption under Art. 81 para. 3 EC (now Art. 101 para. 3 TFEU) since 2004



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

#### 1. European Competition law

- Provisions in the Treaty directly applicable by their nature
- Own administration by EU bodies: Directorate General Competition (“DG Comp”) acting as a competition authority
- Structure governed by Art. 101 ff. TFEU
- Important complementary provisions contained in
  - Merger Regulation No. 139/2004
  - Enforcement Regulation No. 1/2003
  - Various block exemptions issued as regulations





## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

#### 1. European Competition law

- Model of competition and goals of EU Competition law
  - no direct relation with any particular theory of competition
    - Sometimes ordo-liberal approach has been identified
    - ECJ typically relates to “effective” competition, translated sometimes into German as “wirksamer Wettbewerb”, however technically different from “workable” competition as used in economic theory



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

#### 1. European Competition law

- Model of competition and goals of EU Competition law

##### (1) Assaults at the Single Market goal

- » ECJ – *Consten und Grundig* 1966
- » ECJ – *Syfait II* 2008



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

#### 1. European Competition law

- Model of competition and goals of EU Competition law
  - (1) Assaults at the Single Market goal
  - (2) Assaults at the functional conditions of competition
    - i. Consumers' autonomy
    - ii. Market transparency
    - iii. Artificial barriers to market entry



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

#### 1. European Competition law

- Model of competition and goals of EU Competition law
- Efficiency goal
  - Article 101 para. 3 TFEU
  - Merger Regulation 2004
  - Article 102 TFEU and Commission's Communication of 02-09-2009, COM (2009) 864 final: consideration of efficiencies in analogy with Article 101 para. 3 TFEU



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

#### 1. European Competition law

- Model of competition and goals of EU Competition law
- Efficiency goal
- Further aspects: Competition law and specific consumer protection
- Protection of Digital Platform Markets
  - Platform-to-Business Regulation 2019
  - Digital Markets Act 2022 entered into force in March 2024



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

1. European Competition law
2. German Competition law
  - a) structurally adapted to the pattern of European Competition law
    - (1) Identical test for anti-competitive mergers since 1989 (except 2005-2013)
    - (2) Directly applicable prohibition of unilateral abuses in sec. 19 ARC since 1998
    - (3) Single fact pattern for agreements in restraint of competition within horizontal and vertical relations since 2005
    - (4) Analogous assessment of agreements in restraint of competition since 2005
    - (5) Analogous use of European exemptions since 2005



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

1. European Competition law
2. German Competition law
  - a) structurally adapted to the pattern of European Competition law
  - b) But:
    - (1) more extensive control of unilateral conduct in secs. 18 ff. ARC; possible on the basis of Art. 3 para. 2 cl. 2 Enforcement Reg.
    - (2) New sec. 19a ARC on the same grounds



## E. Protection of Competition – an Introduction

### III. Basics on German and European Competition law

1. European Competition law
2. German Competition law
3. Structure of rules on competition applying to undertakings

	<b>Restraints by horizontal agreements</b>	<b>Restraints by vertical agreements</b>	<b>Abuse of a dominant position</b>	<b>Merger control</b>
<b>EU</b>	Art. 101 TFEU	Art. 101 TFEU	Art. 102 TFEU	Art. 102 TFEU, Merger Regulation
<b>DE</b>	Secs. 1-3 ARC	Secs. 1, 2 ARC	Secs. 18 ff. ARC	Secs. 35 ff. ARC





## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

#### 1. German Law against unfair competition

##### a) Development

##### (1) French roots

In the 1840s a French producer of mineral water marketed his mineral water in bottles of a similar shape and carrying similar labels and caps as the mineral water of another producer. (Cour d'appel de Lyon, 21.8.1851, D. 1854, 2, 266)



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

#### 1. German Law against unfair competition

##### a) Development

- (1) French roots in general Tort law
- (2) Specific problems of Tort law in Germany led to ...
- (3) ... the promulgation of specific Acts against unfair competition

##### (AUC)

- i. AUC 1896
- ii. AUC 1909
- iii. Act on Rebates; Regulation on give-aways 1932



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

#### 1. German Law against unfair competition

##### a) Development

- (1) French roots
- (2) Specific problems of Tort law in Germany
- (3) Promulgation of specific Acts against unfair competition (AUC)
- (4) Development of case lines by the courts and doctrine
- (5) Implementation of UCP Directive 2008/2015/2021



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

#### 1. German Law against unfair competition

##### a) Development

##### b) Protective purposes

##### – „Triple action“

- Protection of competitors
- Protection of opposite market side, in particular consumers
- Protection of the public interest in undistorted competition



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

#### 1. German Law against unfair competition

a) Development

b) Protective purposes

- „Triple action“
- Cf. Sec. 1 para. 1 AUC



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

#### 1. German Law against unfair competition

a) Development

b) Protective purposes

c) Integrated model of Competition law

(1) Fact patterns protecting consumers against misleading or aggressive commercial practices

(2) Fact patterns protecting non-consumers against misleading or aggressive commercial practices of trade partners

(3) Fact patterns protecting non-consumers against exploitative or obstructive commercial practices of competitors



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

1. German Law against unfair competition
2. European Law against unfair competition
  - a) Failure of early efforts of full harmonization
  - b) Directive on misleading advertising (1984) and comparative advertising (1997)
  - c) Use of fundamental freedoms (movement of goods and services): ECJ – *Dassonville*, *Cassis-de-Dijon*, *Keck*
  - d) „piecemeal approach“
  - e) Principle of mutual recognition in E-Commerce Directive serving as catalyst



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  - e) Principle of mutual recognition in E-Commerce Directive
  - f) Directive 2005/29 on unfair commercial practices („UCP Directive; UCPD“





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  - c) Use of fundamental freedoms
  - d) „piecemeal approach“
  - e) Principle of mutual recognition in E-Commerce Directive
  - f) Directive 2005/29 on unfair commercial practices („UCP Directive; UCPD“)
    - (1) Limited scope of application: business-to-consumer, but total harmonization
    - (2) General clause
    - (3) Concretizations for misleading and aggressive practices
    - (4) Black list



## E. Protection of Competition – an Introduction

### IV. Basics on German and European Law against unfair competition

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  - c) Use of fundamental freedoms
  - d) „piecemeal approach“
  - e) Principle of mutual recognition in E-Commerce Directive
  - f) Directive 2005/29 on unfair commercial practices („UCP Directive; UCPD“)
  - g) Harmonization of Enforcement
    - (1) Directive on injunctions 1998/2009 and representative actions 2020
    - (2) Regulation on co-operation in consumer protection („CPC Reg.“) 2004/2017
    - (3) Individual rights of consumers as of 2022
    - (4) Administrative enforcement including fines as of 2022

