MARKET LAW AS A LEGAL DISCIPLINE

BY

ULF BERNITZ

Professor of Private Law,
University of Stockholm

1. INTRODUCTION

The Scandinavian countries, like other western industrialized nations, have a decentralized economic system. We have a market economy which presumes that production and distribution are directed by decisions made by a large number of firms and individuals. We assume the right of private ownership as the basis of this system, and this makes it possible for firms and individuals to dispose individually and independently of economic resources. We allow many different forms for the ownership of enterprises—sole proprietorships, corporations and partnerships of different types, cooperative and other associations, foundations, etc. It is also possible for municipalities or the state to own and operate enterprises in private forms. Society, however, by means of legislation and other control measures, has drawn up a framework for business decision-making which has come to form an ever finer-meshed net of public direction and control. We have thereby created an economic system which, while it continues to rely on dispersed ownership and competition, differs greatly from the pure market economy. We have also come to see more and more direct public intervention.

This modified market economy of today is, like any other economic system, e.g. the system of the Soviet Union or of Yugoslavia, based on a legal system. The legal rules draw up the basic framework for the economic activities in the market. Some of the features of this legal system and its interplay with the structure of the economic system are the subject of this paper. I shall try to systematize the basic framework of rules in today's modified market economy and to present it as a functionally coherent system—*market law.*[1]

[1] This paper is partly based upon the ideas first presented in chap. 1 of my treatise *Marknadsrätt. En komparativ studie av marknadslagstiftningens utveckling och huvudlinjer* (Market Law. A Comparative Study of the Development and Principles of Market Legislation; with an English summary), Stockholm 1969. Based on this treatise I have published earlier the articles "Harmonization and Co-ordination of Market Legislation: The Concept of Market Law", in *International Conference on Monopolies, Mergers, and Restrictive Practices, Papers and Reports* (Cambridge 1969), Her Majesty's Stationery Office, London 1971, pp. 71 ff., and "Harmonisation et coordination de la législation du marché. La notion de droit du marché", *Rev. trim. dr. com.* 1971, pp. 1 ff. Both articles contain extensive footnote references. During the past few years, Scandinavian market legislation has increased rapidly and I have had many opportunities to discuss, revise and develop my ideas, *inter alia* in seminars and colloquies on

2. THE FUNDAMENTAL "FREEDOMS" AS A BASIS

If we take a closer look at the decentralized economic system which constitutes the basis for the market economy, we find that it is supported by certain fundamental rights or "freedoms". One usually speaks in this context of two such freedoms: freedom of trade and freedom of contract. These "freedoms", however, are actually more complex than these two broad terms indicate. Seen from the enterprise's point of view, they consist primarily of free market entry, freedom to decide the location, direction and scope of the enterprise, freedom to compete with other enterprises, freedom to contract the terms of purchase and sale, and freedom to form corporations, associations and other business combinations. For consumers, the freedom of consumption is of primary importance. The freedom to choose one's profession and work should also be mentioned. In addition, there is the need for free movement over national frontiers (free export and import).

There are five rights or "freedoms" which seem to be particularly fundamental as a basis for the economic system, namely freedom of establishment, freedom of competition, freedom of consumption, freedom of contract and freedom of association. As a point of departure for the following discussion, the main features of these freedoms will now be outlined.

Freedom of Establishment

Freedom of establishment denotes freedom to enter a market and to carry on commercial activity there without having to obtain special permission from government authorities or other organizations of a public administrative nature. It is not possible to draw a clear dividing line between the actual decision to enter a market and the operation of the business, which, of course, demands consecutive decisions concerning expansions, reductions or other modifications of the aims and directions of the business. Implicit in freedom of establishment is a primary freedom to decide according to one's own choice on the location, initiation, aim, scope and cessation of the business. In countries based on a *market economy* the general rule is that full freedom of establishment prevails. Limitations on that freedom have, however, become more and more extensive, and are particularly so for foreign companies and citizens; in the case of these, often

law and economics. The text of the present paper is largely taken from my presentation of market law as a legal discipline in the concluding chapter of the comprehensive textbook Gundersen-Bernitz, *Norsk og internasjonal markedsrett* (Norwegian and International Market Law), Oslo 1977, pp. 514 ff.

stricter rules are applicable than to domestic companies and citizens. The extent of these limitations varies considerably, however, among the countries with market economies. From an international viewpoint freedom of establishment is still very extensive in the Scandinavian countries, with the exception of Norway, where restrictions on establishment are considerable. In most areas, it comprises a freedom for the individual to choose his profession.

Freedom of Competition

Freedom of competition means freedom to take part in the contest among enterprises to enter into contracts with parties on the other side of the market place. It implies the freedom to inflict economic injury on one's rivals and even the freedom to drive them out of business so that they disappear from the market. The infliction of such injury is thus normally not illegal, nor can it constitute the basis of a claim for damages. It is, however, a prerequisite that one should not employ methods of competition that the legal system regards as improper. It is primarily the marketing legislation which provides protection against improper methods of competition.

One should, however, conceive of the freedom of competition more broadly. Freedom of competition should include the freedom for the individual enterprise to take part in the competitive struggle on the basis of independent decisions made without the hindrance caused by actions in restraint of trade by other firms, such as boycotts or discriminatory measures. Thus, freedom of establishment and freedom of competition are closely connected. It can happen, for instance, that freedom of establishment prevails, in the sense that society has not raised any significant legal barriers to establishment, but that this freedom has been made illusory by extensive private restraints on competition in the form of control of entry and similar measures. This problem can, however, be met by means of legislation against restraint of trade (antitrust law).

It should be added that freedom of competition also presumes freedom of action for professional buyers, so that they may have access to, and the opportunity to choose from, whatever is available. Otherwise, the competitive opportunities for enterprises involved in distribution and processing are reduced. Freedom of competition is protected in this area primarily by the rules within the restrictive trade practice legislation dealing with refusals to deal and with price discrimination. In all Scandinavian countries we find today special legislation on restrictive trade practices.

The free movement over national borders, in the sense of basically free export and import opportunities, can be regarded as closely related to

freedom of competition. This is especially true for small countries, like the Scandinavian ones. Here competition in the national market from imported goods and the possibilities of engaging in export competition in foreign markets in many lines of industry play a more important role than the internal competition between domestic firms. The free movement over national borders will be discussed more closely in part 4, *infra*, under the heading International Market Law.

Freedom of Consumption

Freedom of consumption, i.e. the freedom of consumers to make an unrestricted choice on the market concerning the acquisition of goods and services, is also fundamental to the functioning of the market. Legal limitations on free consumer choice appear as reductions of the citizen's personal and economic freedom of action. Normally, therefore, society limits these restrictions, except in times of crisis, to what is required for the maintenance of public order, health and safety. Other values can play a role, however, something which is particularly noticeable with respect to liquor policy.

But in order for citizens to enjoy the full benefits of their freedom of consumption and at the same time to be able to influence the assortment of goods and services, it is necessary that they should have access to reliable and clear information on the existing assortment (consumer information). It is a task for legislation to support consumers in this respect. We can especially mention legislation against misleading advertising and other improper marketing methods, as well as legislation on labelling, price information, and other provisions on compulsory consumer information. Of importance here is also the legislation concerning control of product safety. Interestingly enough, all of the three basic types of provisions mentioned have been integrated into the new Swedish Marketing Practices Act of 1975.[2]

Freedom of Contract

Freedom of contract is another important part of the foundations of the market economy. The proper functioning of competition on the market assumes that freedom of contract prevails as the basic principle in order to have a full exchange of goods and monetary values between buyers and sellers. The primary function of the legal rules is to secure the proper fulfilment of contractual obligations.

[2] For detailed information, readers are particularly referred to Bernitz, "Consumer Protection: Aims, Methods, and Trends in Swedish Consumer Law", 20 *Sc.St.L.*, pp. 13 ff. (1976).

Normally, the legal rules do not prescribe positively the contents of the contracts. But freedom of contract cannot be thought of as unlimited. Public order, social considerations and similar reasons require that the legal system shall forbid completely certain forms of contract or provide for the possibility of adjusting unreasonable terms of contract. In the Scandinavian countries it is now accepted that a more extensive use of such adjustment of unreasonable terms should be allowed in consumer contracts than in contracts between businessmen.[3] In order to protect the typically weaker contracting party from unreasonable contract terms, private contract rules of a mandatory nature have been introduced in most countries in an increasing number of areas. With regard to the Scandinavian countries we can especially mention sea transport contracts, insurance contracts, contracts for rented dwellings, employment contracts, and more recently, consumer sales contracts. As a rule, however, the most important contract term is the price. In this respect, legislation on public control and unreasonable pricing can be of particular importance and, where strictly applied, can greatly reduce freedom of contract.

It should be noted that freedom of contract has *two sides* to it: on the one hand, the freedom to decide whether and with whom one will enter into a contract and, on the other, the freedom for the contracting parties to give the contract the contents upon which they can agree. Intervention in the first respect is expressed primarily in the rules on duty to contract, while intervention concerning the contract's content can be based on a number of different kinds of rules. Entering into the picture here is not only the mandatory legislation on contracts but also a number of special regulations of different types which have as their purpose to effect a restriction of the freedom to decide the contents of the contract. An expression of this is found in the phenomenon within the law of contracts by which, alongside the traditional division between factual and legal defects, a separate category is now being created for "disposition defects", i.e. defects which result from the fact that as a result of public regulation the contracting party lacks the presumed power to dispose over the property under the contract (e.g. where a transferred business lacks the necessary licence).

A certain antagonism exists between freedom of contract and freedom of competition. This antagonism results from the fact that freedom of contract, unless special prohibitory rules exist, also includes the freedom for enterprises to enter into anticompetitive agreements. In the first place, competition between companies collaborating in this manner may be lim-

[3] On this line of development, see Bernitz, "Consumer Protection and Standard Contracts", 17 *Sc.St.L.*, pp. 13 ff. (1973).

ited or excluded altogether. But competitive conditions are also affected for other enterprises, which can be placed in an untenable competitive situation in relation to the collaborating firms, as is the case with boycott actions. During the period of economic liberalism this opposition between freedom of contract and freedom of competition was generally underestimated, but in recent years it has attracted greater attention and is now a common theme in current discussion on the shaping of the law of restraint of trade. In the Scandinavian countries, as in other states based on market economies, the result has been a compromise. The legal starting point is still that competition-limiting agreements are fully valid between the parties, but because of the legislation on restraint of competition, the basic rule is increasingly coming to be that agreements significantly limiting competition cannot be upheld.

Freedom of Association

Freedom of association, i.e. the freedom to form corporations, associations, foundations and other business combinations, is often regarded as a self-evident proposition. It should be realized, however, that the freedom to form and operate joint stock companies without special permission first appeared during the 19th century, and the liberalism prevailing at that time adopted a critical, if not hostile, attitude towards the formation of associations both among businessmen and among employees. Nowadays, however, the freedom to form associations is a recognized part of economic freedom of action and has been so for a long time past.

The trend, as we all know, has gone strongly towards a collectivization of relations and forms of activity within industrial and commercial life. Particularly noticeable, of course, is the development in labour law, but corporate features are becoming apparent in an increasing number of other areas as well. Thus, trade associations have come to play an increasingly important role as negotiating representatives for the business community in relation to those authorities which administer the legislation. Characteristic of the Scandinavian countries is the fact that these organizations even nominate part of the membership of special judicial bodies. In Sweden, we can mention the Labour Court, the Market Court and the Housing Court.

Scope of Protection

The "freedoms" which have been outlined here can be characterized as emanating from the general freedom of movement and action in society. However, they cannot be upheld without modification even in an

economic system which strives to bring about a very great measure of freedom of action in the market place, and it is even less possible to do so in the modified market economies of today. However, they still play an important role as points of departure. The legal system drawing up the framework for the economy presupposes, generally speaking, the normal existence of these freedoms. Against this background, legislation concentrates on the restrictions and modifications regarded as needed.

In many countries there exist constitutional guarantees of varying strength for at least some of the freedoms discussed. The situation varies a great deal in this respect, however. As is well known, the scope of constitutional protection within the area is the subject of intense discussion in the German Federal Republic ("die Wirtschaftsverfassung").[4] As far as the Scandinavian countries are concerned, it can be stated that for the most part such constitutional protection is lacking, although the legal situation varies between the different countries. The most important protective factor seems to be the fact that more extensive restrictions of the freedoms require, as a rule, legal support in the form of legislation passed by Parliament. To a large extent, however, this legislation has been formed in such a way as to delegate the authority to decide on the details of implementation to the government or to state agencies. Under such conditions, the principle of legal support is considerably watered down.

3. THE MARKET LAW SYSTEM

The freedoms which we have just dealt with make up, together with the reservations mentioned regarding limitations and modifications in their scope, a basis for that part of our judicial system which sets norms for the conduct of business activity and the actions of undertakings in the market. As already mentioned in the Introduction (part 1, *supra*), a country's economic system is based upon, and functions within, its legal system.

The Legal Framework

The foundation of legal rules for the market place consists partly of legislation but also, to a great extent, of unwritten legal rules which form the basis for special regulations. Together, these rules make up the legal

[4] Cf., e.g., the classical study by Nipperdey, *Soziale Marktwirtschaft und Grundgesetz*, 3rd ed. Cologne etc. 1965, and the critical analysis by Reich, *Markt und Recht*, Hamburg 1977, chap. II.

area which I have chosen to call market law. Market law has as its purpose to draw up *the legal framework for the activity of undertakings in the market place by means of rules concerning primarily their establishment, marketing, competition, and production*. To a large extent these rules aim at consumer protection.

What is characteristic of the market-law rules is thus that they function as a *framework type of rules* which on a more general level guarantee, but also draw up the boundaries for, the freedom of action of firms in the market place. From these market-law rules one must distinguish all those private-law rules of a contract- and property-law character that are directly tied to the *individual* commercial transactions which within this framework take place continuously in the market place, primarily in the form of sales, rentals and contracts for the provision of services.

The Heptagon

In order to illustrate and explain more closely what has been said we will attempt with the help of a diagram (*Fig. 1*) to show the primary market-law rules which form the framework for the Swedish product market, including the market for services which are provided under approximately the same conditions as products. The diagram, which gives, of course, only a very approximate picture of reality, has been given the form of a seven-sided figure (heptagon). It is intended to illustrate only the most important groups of framework rules and, naturally, it can be expanded by adding more details.

The intention behind this heptagon is to show various clusters of market-law rules, each of which clusters makes up its own part of the framework for the action of firms in the Swedish market for consumer goods in general. Inside the framework, as the figure attempts to show, an enormous number of individual transactions (contracts) continuously take place following the private-law rules on contracts, etc. Each part of the framework is tied to one or more of the major parts of market law.

The rules on import, export and exchange with foreign countries are partly of an international nature. The Swedish product market is, as is also the case with Norway and Finland, to a very great extent open to competition from abroad, primarily as a consequence of Sweden's international commitments connected with GATT, OECD, EFTA, the free trade agreements with EEC, etc. (Denmark is a member of the EEC). The precise scope of the free trade depends upon the legal rules which are to be found partly in those international conventions to which the country has become a party and partly in internal legislation. The matters covered in this area are customs and import licences (both to a great extent abolished), dumping

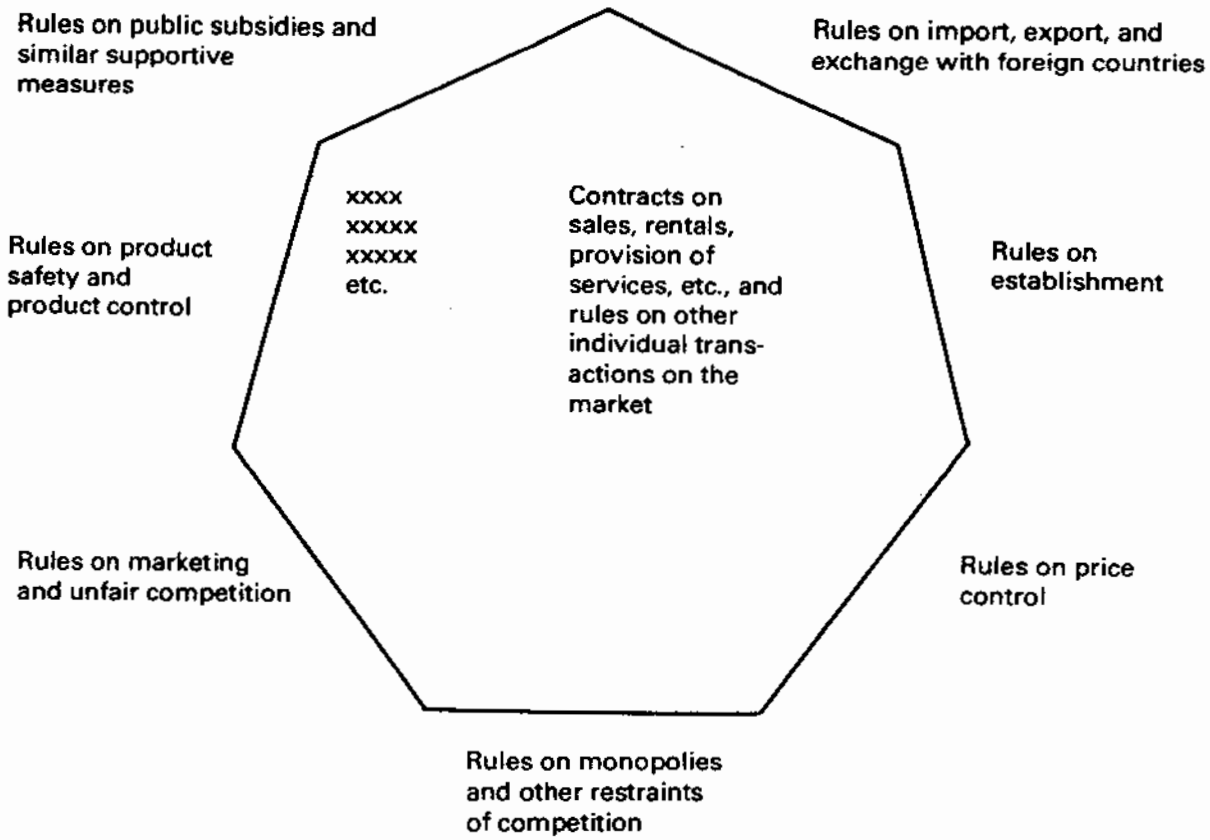

Fig. 1. Fundamental framework of rules for the Swedish product market

and similar practices, restrictions on exports, and the legal rules on currency and exchange, to give just a few of the more important examples.

The rules on establishment, i.e. establishment law, are used here as a collective term for that system of rules which regulates the entry to the market. The basic character and scope of these rules have been discussed above (part 2, *supra*), under the heading Freedom of Establishment.

Rules on price control are of varying types. The public price-control legislation normally grants, when it is in use, a very broad authority to prescribe different types of price regulations (price freezes, price ceilings, etc.), but the extent to which this authority is used in practice is dependent upon the economic and political situation. In Sweden, as in many other countries, the almost permanent inflationary tendencies in recent years have meant that the business community has had to accustom itself to living with price regulations, especially price freezes. In addition, there exist in most countries continuously applied special rules on regulated tariffs or prices in particular areas, e.g. in the housing sector. One can also mention regulated fees for different kinds of services, e.g. in the field of transportation. This body of price regulations subject to criminal sanctions forms a part of market legislation that is of considerable practical significance. Generally speaking, extensive price regulation is hardly consistent

with the principle of price competition as a basic standard in market economies.

The *rules on monopolies* and *other restraints of trade,* i.e. antitrust law, belong to the core of market law. As already mentioned, such rules are necessary to safeguard freedom of competition in the market. In Sweden, as in Norway and Finland, the focus is on the counteracting of injurious effects of monopoly and other restraints of competition, primarily in the interest of consumers and the national economy. The market is also affected by the international restraint of trade rules within the legal system of the EEC and our free trade agreements with the EEC and within EFTA.

We may also include in this part of the framework existing legal monopolies in specific fields. In Sweden, e.g., such monopolies exist in the distribution of liquor and pharmaceutical products. Such monopolies can be regarded as approved restraints on competition, but can also be seen as prohibitions on establishment. Rules that may give publicly-owned enterprises a favoured position in the field of public procurement can also be seen from the viewpoint of a restraint of trade. Patents, and similar protection given to other kinds of intellectual achievements, stand out as a very special type of legal monopoly.

The *rules on marketing and unfair competition* belong likewise to the most fundamental parts of marketing legislation. The rules aim at protecting not only consumers, but also competitors and other entrepreneurs. The protection for consumers has as its starting point the purpose of providing protection against unreliable, deceptive or otherwise improper marketing methods, but it normally also includes a certain duty to provide information to consumers. In Sweden this duty of information has recently been radically expanded through the Marketing Practices Act of 1975. It is, however, not only marketing-practices legislation which plays a role here, but also principles for the labelling of product contents and for information in general, to the extent that such requirements have a legal foundation. Another element known in the Scandinavian countries consists of such rules on control of standard contracts as make it possible generally to prevent an undertaking from using unreasonable contract terms by means of injunctions. In Sweden we find rules of this kind in the Contract Terms Act of 1971, which is closely related to the Marketing Practices Act.[5]

Those rules which protect competitors and other entrepreneurs from unfair competition set boundaries for freedom of competition and work together with the rules on restraint of trade to keep competition "free and fair". In the same part of the framework as rules on unfair competition in

[5] See footnotes 2 and 3 *supra.*

general it is natural to include those rules on competition which provide protection against improper use of trade secrets and improper imitation by competitors of another's achievement or trade symbol, e.g. "passing off".

The *rules on product safety* and *product control* form yet another significant part of the framework. These rules can be found partly in special legislation in particular areas (food and drugs, etc.), and partly in legislation of a more general scope, e.g. legislation directed against pollution of the environment. In Sweden, general rules on the safety of consumer products which are to be found in the Marketing Practices Act provide the Consumer Ombudsman with the opportunity to intervene against the marketing of dangerous products or products manifestly unfit for their main purpose. The Market Court has here been given the power to issue injunctions against the future sale of such products.

We observe how the basic parameters of competition—well known from business economics—namely price, marketing, service and product, all appear in the context of marketing regulation. Although service as a parameter of competition primarily raises questions of terms of contract, it also raises questions of restraint of trade in the distribution sector and questions concerning marketing.

Public subsidies and other supportive measures, the last part of our heptagon, are of a different character. State aid is admittedly embodied to a certain extent in legal rules, but it is basically a question here of a different form of public control, namely *stimulative measures* instead of legislation. At the same time, however, the use of public subsidies, as well as a number of related problems concerning the functions of publicly-owned enterprises and public procurement, raise a number of legal issues of great scope which justify the inclusion in the framework of these rules on supportive measures. One observes how the stimulation method can function as a method of steering towards the realization of desired results in the area of market law both as an alternative and as a complement to legislation. The latter works by means of injunctions, penal provisions, and other legal sanctions, such as damages, and appears as a more direct but sometimes also a less flexible means of control than supportive measures. Supportive measures, on the other hand, stimulate or counteract certain general developments while at the same time individual decision-making and thus freedom of contract are still allowed considerable freedom.

The Market Law of Special Areas

The presentation here made of the framework of rules has been aimed at general market legislation, i.e. legislation with a more general scope. But

alongside the more important pieces of legislation and other legal rules of wide scope—in Sweden for example, the Marketing Practices Act, the Restrictive Trade Practices Act, and the General Public Price Regulation Act—there is within market law a tremendous number of *special framework rules* (specific market legislation) which make up the more detailed frame for market conditions within particular lines of business.

The special rules for the establishment of different types of businesses, the rules on advertising or marketing in general of certain products, *inter alia* tobacco, wine and spirits, and the rules on required character or contents of various products belong to this category. Special legislation of this type hardly lends itself to being classified in any other manner than according to the particular line of business involved.

Within specially regulated lines of business the market-law framework consists of a combination of (1) the general rules of market law and (2) special rules which have been enacted within the particular branch in question. If we take the pharmaceutical industry as an example, we find there special regulation of price levels, advertising, products, etc., and generally quite extensive limitations on competition in the distribution phase (in Sweden there is a state-owned pharmacy monopoly). Together with the general market rules which are of interest for this industry, these special rules form a *pharmaceutical market law* which could appropriately be made the subject of a special study. In a similar manner, one can distinguish, for instance, an *insurance market law,* a *credit market law,* an *agricultural market law,* a *housing market law,* etc. On the basis of this approach, a study has recently been published in Sweden on *maritime market law* which also includes an overview of air market law.[6] The coming into force of the proposed UNCTAD code on the right to cargo, on shipping conferences, etc., would greatly expand the importance of maritime market law.

4. INTERNATIONAL MARKET LAW

An approach to what has been described above can also be made on the international level. Within Common Market law (EEC law) an institutional-law aspect and a substantive-law aspect can be distinguished. The substantive rules of Common Market law have just that character of a framework of rules of the game for the market place which, as we have

[6] Bernitz–Gorton–Grönfors, *Sjöfart och konkurrensrätt,* Publication no. 56 of the Gothenburg Maritime Law Association, Gothenburg 1976.

found, is a feature of market-law rules. To be quite correct, EEC law forms primarily a legal framework for legislators and administrative authorities of the Member Countries, and only to a lesser extent for the individual citizens of these countries. In such areas, however, where the demand for integration has been felt particularly strongly, the Treaty of Rome and the EEC regulations often contain rules directly applicable in Member States which create rights and sometimes also duties for the individual citizens. Seen from the latter's point of view, one may speak of indirect framework rules. It is, *inter alia*, in the fields of labour law, establishment law and competition law that we find such directly applicable law. EEC competition law, in particular, stands out in its form, scope and sanctions as being, to a great extent, an equal to national law.

If we draw a diagram of the framework of rules for the EEC market corresponding to the diagram of the Swedish product market presented above, it is natural also to include in the EEC framework the rules on import, export, and exchange with third countries, the rules on establishment, the rules on monopolies and other restraints of competition, and the rules on public enterprises, public procurement and supportive measures. General rules on product safety and product control still do not exist within the EEC as such, but the body of directives which exist concerning the character and contents of goods and services is so extensive that it fills this gap in the framework. Nor do developed market rules on price control or improper marketing exist on the EEC level. Within the European Coal and Steel Community (ECSC) and the agricultural area there does exist, however, an extensive system of pricing rules at the Community level, and directives concerning consumer protection against improper marketing are, in any case, in preparation. Instead, as cornerstones in the framework of rules for the Common Market should be included the rules on free product circulation within the EEC (the customs union, the prohibition against quantitative restrictions, etc.) and the rules concerning freedom of movement of labour, together with the EEC's prohibition—particularly relevant in this context, but in principle generally applicable—against discrimination on grounds of nationality. On the basis of these considerations we can draw the following heptagon (*Fig. 2*) for the Common Market, illustrating the most important groups of framework rules.

It is also true of the Common Market that special rules exist which are aimed only at particular industries or the like. Particularly notable is the Common Market's tremendously detailed agricultural market law and the specific steel market regulation on prices, etc., within the Coal and Steel Community (steel market law). One can also mention the EEC's regulation of land transport.

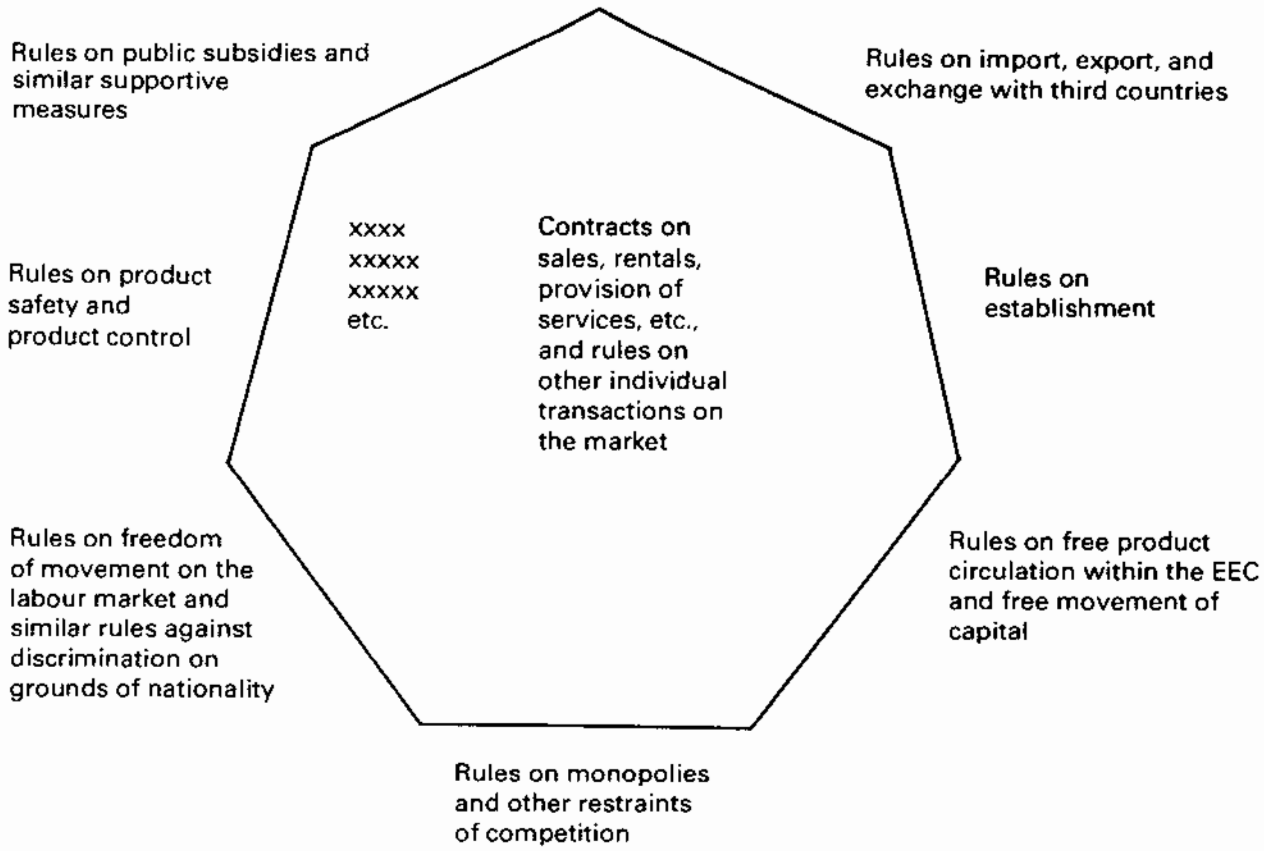

Fig. 2. Fundamental framework of rules for the EEC product market

At present all the *individual* transactions which take place continuously on the EEC market, within the framework drawn up by the market-law rules, follow in all essentials the national legislation for each member country (law on contracts, law on sales, etc.). Here also, however, we begin to see how rules adopted at the EEC level are beginning to play a role. It is, moreover, good to keep in mind the convention on enforcement of civil judgments, the European patent system, the proposal on European companies and the work on harmonizing the international private law (conflict of laws) of the EEC member countries.

International market law has here only been discussed with EEC law as an example, the basic reason for this being that EEC law is so well developed. Obviously, however, one can point to other sets of international market-law rules. Of especially broad international scope are the GATT Agreement on Tariffs and Trade and additional GATT documents, such as the so-called anti-dumping code. Another example is the international market-law rules established within EFTA, the European Free Trade Association. Here we find rules on import, export, and exchange, establishment of firms, competition, etc. One can also mention customs unions and free trade areas established in other parts of the world.

5. MARKET LAW AS A LEGAL CONCEPT

A Functionally Determined Classification

The system of judicial classification has grown up as a result of a long tradition and has its roots to a great extent in Roman law. The system of classification is not, however, determined for all time, but is primarily a working tool, and it is obviously possible to classify legal material from different points of view. What is characteristic of those legal areas which have been treated above is that, among other things, they have been late in emerging, in some cases having assumed importance only in the last few decades. As a result, a system of classification with roots in Roman legal thought has never existed in our area, and, in general, there has been, and still persists, a great deal of uncertainty concerning terminology and systematization.

The concept of market law presented in this paper is based upon economic and social realities and is *functionally determined.* This distinguishes it from classifications based on abstract legal considerations, such as the law on obligations and its distinction from the law of property rights. However, functionally determined legal concepts are no novelty. Obvious examples here are labour law and maritime law.

Market law contains elements of both public law and private law. Legal development seems in this respect to reflect developments in society. The mixture of private and public in setting the standards for economic life is the legal counterpart to the economic system of our time, with its mixture of free market economy and governmental direction and control. This is consistent with the general trend toward the relativization of private rights and the greater emphasis on public interest and social considerations with respect to the limitation of the meaning and scope of freedom and contract. Market legislation does not stand alone in this respect. A similar trend is clear with respect to labour law and real property legislation, for example.

The conclusion in this respect is that market law cannot easily be assigned either to public law or to private law, but constitutes a discipline which must be observed and studied both from public-law and private-law points of view. From the point of view of public law it is particularly notable that market law, as a consequence of the fact that it is such a dynamic legal area, includes many examples of administrative organs and procedural forms that are of general interest for administrative law, however doubtful they may be in some respects concerning the legal security of firms and individuals. From the point of view of private law we can point particularly to the interplay between the market-law rules and the purely

private-law rules governing all the individual transactions taking place within the framework. This interplay will be illustrated below, using consumer law as example. Another important aspect is the fact that civil sanctions, such as nullity or damages, are often attached to market-law rules, e.g. in the field of restrictive contracts.

Relation to Competition Law

An interesting question is the relationship between market law and certain concepts already in use. A commonly used term in Scandinavian law is *competition law* (taken from the German *Wettbewerbsrecht*).[7] This term has traditionally been tied primarily to legislation against unfair competition, but it is now used also to designate restraint of competition law (antitrust law). The term competition law is, in itself, a clear term which indicates the central role that competition and relations between competitors play throughout the area treated here. It is, however, too restrictive. Since marketing-practices legislation stressing consumer protection seems essentially to be replacing the previous rules on unfair competition, the term appears to be too narrow even in its old central area.

As far as marketing legislation is concerned, it is, of course, the relations between businessmen as marketers and consumers which constitute the focal point, rather than the relations between competitors. It is also clear that two important parts of the framework of rules for the business community, namely establishment law and product control, do not lend themselves to being characterized as competition law. On the whole, legal development has passed beyond the view that framework legislation on business activities can essentially be regarded as legislation on competition alone. But, of course, competition law is a convenient term to use for designating the parts of market law which especially deal with restrictions on competition and improper competitive practices.

In this connection one should add that *intellectual property rights* (copyright, patents, protected designs, trade marks, trade names, etc.) are hardly to be regarded as parts of market law but rather as constituting a neighbouring but distinct discipline. In this area the basic rules are not of a framework character but of a property type, directly adapted to the individual transactions taking place in the market, such as licensing contracts. However, as pointed out in part 3, *supra*, patents can be regarded as a kind of legal monopolies and the law of trade marks and trade names is traditionally closely related to the law of unfair competition.

[7] Bernitz, *Marknadsrätt*, Stockholm 1969, pp. 48 ff.

Relation to Consumer Law

As has been stated above, market-law rules are largely aimed at consumer protection (part 3, *supra*). However, in the meaning proposed here, not all market law deals with consumer protection and not all law on consumer protection has the characteristics of market law.

Consumer law, taken in the broad sense of legislation aimed at consumer protection, is from a legal point of view to be divided into three main categories,[8] namely:

- Market law, that is to say framework rules such as legislation on misleading advertising and other marketing practices deemed to be contrary to the interest of the consumers, or legislation against the marketing of dangerous consumer products. The main example of this type of legislation in Swedish law is the Marketing Practices Act of 1975.
- Contract and torts law, that is to say rules of a purely private-law character governing individual transactions, such as consumer sales, consumer credit, consumer service contracts, or consumer insurance contracts, or liability, e.g. products liability. As Swedish examples we can mention the Consumer Sales Act and the Consumer Credit Act.
- Procedural law, that is to say legal rules on procedure, directly aimed at consumer protection, such as legislation on small claims courts.

Thus, consumer law can be used as a functionally determined concept different in character from market law. In my opinion, both concepts are valuable tools. In academic teaching, it often seems valuable to treat within the same course or academic subject consumer *and* market law, comprising the whole area of market law and the whole area of consumer law as described.

From a legal point of view we should note the close connection between basic market-law rules and the purely private-law rules governing individual consumer transactions (sales, rentals, provision of services, etc.), which take place on the market within the established framework. As already mentioned, there exist in several Scandinavian countries general rules of a market-law character on the control of standard contracts, with the possiblity of generally forbidding enterprises from using unreasonable contract terms.[9] A similar effect, however, can be reached with the help of mandatory rules of contract law declaring certain types of contract clauses to be unenforceable. A typical example is the Swedish Consumer

[8] Bernitz in 20 *Sc.St.L.*, pp. 32 ff. (1976).

[9] Bernitz in 17 *Sc.St.L.*, pp. 41 ff. (1973), Sheldon in *American Journal of Comparative Law*, vol. 22, pp. 17 ff. (1974).

Sales Act of 1973. Here we find an interplay between market law and mandatory private law. Also of interest is the close relation between the marketing legislation's prohibition against misleading advertising and the private-law liability for misleading advertising statements, and between product control legislation and the defective product as a concept in the law of sales.

Relation to Economic Law in General

The scope and content of the term economic law (*Wirtschaftsrecht*) has especially been discussed and developed in German and Swiss legal writing. It is accepted in German law that *Wirtschaftsrecht* is to be regarded as a legal discipline of broader scope than *Wettbewerbsrecht* (competition law). However, agreement never seems to have been reached on the precise scope of the *Wirtschaftsrecht* concept. In this respect, reference can especially be made to the very interesting study by Professor W. Schluep entitled "Was ist Wirtschaftsrecht?" (What is Economic Law?) published in the Swiss *Festschrift für Walther Hug.*[1] In this very comprehensive study, Schluep presents no fewer than 35 more or less different views on the matter put forward by German and Swiss legal scholars.

Actually, German textbooks on *Wirtschaftsrecht* generally devote a major part of their contents to antitrust law (*Kartellrecht*). They also treat constitutional aspects of economic freedom and its restrictions (*Wirtschaftsverfassung*), as well as principles of establishment law.[2] Normally, the books also discuss the so-called *Wirtschaftslenkung*, i.e. legal rules on state aids and other arrangements for steering and controlling the proper functioning of the economy and the development in particular lines of business (tax law aspects, too, are sometimes included). However, there is a recent tendency in German law to develop a so-called *Unternehmensrecht* (enterprise law) and to merge within this concept most parts of *Wirtschaftsrecht* with certain aspects of private-law protection of enterprises, especially the tort-law rules protecting *der eingerichtete und ausgeübte Gewerbebetrieb* (*BGB sec. 823 (1)*).

In French law, the designation *droit économique* (economic law) has won acceptance.[3] The French concept differs from the German one, inasmuch

[1] *Festschrift für Walter Hug*, Berne 1968, pp. 25 ff. See, also, Rittner, "Zur Systematik des Wirtschaftsrechts", *Festschrift für Bartholomeyczik (Entwicklungstendenzen im Wirtschafts- und Unternehmensrecht)*, Berlin 1973, pp. 319 ff.

[2] See, e.g., Rinck, *Wirtschaftsrecht*, 5th ed. Cologne etc. 1977, Steindorff, *Einführung in das Wirtschaftsrecht der Bundesrepublik Deutschland*, Darmstadt 1977, Rauschenbach, *Wirtschaftsrecht mit Kartellrecht*, Stuttgart 1965.

[3] See, e.g., Savatier, "La necessité de l'enseignment d'un droit économique", *D.* 1961,

as normally the major interest is devoted to the legal consequences of the *planification*, i.e. the control exercised in France by means of centrally adopted plans. Competition law, on the other hand, seems to be given less attention. Certainly, these differences reflect basic differences between German and French economic policy.

In Scandinavian law, a distinct concept of economic law (*Wirtschaftsrecht*) has never been developed and legal writing discussing the issue is scanty. However, economic law (in Swedish, *näringsrätt*) is often used in a broad and indistinct manner, designating economic legislation of various types.

Special concepts of economic law, often of a far-reaching character, have been developed elsewhere. An example worth mentioning is the comprehensive and learned treatise by the Argentine scholar Estaban Cottely, *Teoría del derecho económico.*[4] The concept used by Cottely comprises not only those parts of the law which in German legal writing are normally regarded as *Wirtschaftsrecht*, but also comprehensive parts of commercial law of a private-law character.

Mention should also be made of the specific concept of economic law developed in recent years in certain socialist states.[5] Here, the preponderant emphasis is laid on the legal aspects of the state planning system and the relations (often of a contract-like character) between state-owned enterprises. However interesting the much-debated division between economic and private law may be in socialist states, it is obviously related to the basic economic structure in these states and thus is not applicable to the situation in countries with a market economy.

As this short survey shows, economic law is a much-debated concept,[6] at least outside the common law world.[7] However, if it is given a very wide scope, more or less comprising all economic legislation in a broad sense, it hardly seems to form a coherent legal system anywhere.[8]

Chron. pp. 117 ff., Champaud, "Contribution à la définition du droit économique", *D.* 1967, Chron. pp. 215 ff. Farjat, *Droit économique*, Paris 1971.

[4] Cottely, *Teoría del derecho económico*, Buenos Aires 1971. Attention is drawn to the comprehensive and truly comparative bibliography of this book.

[5] See the reports from these and other parts of the world, gathered in Rinck (ed.), "Begriff und Prinzipien des Wirtschaftsrechts", *Arbeiten zur Rechtsvergleichung* no. 51, Frankfurt/M. 1971.

[6] See also *The Economic Law of the Member States in an Economic and Monetary Union*, International Conference in Utrecht 1975, publ. by the Europa Instituut der Rijksuniversiteit Utrecht and the EEC Commission 1976.

[7] In the United States the term "trade regulation" is sometimes used. In practice, however, even when this term is used most of the attention is focused on the antitrust law; see, e.g., the classical case-book by Handler, *Cases on Trade Regulation*, now Handler–Blake–Pitofsky–Goldschmid, *Cases and Materials on Trade Regulation*, New York 1975.

[8] This lack of coherence is clearly demonstrated in a report to the EEC Commission on Danish economic legislation, H. Koktvedgaard-Lando, *Rapport over dansk økonomisk lovgivning*, Institut for europæisk markedsret, Handelshøjskolen i København (Copenhagen School of Business Economics), 1975.

The Term Market Law

It is the present lack, at least in Scandinavia, of an articulate terminology and the need for the formation of concepts which can give a fairly true picture of the legal material and make possible the further development of legal science in this area that has caused me to choose the term market law (in Swedish, *marknadsrätt*) as the designation for the legal area presented in this paper. The term indicates the fundamental function of the rules in question—setting norms for the market place. The term is also suitable from the viewpoint of economic terminology and has the advantage of not being tied to a particular economic or political programme. Whether the development in coming years moves towards an increase in government control and state-controlled enterprise or in the opposite direction, we are certainly going to have national and international markets which require market legislation if they are to function properly.

A legal concept of a systematic nature must be functional and coherent to be acceptable. Whether market law presents a useful model for legal thinking and arranging of legal materials can only be proved by practical use. It falls beyond the scope of this article to show in detail how the concept has been used in practice in Scandinavian legal writing. However, it has formed the basis for the arrangement of materials in my textbook *Svensk och internationell marknadsrätt* (Swedish and International Market Law),[9] its Finnish counterpart *Suomalainen ja kansanvälinen markkinaoikeus*[1] (Finnish and International Market Law), and the treatise *Norsk og internasjonal markedsrett*[2] (Norwegian and International Market Law), written jointly by Professor Fr. Fr. Gundersen and myself. In the last-mentioned book, the materials have been divided into nine major chapters, namely

International market law—a survey
The Common Market law
Norwegian import, export, and exchange law
The law of establishment
The law on restrictions of competition and price control
Public enterprises, public procurement and state subsidies to business
The law on marketing practices
The law on unfair competition (including a survey of intellectual property law)
The law on product control

[9] 2nd ed. Stockholm 1973.
[1] By Bernitz–Tiili, Helsinki 1974.
[2] By Gundersen–Bernitz, Oslo 1977.

In the concluding chapter of the treatise, problems common to market law as a whole have been discussed. In the teaching of law at Scandinavian universities, market law is now increasingly being taught as a separate legal discipline (sometimes as market and consumer law, including private-law rules on consumer protection, e.g. consumer sales).

Some Characteristics of Market Law

There are many bonds which hold the components of market law together. They relate both to the interplay between the different parts of the framework and to the characteristics of the legal technique used. One of the basic problems running through all market law is the resolution of conflicts between economic freedom and regulation of business activities. Certain parts of market law aim particularly at the promotion of competition or try at least to find solutions that are neutral from a competition point of view, whereas other parts aim at regulations that actually reduce competition. One finds in the Scandinavian countries, as in many other parts of the world,[3] an ongoing debate between advocates of competition and advocates of regulation. The conclusions resulting from such political debates are not always consistent. Rules in line with the proper functioning of the market sometimes collide with regulative rules lacking market conformity. From a legal point of view such collisions often result in interesting but difficult legal problems, often concerning relations between market legislation of a general type, e.g. antitrust rules, and special regulations in particular lines of business.

As is well known, present market law is hardly the product of a harmonious legal evolution. Rather, it is the result of adjustments among separate economic interests and basic views as, for instance, between producer and consumer interests. The power struggle among the various interests is complicated and often the legislative intentions behind a certain act are ambiguous. It is an important task for legal science to point out the relationship between different pieces of legislation in the market-law area and to promote a coherent legal system in the field. It is my experience that lawyers working on legislation on a specific matter quite often lack the necessary knowledge of the market-law system as a whole.

The legal milieu surrounding market law is necessarily stamped by its orientation towards the economic life of the community and business enterprises. The interaction between law and economics is an important

[3] Cf. Wilcox, *Public Policies Towards Business,* Chicago, Ill. 1955 (or later ed.).

part of the picture. From a legal point of view, the close connection with constantly changing economic conditions explains, at least partly, the notable tendency to allow market law to be formulated less stringently than is customary within more traditional legal disciplines. In Scandinavian market law there is a notable tendency to use basic legal provisions of a very vague character (general clauses). There is also a tendency, on the whole a very refreshing one, not to hesitate to try new legal solutions. One can point to the institution of the Consumer Ombudsman and the use, especially in Swedish law on marketing practices, of so-called guidelines of a non-binding nature. Also worth noting is the tendency to set up "councils" with quasi-judicial functions, such as public complaints boards. Sometimes solutions first used within market law are adopted at a later date within other parts of the law as well.

Certainly, legal science can play a great part in the ongoing development and refinement of the market-law system. It has, in my opinion, a responsibility not only for the promotion of consistency between different parts of market law but also for the maintenance of the principles of the rule of law as the lodestar in governmental and judicial decision-making in this field. There is much room both for legal writing analysing the present legal situation and for initiatives with regard to law reforms, as well as for studies in legal sociology.

Legal systematization should not be allowed to live a life of its own but should be regarded as a working tool. As such, however, it can be of great importance. Appropriate systematization facilitates research and academic teaching, while less appropriate systematization may have a negative influence upon legal development. In my opinion, the concept of market law is a valuable tool to be used as a systematic framework. This is especially the case nowadays, when economic and political developments in the industrialized western countries lead to such an increase in legal regulation of the market. Carefully drafted market legislation plays an important part in securing a well-functioning economic system and in safeguarding the relevant interests, such as the interest of adequate consumer protection.