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# FairEconomy

Crises, Culture, Competition and  
the Role of Law



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Max Planck Institute for Intellectual Property  
and Competition Law

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# FairEconomy

Crises, Culture, Competition  
and the Role of Law

 Springer

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# Foreword

This book aims to show that imminent economic crises can be discovered earlier, ongoing crises better controlled, and past crises healed more efficiently if certain economic laws of freedom and fairness, of risk-taking and liability are observed. Its three co-authors submit their ideas about what free and fair competitive economy and adjacent social cost economy may contribute to foresee, mitigate and overcome crises in national, regional and world economies.

At the core of this concept is a functioning market economy with competition at its center. This economy, however, is also workable in a culturally freedom- and justice-oriented society where competition is absent or of no interest. The central economic value under scrutiny in this investigation is contained in a principle of a merchant's ordinary, recognized behavior and engagement in trade and commerce. Part of this behavior and engagement is an adequate involvement in taking economic risks and carrying certain legal responsibilities if those risks become reality.

To initiate a market, to keep it going, to protect it against disturbances and in case of emergency to imitate it (by "as-if-competition"), rules concerning economic freedom of competition are required. Free competitive bargaining includes entering into economic risks and someone to be held liable if they hit. Therefore, competition involves a decision of whether to keep a risk concealed or having to bring the business partner up-to-date. Whether the one or the other is recommendable or even due, is judged by legal rules regulating fair competition. Thus free competition has to be fair and fair competition concerns, among other circumstances of the deal, the relation between risk and liability. The offer to sell a toxic derivative as well as the incitement to acquire one serve as an example.

The title "FairEconomy – Crises, Culture, Competition and the Role of Law" aims at indicating this program.<sup>1</sup>

The book consists of five chapters, on the anthropological and economic foundations of FairEconomy as a free market system (drafted by Wolfgang Fikentscher), on Rules of Freedom and Fairness (drafted by Rupprecht Podszun), on Risk and Liability (drafted by Philipp Hacker), and on possible Sanctions and some

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<sup>1</sup> The unusual word combination "FairEconomy" is to distinguish between the authors' intent to concentrate on a study on reasons and dealings with economic crises from the point of view of competitive economies and social cost economies on the one hand, and the so-called Fair Trade movement that propagates and organizes procurement and supply of food and merchandise from developing countries, produced there under humane conditions such as minimum wages, ILO conforming labor conditions, exclusion or reduction of child labor, protection of environment, sustainability of harvesting, etc., on the other. Surveys on Fair Trade in this sense: [www.fairtradefederation.org](http://www.fairtradefederation.org); Raschke, Fairer Handel. Engagement für eine gerechte Weltwirtschaft, 2009; Kuhn, Fairer Handel und Kalter Krieg, 2005; Stiglitz/Charlton, Fair trade for all, 2005; Warrior, The politics of fair trade, 2011. FairEconomy, by contrast, focuses on the engagement in markets, under fair conditions, in the broad sense of an economic system.

Procedural Aspects (drafted by Wolfgang Fikentscher). Rupprecht Podszun provided the draft of the summary. The contributors joined in working on all texts so that the scientific responsibility remains with all three co-authors alike. The links between the concepts of a free market system (Chapter 1), economic freedom and fairness (Chapter 2), risk and liability (Chapter 3) and sanctions (4) are discussed in Subchapter 1.5 below.

The three authors are affiliated with the Max Planck Institute for Intellectual Property and Competition Law, Munich. Josef Drexl, one of the Institute's directors, encouraged the authors from the beginning and offered many valuable comments. The authors are very grateful to him. They also wish to thank the editors of this series and Dr. Brigitte Reschke from Springer for their support to publishing "Fair Economy". In the Max Planck Institute, a politically and economically independent research institution, fundamental aspects of free and fair competition form part of its daily agenda. In 1993, the presentation of a Draft International Antitrust Code and, in recent years, proposals for the reform of the law of unfair competition to European Union authorities and the World Intellectual Property Organization, Geneva, reflected activities within the framework of said agenda. The present series of economic crises gave rise to resuming the idea to contribute old and new thoughts to the field of national, regional and international market and competition issues and to submit them to the interested public. Of interest are not the histories of these crises as such that began to attract public attention in 2006 with the real estate crisis in the U.S.A., and were followed by the international banking crisis in 2007 and the general economic crisis of 2009, which in turn triggered the debt and financing crisis of 2010 including the Euro crisis of 2011. Instead of focusing on particular facets and singular acts of this drama, the focus is on the underlying story, that is, on what might have gone wrong with regard to the driving forces of contemporary economy: competitive market behavior in a globally interconnected world. Thus, our suggestions do not contain blueprints for formalized legal provisions. They are meant as a stimulus for further thought.

Looking for a general trend underlying the unrest and upheavals not only in the economic sphere – which of itself is broad enough – but also with respect to political, cultural and societal longings, one concern or drive seems to be evident: the longing for individual participation in matters that affect oneself. In politics, the plea goes for democratization, as in Arabia; in environmental affairs, for individual protection, such as against the consequences of oil spills and global warming; in health, for vaccination campaigns, personal inoculations and the availability of pharmaceuticals; in economics, for private law suits against merger and monopoly power. There is a global mistrust in all existent powers. Private litigation in economic matters is a recurrent theme in these deliberations.

In economic matters private enforcement exists in many variations in a number of countries. EU law favors customers' rights, common law countries use tort actions, the U.S.A know class actions and treble damage claims. Younger antitrust and unfair trade practices systems often prefer a public law administrative approach over private claims raised by individual victims of restraints of competition and unfair trade practices. The PR of China, China RoC and Indonesia are examples.



Yet, these jurisdictions also have private enforcement mechanisms in place. India's collective claims use a middle road by rallying economically underprivileged victims around a more powerful and politically respected leader as their authorized plaintiff. Whether to go one way or the other depends on the prevailing social and economic culture and tradition, including the aims a government seeks to achieve by using economy-related litigation. The PR of China, for example, presently opts for government regulated control of economic relations.<sup>2</sup> As is common for younger self-industrializing nations, the PR of China partly uses its economic law to protect business at home in a mercantilist way in order to catch up with competing nations.<sup>3</sup> Under this ideology, the wealth of nations is seen as the wealth of one's own nation, and it takes a while until it is seen as a matter of competing individuals of several nations. While the PR of China understandably took a rather self-absorbed path in the past, it now seems to seek at least minimal cooperation. This is the background for the attempt, repeated in 2011 after a long period of limited activity, to reinforce and expand ASEAN, the Association of Southeast Asian Nations. Now PR China, Japan, Australia, New Zealand and U.S.A. show, if reluctantly, interest in acceding ASEAN as a free trade agreement in one way or another. If successful, ASEAN's legal impact – administrative measures and/or private claims – will be of interest.

One of the major characteristics in today's economic-political world is the desire to turn to democratic individual participation in daily political and economic life, as against the dictatorship of a one-party system, an aggressive theocracy, a militant junta or a charismatic leader. Those countries in the world that want to pursue cultural diversity and tolerant value assessment could be called – for lack of a name – the “Free Nations”. Amazingly, freedom seeking nations proceeded collectively, but not under this or any other name, in 2010 and 2011 on issues concerning Libya, Syria and Iran. They acted as nations that wanted to resist cross-border human right abuses and expansionist trouble-making.<sup>4</sup> Would Free Nations settle on rules of economic law and good performance intended to establish and maintain social and economic justice and fairness, and would they do so by assigning standing to the individual victim?

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<sup>2</sup> Hertz, *The Trading Crowd: An Ethnography of the Shanghai Stock Market*, 1998; Fikentscher, *Die Rolle von Markt und Wettbewerb in der Sozialistischen Marktwirtschaft der Volksrepublik China: Kulturspezifisches Wirtschaftsrecht*, GRUR Int. 1993, 901 – 909; Chinese translation by Shao Jiandong in: *Jahrbuch des Deutsch-Chinesischen Instituts für Wirtschaftsrecht der Universitäten Nanjing und Göttingen* 4 (1993) 17 – 37.

<sup>3</sup> Masseli, *The Application of Chinese Competition Law to Foreign Mergers: Lessons from the Draft on New Guidelines*, *Journal of European Competition Law & Practice* (2012) 3 (1): 102-109.

<sup>4</sup> An early proposal: W. Fikentscher, *Blöcke und Monopole in der Weltpolitik: Die Herausforderung der Freien Nationen*, 1979 ; Chinese translation by Yeong-chin Su, 1985.



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