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*From free competition  
to fair competition on  
the European internal  
market*

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# From free competition to fair competition on the European internal market

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## Abstract

This paper investigates whether an increased use and reinterpretation of what has been called “fair competition” has occurred at the expense of “free competition” among the central institutions of the European Union. We are also interested in assessing how frequently these terms have been used by the various EU institutions over time.

We have empirically examined this through a quantitative survey of more than 12,000 public documents, out of totally 242 000 documents containing 630 million words, in the EUR-lex database over the last 50 years, from 1970 to 2020. Our conclusion is that the emphasis of the common policies in the EU is likely to have shifted from free competition and an open market economy to “fair competition” in the sense of a level playing field, in official EU documents, such as treaties, EU acts institutions, preparatory documents relating to EU directives and recommendations including motions and resolutions, case law and more.

The European Commission has been a driving force in this development, followed closely by the European Parliament and subsequently by the Council of Ministers. This change entails a risk that the regulation of the European internal market has shifted so that the dynamics of the internal market and thus the EU's competitiveness will weaken. The change also entails a centralization of decisions at EU level at the expense of the Member States.

**Keywords:** European Union, free competition, fair competition, level playing field, regulation

**JEL:** F13, F15, F42, F55, G18, H71

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## 1. Introduction

The EU's internal market has been a cornerstone of European cooperation since its inception. It is based on the four freedoms, that is, the free movement of goods, services, capital, and people. It means that around 20 million companies come into contact with 500 million consumers in the 27 Member States of the Union and in Iceland, Norway and Switzerland. This has led to increased welfare and economic growth for the Member States of the Union (Karlson, 2019, p. 7).

According to the Treaty Establishing the European Community, it must pursue an “economic policy [...]in accordance with the principle of an open market economy with free competition.” An open market economy is based on the possibility for market players - companies and consumers - to compete freely with each other. Freedom of contract and establishment shall prevail, and price formation shall be free, and the borders shall be open to goods, services, capital, and persons. It is the free competition of the internal market that has created increased growth, and prosperity for the citizens of European countries.<sup>2</sup>

The common European competition policy also uses the term "fair competition", which aims to promote competition on equal terms. European Competition Law thus emphasizes the prohibition of fraud, illegality, price and cartel settlements, market division and restrictions regarding the handling of state aid.

However, “fair competition” lately seems to have become increasingly widespread and potentially reinterpreted in connection with issues relating to wages, working conditions, social justice, environmental policy, digitalisation, trade, and third countries. Fair competition in the sense of level playing field seems to have become increasingly common at the expense of the earlier, narrower, interpretation.

The purpose of this paper is to investigate whether an increased use and reinterpretation of what has been called “fair competition” has occurred at the expense of “free competition” among the central institutions of the European Union. We are also interested in assessing how frequently these terms have been used by the various EU institutions over time.

To examine how frequently the terms are used over time, we conduct a quantitative survey of more than 12,000 public documents, out of totally 242 000 documents containing 630 million words, from the EU's central institutions during the years 1970 to 2020.

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<sup>2</sup> See for example Schumpeter (1934), Hayek (1945), Audretsch (1995; 2008), Baumol and Burke (2001), Baumol (2002) and Acs (2002).

The following analysis discusses what can explain the trends that can be seen in the data material. Are there turning points and different driving forces that can be important for understanding the development? And what are the consequences for the dynamics of the internal market and thus the EU's competitiveness and further development?

The next section introduces some of the literature on using text as data and studies on the European Union using this approach. Thereafter, we present how the concept of competition is used in EU treaties and competition law. We then discuss whether and in what sense a reinterpretation of the term "fair competition" may have occurred. This is followed by the empirical study, with a review of the data material, the chosen method, and the most important findings. In the next section, an analysis and discussion around what can explain the observed trends we have found, as well as what consequences the development may have, is carried out. Finally, we give some summary conclusions.

## 2. Text as data and corpus linguistics

The epistemological foundation of this study lies in the assumption that making inference about political development can be achieved through the study of political actors' sayings and writings (Grimmer and Stewart, 2013). The possibility of using text as data for researching purposes has been enabled thanks to advances in computing technology and the digitalisation of textual databases. Digital text has become a rich source for different types of analysis (Gentzkow, Kelly, and Taddy, 2019). Research in this field particularly relevant to this study is where the data is accessed through a search-engine, indicating the occurrence of a word in a document.

Gentzkow and Shapiro (2010) analyses whether political discourse in the US Congress is reflected by newspapers seeking profit-maximization. The newspaper data was accessed through the ProQuest database. Baker, Bloom, and Davis (2016) uses similar newspaper searches across time to build an index of economic policy uncertainty. Saiz and Simonsohn (2013) measured corruption across American cities by using combinations of city names and search-terms related to corruption. Gentzkow, Kelly, and Taddy (2019) highlight a key point of search-engine based studies: researchers must deal with trade-offs, such as not being able to access counts of search-terms per document and must therefore be tough in their initial selection phase (Gentzkow, Kelly, and Taddy (2019), p. 540).

In a European Union context and using the EUR-lex database, Blom-Hansen (2019) mapped the frequency of different post-Lisbon legislative procedures between 2012-2017. Senninger and Blom-

Hansen (2020) used European Commission policy documents and quantitative text analysis to study the power of the Regulatory Scrutiny Board. A vast array of studies using this approach looked at institutional power-dynamics of the European Union institutions under different legislative procedures and different time periods.<sup>3</sup> The methodology keeps on evolving and new tools have been made available for researchers such as the statistical *eurlex* R package developed by Ovádek (2021).

Another stream of studies using text as data are to be found in quantitative linguistics and more specifically the branch of corpus linguistics. This approach uses computing technology to study language in vast amounts of textual data called corpus. The method offers broad applicability and is mainly focused on answering questions about frequencies and distribution of different linguistic features (Gentzkow, Kelly, and Taddy (2019), p. 540). A corpus is thus representative of a particular language and can be used to draw statistical inferences and generate frequency lists (Brezina and McEnery, 2020). Research on language in the European Union institutions can use corpus linguistics through corpora built from documentation from the different European institutions. The richest corpus available is the EUR-lex English corpus generated from 242 000 documents containing 630 million words from the 1950s to the year 2016 (Baisa et al., 2016). This vast amount of data can be accessed through the corpus manager Sketch Engine. Studies using this method in the context of the European Union are rather few. An example is Germond, McEnery, and Marchi's (2016) use of a corpus to study the EU discourse in the context of counter-piracy engagement at the Horn of Africa.

We identify a gap in the literature for providing textual evidence from EU documentation, and more specifically evidence on shifting use of competition terms from the central EU institutions.

Finally, a disclaimer regarding this study's validity is appropriate. In their methodological toolbox, Grimmer and Stewart (2013) advise caution for the use of commercial tools, in other words software where output alone is provided to the researchers (Grimmer and Stewart, 2013, p. 271). As this is the case for this study, using both the EUR-lex search-engine and Sketch Engine, we are aware of validity concerns due to the inaccessibility of the search-engines detailed functioning. These validity concerns are partly addressed with the use of both engines to confirm findings and full disclosure on the details of the searches conducted.

A potentially more serious problem, however, common to the use of text as data for quantitative studies, is that we look at the frequency of the use of the terms in different documents, *not* at the content of the documents themselves. A document could thus either criticise or favor, for example,

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<sup>3</sup> See for example Golub (1999), Häge (2008), and Kardasheva (2009, 2013), Hagemann and Høyland (2010), Hurka and Steinbech (2021), and Rauh (2021).

"free competition" and still be counted as free competition. A way to increase the validity would be the manual coding of documents, something that is outside the scope of this study. We will return to these questions later.

### 3. The concept of competition in EU treaties and competition law

The establishment of the European Coal and Steel Community (ECSC) by the Treaty of Paris in 1951 was the starting point for the internal market (Busch-Hansen and Wigger, 2011). Even then, the then six Member States agreed that there was a need for competition on equal terms. As a result, they set up a Competition Council with the aim of combating unfair conditions in the internal market and maintaining "normal conditions of competition" (Busch-Hansen and Wigger, 2011). In the Treaty of Rome 1957 on the establishment of the European Economic Community (EEC), a common internal market was the main objective. In 1968, a customs union was formed, which meant the abolition of customs duties on trade between Member States of the Communities and the introduction of common customs duties against third countries. However, it was the Single European Act, which entered into force in 1987, which laid the foundations for the free movement of goods, services, people, and capital within the internal market. These were finally stipulated in 1993 by the Maastricht Treaty. This Treaty replaced the EEC with the European Community (EC) which, together with other areas of cooperation, constituted the European Union (EU). The Treaty also laid the legal basis for monetary union. Subsequent treaties, most recently the Treaty of Lisbon, which entered into force in 2009, have in principle transposed the internal market acquis but left competition rules unchanged.

This means that the EU today is based on the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (the Maastricht Treaty). The latter includes the cornerstone of economic policy, namely that it should be:

[B]ased on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

(Treaty on European Union, chapter 2 article 2)

The open market economy with free competition thus constitutes the fundamental principle of the common policies of the Member States within the EU. The TFEU also identifies the need to protect and uphold these principles by monitoring "fair competition", including the elimination of various barriers to trade. The treaty states, among other things, that:

[T]he removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition. (Treaty Establishing the European Community)

The latter is also reflected in EU competition law, as formulated in Articles 101 and 102 of Title VII, Chapter 1 of the TFEU. These competition rules contain two prohibitions: one against anti-competitive agreements (Article 101 TFEU) and one against abuse of a dominant position (Article 102 TFEU). There are also special provisions for reviewing mergers and rules on state aid and public procurement (Swedish Competition Authority, 2020).

The ban on anti-competitive agreements is about cooperation and agreements between companies that can affect trade between EU countries, while agreements that prevent, restrict, or distort competition are prohibited. The ban primarily applies to agreements that:

- directly or indirectly set prices,
- restricts production, markets, technological development, or investment,
- lead to market sharing,
- lead to trading partners receiving different terms for equivalent transactions or
- contain requirements that have no connection with what the agreement refers to, so-called tying agreement.

For collaborations where the positive effects are considered to outweigh the negative ones, there is a generally applicable exemption from the ban on anti-competitive collaboration. Undertakings may decide on their own whether the agreement or conduct satisfies the conditions laid down in the Treaty.

It is also forbidden for a company that has a dominant position to abuse it. Under this prohibition, a company may not:

- force a contracting party to pay unreasonable prices or accept other unfair business terms,
- restrict their production, their markets, or their technological development to the detriment of consumers,
- apply different conditions for equivalent transactions,
- require a party to the agreement to accept certain terms that have nothing to do with the agreement, so-called tying agreement.

Mergers with a Community dimension, that is, concentrations which have the effect of affecting competition in several Member States, must in certain cases be notified to the European Commission for review.

EU competition rules are also directed at the governments of the member states. A country must not act in a way that impedes the free movement of goods, services, and capital within the EU. The Commission can ban state aid measures that distort competition between Member States. Public administrations must also not discriminate against companies from other EU countries when it comes to procuring goods and services.

This is what "fair competition" means in competition law. It is thus a matter of competition in the internal market requiring a ban on fraud, illegality, price and cartel settlements, market sharing, abuse of a dominant position and restrictions on the management of state aid.

It is an approach that is broadly in line with what most economists usually mean by free competition and free markets.<sup>4</sup> Free competition acts as a discovery procedure which, through the price system and corporate profits and losses, leads to information on supply and demand, innovations and effective solutions, being disseminated to market participants without central control or planning, and in the long run to growth and prosperity.<sup>5</sup>

EU competition law can be said to have its basis in the ordoliberal Freiburger school, whose perspective emphasizes that the market economy needs a state regulatory framework in addition to private property rights and freedom of contract, which ensures that competition is "fair".<sup>6</sup> Germany was also the first country in the Community to have comprehensive competition law.<sup>7</sup>

#### 4. Fair competition as a level playing field

However, the term "fair competition" can be given an expanded and partly different meaning, where "everyone should have the same conditions" and where the playing field should be fair or equal. Fair competition is then equated with an "equal playing field". The meaning is then no longer an internal market free from regulations or other interventions (in addition to what was discussed in the

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<sup>4</sup> Note, however, that this does not apply to all economists. There are also those who believe that monopoly, market dominance and the like are temporary and compatible with freedom of contract and private property rights. See, for example, Krizner (1973).

<sup>5</sup> See, among others, Hayek, F. A. (1945; 1980, p. 87), and Baumol (2002).

<sup>6</sup> For an introduction on ordoliberalism, see Dold & Krieger (2019).

<sup>7</sup> See among others Bork (1978), Posner (2001) and Weitbrecht (2008). For distinctive cases in this development, see Commission Decision of January 31, 2001—SCA /Metsä tissue [2002] OJ L57/1; Commission Decision of July 3, 2001— General Electric/Honeywell [2004] OJ L48/1; Commission Decision of October 10, 2001 — Schneider/Legrand [2004] OJ L101/1; Commission Decision of October 17, 2001 — CVC/Lenzing [2004] OJ L82/20; Commission Decision of October 30, 2001 — Tetra Laval/Sidel [2004] OJ L43/13.



previous section) as such, but instead that the market should be corrected so that the conditions are fair or equal.

One such example, to which we shall return, is the European Pillar of Social Rights<sup>8</sup>, where 20 principles and different social rights are advocated:

The principles and rights enshrined in the Pillar are structured around three categories: equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. (The European Pillar of Social Rights)

The realization of social rights is intended to ensure that the internal market is characterized by equal opportunities, fair working conditions and inclusive social protection. Only then can the competition be considered fair, and the playing field levelled, according to the European Commission. This is a different interpretation of the earlier concept of fair competition, an interpretation which is no longer in the same way compatible with "free competition".

In the following section, we will therefore distinguish between *free competition*, *fair competition in the sense of free competition* and *fair competition in the sense of a level playing field*.

## 5. An empirical study

The question is whether there has been an increased use and reinterpretation of "fair competition" at the expense of "free competition"? Has the later, expanded interpretation of "fair competition" come to dominate within directives, regulations, and other documents from the EU's leading institutions? And how frequently these terms have been used by the various EU institutions over time? We will study this quantitatively by examining the frequency of the different terms in more than 12,000 official documents in the EU during the period 1970 to 2020 from the EUR-lex database.

### 5.1 Choice of competition terms

To be able to map the frequency of the three concepts *free competition*, *fair competition in the sense of free competition* and *fair competition in the sense of equal competition and level playing field* in various EU documents, three terms or keywords have primarily been identified as interesting:

1. "Free Competition"

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<sup>8</sup> See appendix 2.

2. "Fair Competition"
3. "Level Playing Field"

To also be able to map the frequency of *fair competition with the meaning of free competition* and *fair competition with the meaning of a level playing field*, the existence of documents with the following combinations, that is documents in which both terms are used, is of interest:

4. "Fair Competition" and "Free Competition"
5. "Fair Competition" and "Level Playing Field"

Synonyms for "free competition" could conceivably be "free enterprise", "open market economy" or "free market economy". However, these terms are particularly often used in conjunction with "free competition" – it is rare that discussions about a free market are not linked to free competition. These were therefore excluded as synonyms for free competition. As stated above, "free competition" can also have "fair competition" as a synonym, but not "level playing field" and not "fair competition" together with "level playing field". Other synonyms for "fair competition" could be "fair competitive conditions", but this is equally a term rarely used separately from "fair competition" or "level playing field".

## 5.2 Data and empirical approach

The empirical analysis aims to map the frequency of terms used by the EU's central institutions. Our data comes from EUR-lex, which is a branch of the European Union Publications Office<sup>9</sup> which provides legal documents and other documents from all the institutions of the Union. This includes treaties, acts of the EU institutions, preparatory documents relating to EU directives and recommendations including motions and resolutions, EU case law, international agreements, EFTA documents, references to national transposition measures and references to national case law related to EU law.

The data material was collected manually through specified searches in the EUR-lex database. The search language was English, but the languages of the retrieved documents were not specified. The terms searched consisted of *Free Competition*, *Fair Competition* and *Level Playing Field*, as well as

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<sup>9</sup> Initially, data from both the European Union Publications Office's aggregate database (which includes informal documents and documents such as flyers, party material and written comments, etc.) and EUR-Lex were used, but due to the Publications Office's aggregate database showing a high degree of uncertainty in search results despite identical search criteria, it was excluded. In correspondence with the Publications Office's technical department, it was confirmed that the total database has shortcomings in its search engine. Therefore, multiple searches with identical search criteria may give different results.

*Fair Competition and Free Competition* as well as *Fair Competition and Level Playing Field*. The search engine displayed documents where the searched term occurs at least once, which means that it did not take into account how many times a concept occurred per document. In other words, an observation is the same as a document where the chosen keyword appears at least once.

In the first three searches, the search engine showed results from the exact terms or phrases separately. In searches four and five, the search engine showed results from finding documents where both *Fair Competition and Free Competition* and *Fair Competition and Level Playing Field* occur at least once.

Searches six through eight are done to assess possible primers behind the use of the terms *Fair competition* and *Level playing field*. We use the terms *social*, *climate change*, and *China* in conjunction with *Fair competition* and *Level Playing Field*.

The time period for the searches extends between 01-01-1970 to 31-12-2020. For an overview of the search criteria, see Appendix 2.

Thus, a total of eight searches were performed according to the selected criteria and a total of 12,273 documents containing our keywords were identified at least once.<sup>10</sup> All retrieved documents followed the year-month-date format but were transformed to a yearly data frequency for easier data processing.

We also registered the documents based on the institution, that is, after the European Commission, the European Parliament, the Council of Ministers, the European Council, and the European Court of Justice, respectively. However, it turned out that the European Council had only a few total data points for all searches, after which this institution was removed before the searches. The searches also removed documents concerning specific Member States, such as transposition measures and national case law, as this falls outside the scope of this report and risks distorting the results.

### 5.3 Our results

Table 1 below shows the results from searches of terms for the entire time period for the various actors. *Level Playing Field* accounts for the largest number of observations, more than three times as many as *Free Competition*, while the frequency of *Fair Competition* is between the two other terms.

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<sup>10</sup> The EUR-lex engine searches for documents where the specified search-term appears at least once. This means that the engine omits information regarding how many times the specified search-term appears in a given document and informs us only that the search-term does, in fact, appear.

*Fair Competition and Level Playing Field* are five times more common than *Fair Competition and Free Competition*.

For reference, table 2 presents the total number of documents and average amount of documents per year for each institution over the sample period between 1970 to 2020.

Table 1: Frequency of different competition terms 1970 – 2020. N=12 273.

Actors	Frequency					Total
	"Free competition"	"Fair Competition"	"Level Playing Field"	"Fair Competition" and "Free Competition"	"Fair Competition" and "Level Playing Field"	
Commission	302	1552	3286	74	581	5795
European Parliament	282	667	879	34	210	2072
Council of Ministers	52	444	450	5	82	1033
Court of Justice	506	358	134	36	12	1046
Others*	402	705	986	62	172	2327
Total	1544	3726	5735	211	1057	12 273

\*Others are defined as the total sum of documents produced subtracted from the search results that go to the above-mentioned institutions.

Table 2. Total and average yearly number of official documents from the chosen EU institutions 1970 – 2020.

	Commission	European Parliament	Council of Ministers	Court of Justice
Total number of documents	236 032	232 206	64 409	96 129
Average number documents per year	4 628	4 553	1 263	1 885

In the category "others" fall all committees and institutions that are not directly subordinate to the other institutions – this category is only here to illustrate all the observations that are included in the overall result, but which are not visible in the analysis part where we focus on the leading institutions' use of competition terms.<sup>11</sup> In terms of which institutions have used the terms, it can be stated that the European Commission has by far the most frequent use of the term *Level Playing Field*, followed by the European Parliament and the Council of Ministers. The European Court of Justice, on the other hand, has used the term significantly fewer times; the European Commission uses it 25 times more often than the Court. In terms of *Free Competition*, on the other hand, the European Court of Justice is the most frequent user, followed by the European Commission, the

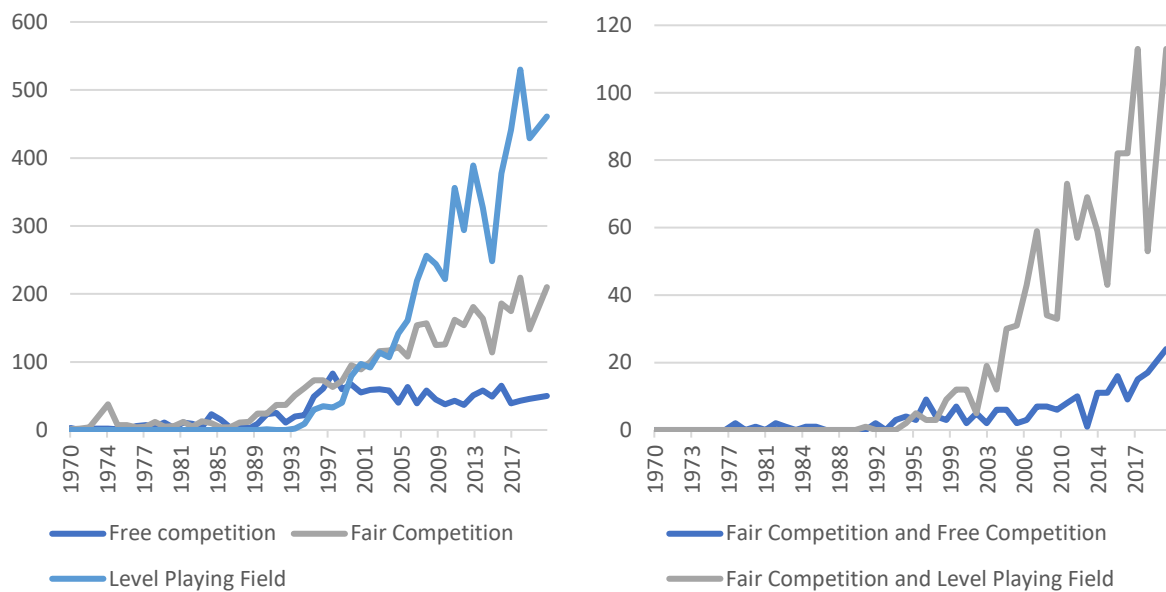
<sup>11</sup> These include the European Economic and Social Committee and the European Committee of the Regions, but there are also minor branches within the Union.

European Parliament, and the Council of Ministers, respectively. It is also noteworthy that the European Court of Justice has barely used *Fair Competition* and *Level Playing Field*, which is in sharp contrast to the European Commission in particular. In the case of *Fair Competition and Free Competition*, the prevalence is generally low and relatively evenly distributed between the institutions.

Figure 1 presents the frequency of our chosen competition terms and how the use of the terms has changed over time. The left diagram shows the frequency of *Free Competition*, *Fair Competition* and *Level Playing Field* 1970 to 2020. *Level Playing Field* is first noticed around 1990, and then gradually comes to prevail. The diagram on the right shows how the use of *Fair Competition and Free Competition* relates to *Fair Competition and Level Playing Field*. Here, too, a shift can be seen around 1990, after which *Fair Competition and Level Playing Field* are becoming more common.

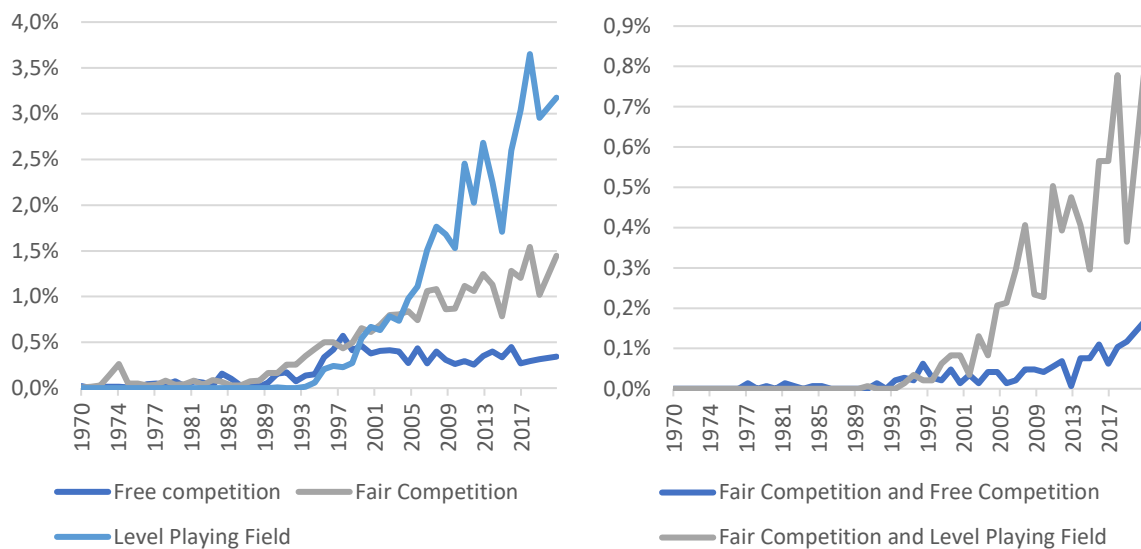
Figure 2 presents the frequency of competition terms as a share of total number of documents within EU institutions. The same patterns as in figure 1 can be seen. The competition terms *Free Competition*, *Fair Competition* and *Level Playing Field* in the left diagram fluctuate between 0 to 4 percent of total documents. In the right diagram, the combined terms of *Fair Competition and Free Competition* as well as *Fair Competition and Level Playing Field* are all under 1 percent of total documents.

Figure 1. Frequency of competition terms within EU institutions, 1970–2020.



Source: EUR-Lex.

Figure 2. Share of competition terms of total number of documents within EU institutions, 1970-2020.



Source: EUR-Lex.

Figure 3 shows how the EU institutions have used the competition terms over time as a share of total documents for a given institution.

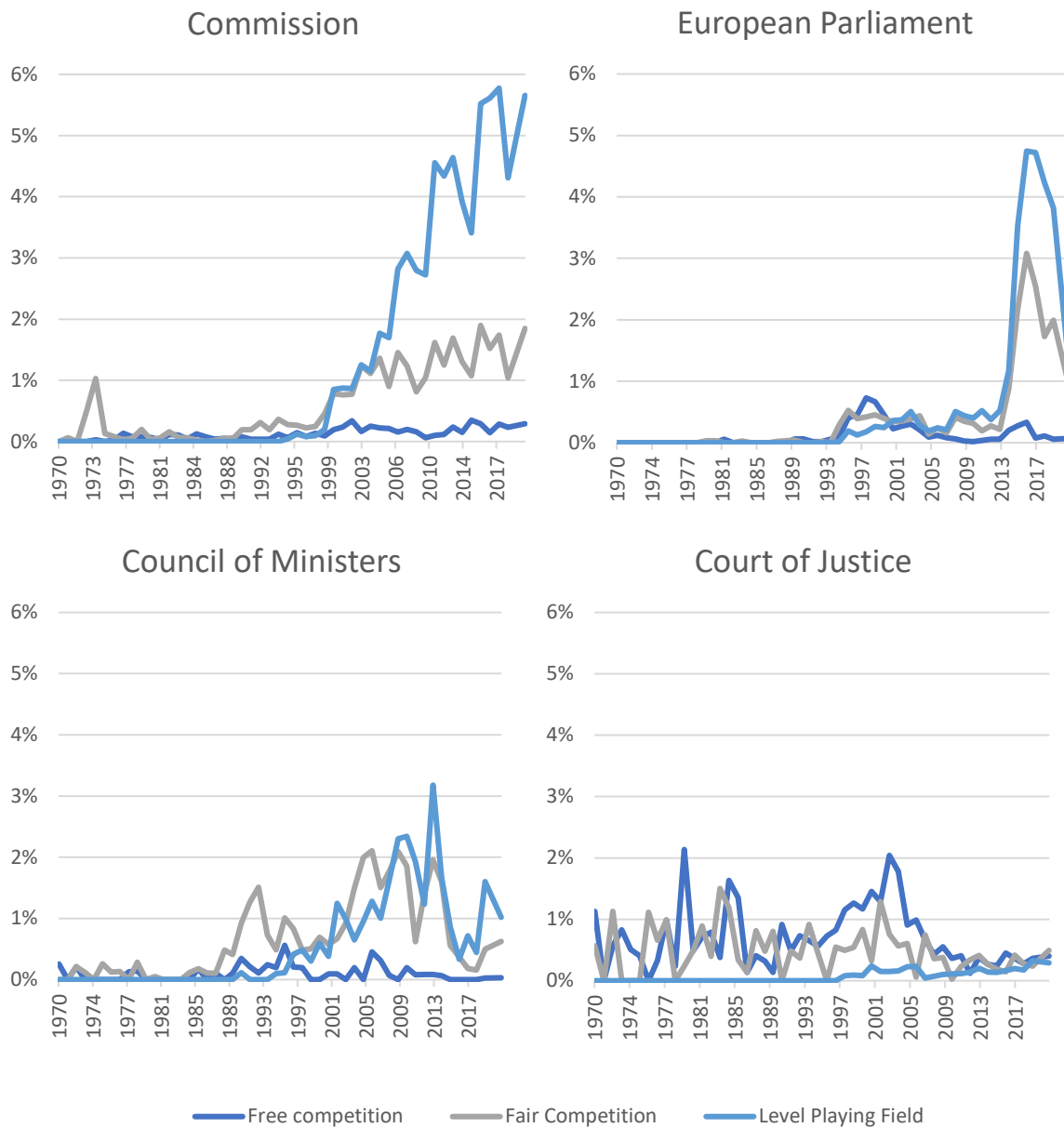
It can be stated that the changing frequency in the use of the competition terms described above - the increasingly common use of *Fair Competition* and *Level Playing Field* - was initiated by the European Commission in the 1990's and started rising rapidly around the turn of the century. While *Fair Competition* and *Free Competition* were the most prevalent terms in the European Parliament up until the 2001, *Level Playing Field* has since overtaken *Free Competition* and become the

dominant term. The Council of Ministers, while using *Fair Competition* and *Free Competition* frequently throughout the latter part of the 1980's and the entire 1990's, has seen an increase in *Level Playing Field* around 1997 and onwards. Since 1997, the correlation between *Fair Competition* and *Level Playing Field* has been noticeable. The European Court of Justice has mostly used the term *Free Competition* throughout the sample period – it is only after 2010 that *Level Playing Field* has reached the same frequency as *Free Competition* and *Fair Competition*.

Figure 4 presents the use of *Fair Competition* and *Free Competition* as well as *Fair Competition* and *Level Playing Field* in the same institutions over the same period.

A similar overall pattern can be seen here in the European Commission and European Parliament as with the terms plotted separately. The Council of Ministers have sparsely used the terms up until 2001, after which the frequency of *Fair Competition* and *Level Playing Field* has grown. The European Court of Justice lacks a corresponding pattern and is in general seldom using these terms.

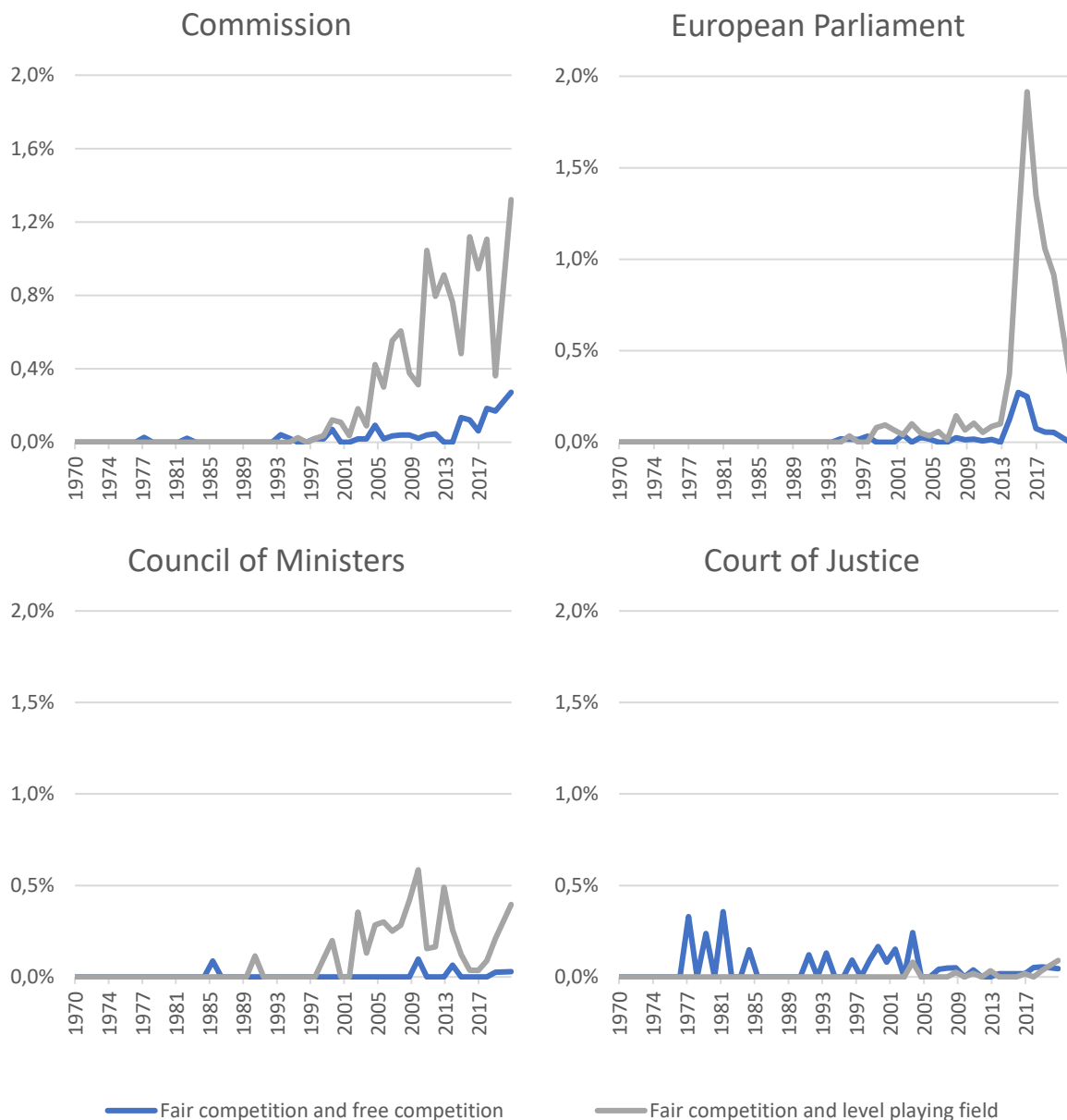
Figure 3. Share of competition terms of total number of documents within EU institution, 1970-2020.



Source: EUR-Lex.



Figure 4. Share of combined competition terms of total number of documents within EU institution, 1970-2020.

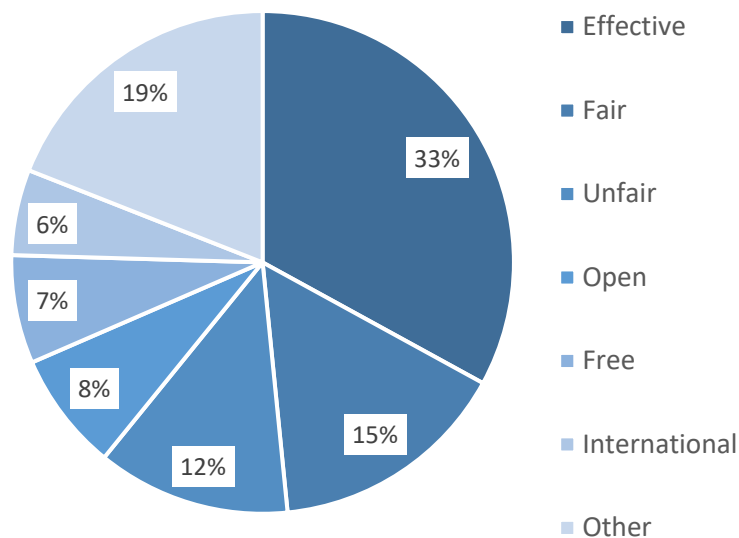


Source: EUR-Lex.

As mentioned above in the methodology section, it should be emphasized that what these result shows is only the share of documents containing the chosen competition terms, *not* at the content of the documents themselves. Moreover, the search engine displayed documents where the searched term occurred at least once, which means that it did not take into account how many times a concept occurred per document. Still, the changing patterns of frequencies clearly shows that there has been a major shift in what competition issues the major EU institutions are concerned about.

One way to investigate this further is to use the method in corpus linguistics to analyses of the term *Competition* in the EUR-Lex English 2/2016 corpus through Sketch Engine. The results are presented in figure 5 below. With this method, every single word of each document available on EUR-lex becomes a unit of analysis. This contribution strengthens the results of the frequency searches in the main analysis, where we know that the specified search-term appears at least once but not how many times it appears in a given document. The results confirm previous findings when one is looking at the ten words most often associated with *Competition*.

Figure 5. Share of the ten most frequent modifiers of *Competition* (1950-2016)



The most common modifier, with 33%, is the perhaps ambiguous term “effective competition”. What confirms previous findings is the use of *fair* and *unfair* (27 %) which is far superior to the use of *open* and *free* (15 %) when associated with *Competition*. However, this analysis differs to some extent from the previous frequency analysis as it does not separate the different institutions.

## 6. Analysis and discussion

What can explain the trends that can be seen in the data material? Are there turning points and different driving forces that can be important for understanding the development? And what are the

consequences for the dynamics of the internal market and thus the EU's competitiveness and further development?

### 6.1 A clear pattern

Despite the validity concerns raised above, it is a clear pattern that emerges: The use of the terms free competition and fair competition in the meaning of free competition have greatly diminished over time, in relative terms, in favour of the term fair competition within the meaning of fair competition as a level playing field, in official EU documents such as treaties and acts from central EU institutions.

This is also an indicator that the concept of “fair competition” has over time taken on an expanded and partly different meaning, compared with competition law's ban on fraud, illegality, price and cartel settlements, market sharing and restrictions on the handling of state aid. Today, fair competition is more about everyone having the same conditions and that the playing field should be equal. This development began in the early 1990s and then accelerated around the year 2000.

The European Commission has been the dominant actor in this development, closely followed by the European Parliament and subsequently by the Council of Ministers. However, the European Court of Justice has largely stood by this development.

These are the main results of this study.

### 6.2 Important turning points

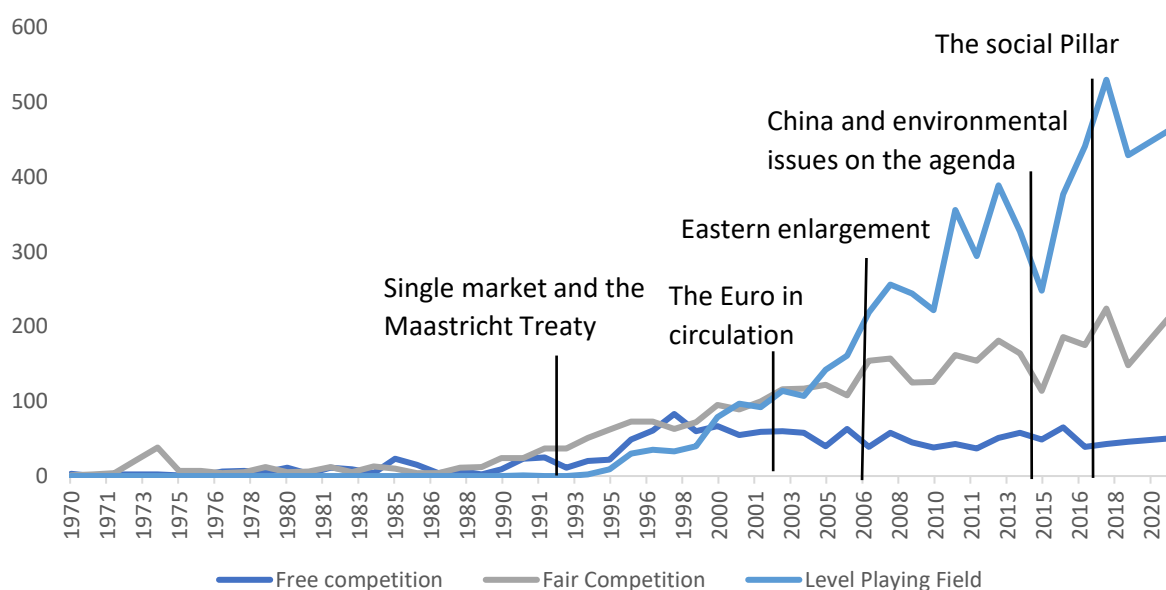
There are several turning points in the development of the EU that may be important for understanding why free competition has come to be dominated by fair competition in the sense of level playing field.<sup>12</sup>

In Figure 6, where for the sake of clarity only the use of the competition terms *Free Competition*, *Fair Competition* and *Level Playing Field* is included, some of the important turning points have been added.

*Figure 6. Turning points and frequency of competition terms, 1970 – 2020*

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<sup>12</sup> The breakpoints discussed below are described in more detail in, for example, Karlson (2014) and Tallberg (2016), unless a specific source is missing.



The first such turning point is the Maastricht Treaty in 1993, which laid the foundations for the free movement of goods, services, people, and capital on the internal market. It is no surprise that questions about free competition and the meaning of fair competition came to be discussed at that time. When capital and people can move freely across borders, transformative pressure increases, and previously successful sectors and regions are faced with new challenges. An equally important explanation is probably found in the fact that majority voting was introduced at the same time in several areas, which in turn opened for decisions in areas that could previously have been blocked by veto (Taylor, 2018).

A second turning point is the introduction of the euro in 1999. For the first three years, the new currency was an “invisible” currency used only for accounting and electronic payments, but in 2002 coins and banknotes were put into circulation in twelve EU countries. This meant an increased need for coordination in areas such as fiscal, monetary, and social policy. In addition, the Treaty of Amsterdam (Part 2, 2 §) had already been adopted in 1997, followed by the Treaty of Nice in 2000, which gave the EU greater influence in policy areas such as employment, the environment, gender equality, public health, consumer rights and social policy. The EU also received a common charter of rights. At the same time, the role of the European Parliament in the legislative process was further strengthened.

The next important turning point is the eastern enlargement in 2004 and 2007. As early as 1995, Sweden, Finland and Austria had become members. In 2004, ten more countries were added, followed by Bulgaria and Romania in 2007. In several of these new Member States, economic and social conditions were significantly different and lower than in the West. As a result, many of the

former Member States wanted to protect themselves against, as they saw it, unfair competition and "social dumping" (Vaughan-Whitehead, 2003).<sup>13</sup>

A fourth important turning point is the already mentioned European Pillar of Social Rights, which was adopted in 2017. It is an ambitious project that includes 20 guiding principles aimed at reducing disparities in working conditions and living standards within the EU. According to the 2017 Establishing a European Pillar of Social Rights (COM 2017, 250 final), these 20 principles are in turn divided into three categories: "Equal opportunities and access to the labour market; Fair working conditions; and Social protection and inclusion", which in turn contain several specific rights that should apply to all EU citizens. Employees shall, among other things, have the right to a minimum wage, unemployment benefits, to be informed in writing by the employer of their rights and obligations, to be informed in good time before dismissal, to resolve disputes with the employer and more.

The social pillar was originally said not to be legally binding, but rather a recommendation in which the member states themselves choose which parts of the pillar they want to ratify according to national conditions (COM 2017, 250 final). In fact, the European Commission has presented a number of directives that directly refer to the social pillar, such as the directive "Transparent and predictable working conditions" which attributed to employers a range of new obligations towards employees (Karlson & Wennerberg, 2018, p. 13). The "Work-Life Balance"-directive (COM 2017, 253 final) and reforms to the previous "Working Time"-directive<sup>14</sup> also bring about social and labour market policy changes within the Union and have made parts of the social pillar binding. In 2019, the European Labour Authority was also set up with the aim of monitoring the labour market conditions of the member states.

In 2020, the European Commission has promised continued implementation of the social pillar during the term of office and seeks to create a legal instrument to guarantee a minimum wage for all citizens and a common unemployment benefit within the Eurozone (COM(2020) 682 final).

However, apart from the rising importance of social issues within the EU in the second decade of the 21<sup>st</sup> century, there has been an increase in concerns over trade and environmental policy, where fair competition as a level playing field has been prominent issue. The former concerns China's growing economic importance, which has led to a review of internal state aid and procurement rules, mechanisms for examining foreign government-subsidized bids and investments in critical

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<sup>13</sup> For previous contribution on "social dumping" in the context of EU enlargement, see, inter alia, Pochet (1990) and Mosley (1995).

<sup>14</sup> The directive is based on the Working Time Directive from 2003, Directive 2003/88/.

infrastructure, and, by extension, a changed view of the EU's own industrial policy (Wiberg, 2020; Flam, 2021). The same can be said for the increased importance of environmental policy, where the argument is that competition should be fair in the sense that no country should be allowed to compete through looser environmental regulation (Reitberger, 2019).

### 6.3 China, climate change or social policy, and the increasing frequency of “fair competition as level playing field”

Since the sharpest increase in the use of level playing field occurred in the last 15 to 20 years, in order to further explore the relationship between fair competition and the social pillar, China and environmental concerns, respectively, we three additional searches of the EUR-lex database were conducted, with the same methods and data as above. First, the term *Social* represents the possibility of an increased prevalence of social issues at the European level<sup>15</sup>. Secondly, the increased influence of environmental and climate related issues are represented with the term *Climate change*<sup>16</sup>. Finally, the rise of China and its growing concern for the European Union is represented with *China*. All these additional terms are searched in combination with *Fair competition* and *Level Playing Field*.

Table 3 shows the results from searches of explanatory terms for the entire period for the various actors. These three additional searches, sharing many characteristics with the previous search on *Fair Competition* and *Level Playing Field*, shows that the use of the terms is almost exclusively coming from the European Commission. Readings across the two tables shows that these explanatory terms occur a total of 1006 times out of 1057 search-hits from *Fair competition* and *Level Playing Field*.

Table 4 presents the correlation table between the competition terms and the hypothesised primers. Unexpectedly, there is a high degree of correlation between the primers and both *Fair Competition* and *Level Playing Field*, while the same does not hold true with *Free Competition*. All three primer terms correlate more than 90 percent with *Level Playing Field* and above 80 percent with *Fair Competition*. The degree of correlation with *Free Competition* ranges between 48 and 58 percent. The terms are amongst themselves highly correlated to a degree over 90 percent.

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<sup>15</sup> When searching for “social”, the term of “social committee” has been excluded from the search as this term is highly frequent due to the European Economic and Social Committee being mentioned in documents not necessarily related to social matters.

<sup>16</sup> After a multitude of considerations, these two words best represented the issue while avoiding the risk of being used as synonyms for something unrelated to climate change, such as “sustainability” or “environment”.

Figure 7 presents the correlation over time. The shift that occurs at the beginning of the new millennia, where all the terms become increasingly prevalent, naturally corresponds with the shift occurring for *Fair competition* and *Level Playing Field* at the same period.

Although the search-hits from the different explanatory terms are overlapping, the extent in which they do so is not explored in this study. Nevertheless, the high frequency resulting from these terms are a good indication that they are likely to be some of the drivers of the change towards the more frequent use of *Fair competition* in the meaning of *Level playing field*. One avenue for further research is the analysis into further primers of this change.

Table 3: Frequency of possible explanatory terms 1970 – 2020.

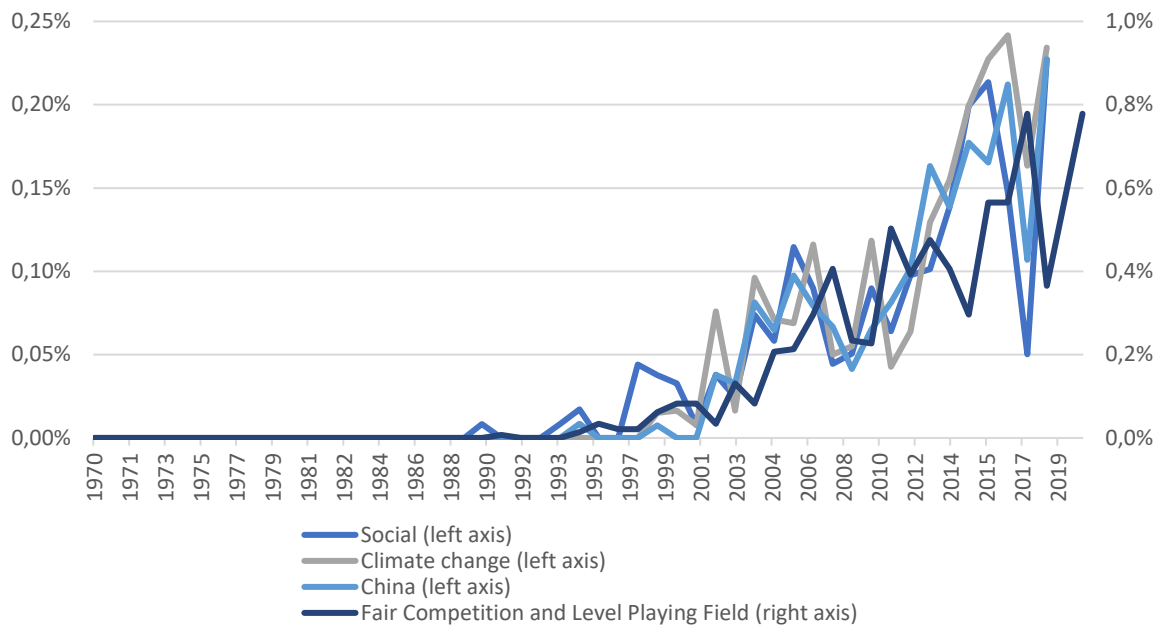
Actors	Frequency			Total
	"Social"	"Climate change"	"China"	
Commission	201	222	211	634
European Parliament	71	69	46	186
Council	18	18	14	50
Court of Justice	6	0	0	6
Others*	28	46	56	130
Total	324	355	327	1006

\*Others are defined as the total sum of documents produced subtracted from the search results that go to the above-mentioned institutions.

Table 4: Correlation table of the included competition terms.

Terms	Frequency					
	"Fair Competition"	"Free Competition"	"Level Playing Field"	"Social"	"Climate Change"	"China"
"Fair Competition"	1.000					
"Free Competition"	0.756	1.000				
"Level Playing Field"	0.935	0.570	1.000			
"Social"	0.896	0.520	0.933	1.000		
"Climate Change"	0.876	0.486	0.963	0.926	1.000	
"China"	0.894	0.487	0.962	0.948	0.942	1.000

Figure 7. Share of 'Fair Competition and Level Playing Field' (left axis), and possible explanatory terms (right axis) within EU institutions, 1970–2020



#### 6.4 Driving forces of change

While some possible driving forces have been explored empirically in the section above, some additional reflections may be in order. Political or institutional change of this kind can often be explained, previous research shows<sup>17</sup>, by a combination of ideological considerations and interests, which in turn often are dependent on various changes in the economic and social conditions.

As we have seen, it is the European Commission that has most frequently adopted, expanded, and changed the concept of competition where free competition has been toned down in favour of fair competition in the sense of level playing field. That this is the case is not surprising as the European Commission is the EU system's only institution that can propose new laws which are then submitted to the European Parliament and the Council for decision. The European Commission is also the EU's executive body that implements decisions.

The question is, however, *why* the European Commission has pushed development in the direction described. According to the Treaties, the free competition of the internal market is the Union's original and most important task and fundamental idea. Over time, however, as stated in the previous section, new projects and roles has been added to the Treaties. The European

<sup>17</sup> See Karlson (2018) and Acemoglu & Robinson (2012). Specifically applied to the EU, see for instance Dunleavy (1997) and Niklasson (2013).



Commission's main task since the Treaty of Rome in contributing to "an ever closer union among the peoples of Europe" has thus been given a broader interpretation. At the same time, the development has given the European Commission a more important role within the EU, which can be assumed to have been in its own interest. Its powers and competences have increased and expanded to more policy areas where fair competition by levelling the playing field is rewarded.

The same can be said of the European Parliament, which, after a short lag, has followed in the footsteps of the European Commission in changing the concept of competition. Through several treaty amendments described above, the role and importance of the European Parliament in the EU system have been expanded. It is not surprising that the Parliament, consisting of party representatives from the Member States, wants to expand its influence into new areas, in addition to the already established focus of competition policy on the freedom of the internal market. It is likely that both ideology and interests have come into play, just as for the European Commission.

In addition, the possibility of changing competition policy has been facilitated by the fact that qualified majority voting has become more important in EU policy. This institutional change has reduced the ability of individual countries to block decisions they disapprove of, and correspondingly increased the opportunities for majorities to pass the decisions they prefer. It also means that larger countries with larger populations have gained increased influence.

The decisions behind the changed policy are of course also based on fundamental societal or external changes. As mentioned, the enlargement of the East resulted in wages and other economic and social conditions varying significantly within the EU. At the same time, the economic disparities between Northern and Southern Europe have widened in recent decades. Problems with competitiveness, unemployment, budget deficits, public debt and the like are in many cases greater in countries such as Greece, Italy, and Spain than in Northern and Central Europe. The introduction of the single currency has partly contributed to this, as the possibility of devaluing oneself from the problems no longer exists.<sup>18</sup>

Together, these increased differences have contributed to increased demand for support and subsidies to countries within the EU with poorer social conditions, and to increased protection for employees in high-cost countries from being affected by 'social dumping'. The different principles and rights of the social pillar can be a way of trying to meet both requirements at the same time. As presented in the empirical part of this study, the term *social* is often present in documents where *Fair Competition* (in the sense of a level playing field) is used.

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<sup>18</sup> For an analysis, see Stiglitz (2016).

The Council of Ministers, which according to the empirical study thus only later entered the process of the expanded and changed concept of competition, can be assumed to have had similar considerations as the European Commission. Ideas and interests have probably worked together, and in order to meet the tough majority requirements, bargaining and compromises have been needed. It is interesting, however, that in some cases the so-called subsidiarity objections have been raised by the parliaments of individual Member States. For example, in 2018 the Swedish Parliament's Labour Market Committee (2017/18: AU11) requested a subsidiarity test of the EU Commission's directive proposal on clear and predictable working conditions, which is part of the social pillar. Likewise, the Swedish Parliament through the Labour Market Committee (2020/21: AU6) in December 2020 requested that the EU's proposal on minimum wages be tested for subsidiarity because it was considered to threaten the Swedish labour market model.

Finally, as noted, the European Court of Justice has mainly stood by the side of the development towards a changed view of "fair competition". The Court's task is to interpret EU law and ensure that it is complied with and applied in the same way in all EU countries, so this can be expected to change in the future as a result of the new directives and regulations that have been added in recent years. An interesting question then is how the Court should weigh the free competition of the Treaties against the expanded and changed concept of competition. It is worth noting, however, that the European Court of Justice, like the European Commission, has the task of working for "an ever closer union", which may provide an indication about the future.

All in all, a combination of ideological considerations and interests, which in turn have often been dependent on previous institutional changes and external circumstances, thus seem to have been the driving forces behind the development in a kind of self-reinforcing process. Since free competition essentially is collective good that benefits everyone in the long run, but for which it is hard to mobilize active support due to collective-action and free-riding problems, this is perhaps not very surprising.

## 6.5 Consequences of change

The question is nevertheless what the consequences are for the dynamics of the internal market and thus the EU's competitiveness and future development. What can we expect from the fact that free competition and fair competition within the meaning of free competition over time have greatly diminished in importance in favour of fair competition within the meaning of level playing field in official documents from the EU's central institutions? For example, is there a risk that the dynamics of the internal market and thus the competitiveness of the EU will weaken?

There is much evidence to suggest that this is the case. If the freedom of contract and establishment, the free formation of prices and the free movement of goods, services, capital and persons are restricted by various requirements - in addition to the actual competition law's prohibition of fraud, illegality, price and cartel settlements, market sharing and restrictions on state aid management - the market economy's ability to create wealth and innovation is likely to decrease. Free competition and open markets can be replaced by mercantilism and protectionism.

This risk is exacerbated to the extent that various resourceful and established actors and employees in high-cost countries successfully use the argument of unfair competition against competitors in less developed Member States with lower costs and wage levels. West eventually faces East and South. The changes made in the Posting of Workers Directive 2018, where requirements for minimum wages were replaced by requirements of equal wages as in the host state, can be interpreted as a protectionist measure of this kind (Shotter, 2017; Karlson, 2019). In December 2020, the European Court of Justice also rejected the criticism of Hungary and Poland that the directive is contrary to the free trade in services (EU & Arbetsrätt, 2020).

Corresponding objections can also be made to the change in EU industrial policy that appears to be emerging as a consequence of China's increased economic importance, a development reinforced by the consequences of the Covid-19 pandemic, where previously established antitrust approaches and best practices may be about to be repealed.<sup>19</sup>

For the market economy to be able to maintain its ability to generate growth and increase the welfare of EU citizens, competition needs to be free, as pointed out at the outset of this article. This means that freedom of contract and establishment must prevail, and price formation must be free,

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<sup>19</sup> For recent analysis, see Engberg (2021), Youngs (2020) and Nyberg (2020).

and that the borders must be open to goods, services, capital, and people. It is a prerequisite that contractors and companies must be able to develop, test and offer new and better products and services to buyers and consumers, in competition with other producers. In the words of William Baumol, *free competition rewards the free-market Innovation machine* (Baumol, 2002).

A possible objection to this reasoning may be that a balance between the wealth-creating capacity of free competition and the value of a more levelled playing field or fair competition within the EU is necessary and desirable. That may of course be the case, but it is doubtful - at least as far as we can judge - whether this discussion has been conducted sufficiently.

Salient issues like the social pillar, the environment and the growing concern for China are impactful consequences of societal and economical changes in the world. The legitimate demand for additional policy to tackle these issues could however also be used for protectionist ends. Regulation implemented for sound reasons may lead to unforeseen consequences for the internal market. This is indeed a real risk.

The shift of the EU institutions towards fair competition in the sense of a level playing field also means centralizing decisions at EU level at the expense of the Member States. More and more decisions that affect companies, employees and consumers will be made at the supranational level. Not least, the various European labour market models that exist today will be affected and increasingly aligned. In the long run, even important welfare state functions can be moved to the supranational level. What this will mean for the cohesion and legitimacy of the European project is questionable.<sup>20</sup>

## 7. Conclusion

According to the Treaties, the common economic policy of the European Union shall be based on market economy principles based on free competition.

T Our ambition has been to investigate whether an increased use and reinterpretation of what has been called “fair competition” has occurred at the expense of “free competition” among the central institutions of the European Union. We are also interested in assessing how frequently these terms

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<sup>20</sup> For further discussion, see Karlson & Wennerberg (2018) and Selldén (2020).

have been used by the various EU institutions over time. We have empirically examined this through a quantitative survey of more than 12,000 public documents, out of totally 242 000 documents containing 630 million words, in the EUR-lex database over the last 50 years, from 1970 to 2020.

Our conclusion is that the emphasis of the common policies in the EU is likely to have shifted from free competition and an open market economy to "fair competition" in the sense of a level playing field, in official EU documents, such as treaties, EU acts institutions, preparatory documents relating to EU directives and recommendations including motions and resolutions, case law and more.

The European Commission has been a driving force in this development, accompanied by the European Parliament and subsequently by the Council of Ministers. The European Court of Justice has largely stood by the described development.

A combination of ideological considerations and interests, which in turn have often been dependent on previous institutional changes and external circumstances, seem to have been the driving forces behind this development in a kind of self-reinforcing process.

This change entails a risk that the regulation of the European internal market has shifted so that the dynamics of the internal market and thus the EU's competitiveness will weaken. The change also entails a centralization of decisions at EU level at the expense of the Member States.

To the extent that this is a conscious choice of path, a more open discussion on the balance between free competition and growth on the one hand and fair competition in the sense of level playing field on the other should be of great value. Such a discussion would undoubtedly be facilitated if a clearer distinction were made between the various concepts. As stated, they have entirely different meanings and consequences.

This development also means a centralization of decisions at EU level at the expense of the Member States.

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The European Pillar of Social Rights

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Treaty on European Union

Treaty of Amsterdam

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## Appendices

### Appendix 1. The European Pillar of Social Rights

<b>Chapter I:</b> <b>Equal opportunities and access to the labour market</b>	<b>Chapter II:</b> <b>Fair working conditions</b>	<b>Chapter III:</b> <b>Social protection and inclusion</b>
1. Education, training and life-long learning	5. Secure and adaptable employment	11. Childcare and support to children
2. Gender equality	6. Wages	12. Social protection
3. Equal opportunities	7. Information about employment conditions and protection in case of dismissals	13. Unemployment benefits
4. Active support to employment	8. Social dialogue and involvement of workers	14. Minimum income
	9. Work-life balance	15. Old age income and pensions
	10. Healthy, safe and well-adapted work environment and data protection	16. Health care
		17. Inclusion of people with disabilities
		18. Long-term care
		19. Housing and assistance for the homeless
		20. Access to essential services

Appendix 2. Search criteria for the data material from EUR-Lex.

	<b>Search 1</b>	<b>Search 2</b>	<b>Search 3</b>	<b>Search 4</b>	<b>Search 5</b>
Search entry	“Free Competiton”	“Fair Competiton”	“Level Playing Field”	“Free Competition and Level Playing Field”	“Fair Competition” and “Level Playing Field”
Specification	Search for exact phrase	Search for exact phrase	Search for exact phrase	Both terms	Both terms
Time period	1970-01-01 – 2020-12-31	1970-01-01 – 2020-12-31	1970-01-01 – 2020-12-31	1970-01-01 – 2020-12-31	1970-01-01 – 2020-12-31
Author	European Commission, European Parliament, Council of the European Union, European Court of Justice.	European Commission, European Parliament, Council of the European Union, European Court of Justice.	European Commission, European Parliament, Council of the European Union, European Court of Justice.	European Commission, European Parliament, Council of the European Union, European Court of Justice.	European Commission, European Parliament, Council of the European Union, European Court of Justice.
Document	All, excluding national legislation related to EU law and national transposition of EU legislation.	All, excluding national legislation related to EU law and national transposition of EU legislation.	All, excluding national legislation related to EU law and national transposition of EU legislation.	All, excluding national legislation related to EU law and national transposition of EU legislation.	All, excluding national legislation related to EU law and national transposition of EU legislation.
Search language	English	English	English	English	English
Document language	All	All	All	All	All

Appendix 2 (cont.). Search criteria for the primer terms from EUR-Lex.

	<b>Search 6</b>	<b>Search 7</b>	<b>Search 8</b>
Search entry	"Social"	"Climate change"	"China"
Specification	In combination with "Fair Competition" and "Level Playing Field", excluding "Social Committee"	In combination with "Fair Competition" and "Level Playing Field"	In combination with "Fair Competition" and "Level Playing Field"
Time period	1970-01-01 – 2020-12-31	1970-01-01 – 2020-12-31	1970-01-01 – 2020-12-31
Author	European Commission, European Parliament, Council of the European Union, European Court of Justice.	European Commission, European Parliament, Council of the European Union, European Court of Justice.	European Commission, European Parliament, Council of the European Union, European Court of Justice.
Document	All, excluding national legislation related to EU law and national transposition of EU legislation.	All, excluding national legislation related to EU law and national transposition of EU legislation.	All, excluding national legislation related to EU law and national transposition of EU legislation.
Search language	English	English	English
Document language	All	All	All