

# Competition Law through an Ordoliberal Lens

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## Abstract

Ordoliberalism is a German school of economic thought that advocates regulation of the free market economy based on a set of state-imposed rules guaranteed by the economic constitution, to impose a competitive order in society. It proposes an alternative method to pure *laissez-faire* and state-planned economy for the better regulation of the market economy, where the goals are the protection of the competitive process and individual freedom. In this paper I submit that ordoliberalism, an indigenous European competition policy, is an adequate economic and analytical tool upon which to base the practice and decision-making of competition law. My aim is twofold: to contribute to the discussion on what ordoliberalism is, in general, and in particular concerning competition policy, and offer a fresh perspective on an ordoliberal-oriented competition policy.

**Keywords:** Ordoliberalism; competition law; law and economics; economic constitution; German neo-liberalism; social market economy; Freiburg School of Law and Economics.

## 1. Introduction

Ordoliberal ideas of *Wettbewerbsordnung* and *Wettbewerbsfreiheit* — competitive order and freedom to compete — have partially influenced the historical development of the internal market,<sup>1</sup> and EU competition policy.<sup>2</sup> At its core, ordoliberalism (also known as

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<sup>1</sup> Karel Van Miert (Member of the European Commission), 'The Future of European Competition Policy', *europa.eu* (17 September 1998) <[http://ec.europa.eu/competition/speeches/text/sp1998\\_042\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1998_042_en.html)> accessed 6 November 2015; Alessandro Somma, 'Private Law as Biopolitics: Ordoliberalism, Social Market Economy, and the Public Dimension of Contract' (2013) 76 *Law and Contemporary Problems* 105.

the 'Freiburg School of Law and Economics' or German neo-liberalism)<sup>3</sup> advocates a state-regulated competitive process as a necessary instrument for the protection of individual economic freedom.<sup>4</sup> Ordoliberalism, however, is not just about competition policy, it also views the competitive process as a pillar of a holistic political economy and societal order.<sup>5</sup> Importantly, ordoliberalism represents an original and indigenous European trend of thinking that, along with other pluralistic economic and legal schools,<sup>6</sup> has shaped, and continues to influence EU law in general, and EU competition policy in particular.<sup>7</sup> Although the extent of the influence of ordoliberalism may be contested, its influence is nevertheless undeniable.<sup>8</sup>

In this paper, I present the core ordoliberal ideas and discuss the influence of ordoliberalism in competition law and the implications of its application as an analytical

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<sup>2</sup> David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 *The American Journal of Comparative Law* 25, 49; David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001) ch VII; Ian Rose and Cynthia Ngwe, 'The Ordoliberal Tradition in the European Union, its Influence on Article 82 EC and the IBA's Comments on the Article 82 EC Discussion Paper' (2007) 3 *Competition Law International* 8; Liza Lovdahl Gormsen, 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 *European Competition Journal* 329; Flavio Felice and Massimiliano Vatiere, 'Ordo and European Competition Law', *Società Italiana degli Economisti* (September 2013) <<http://www.siecon.org/online/wp-content/uploads/2013/09/Felice-Vatiere.pdf>> accessed 12 December 2015.

<sup>3</sup> An alternative name is used by Alan Peacock and Hans Willgerodt, who refer to the *Ordo-Kreis* (Ordo-Circle) to denote a group of scholars who are part of this trend, although notably, not all scholars who adhere to this teaching have studied or taught at the University of Freiburg; see also Alan Peacock and Hans Willgerodt, 'German Neo-Liberals and the Social Market Economy' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy*, vol 1 (MacMillan 1989) 1-320.

<sup>4</sup> Werner Bonefeld, 'Freedom and the Strong State: On German Ordoliberalism' (2012) 17 *New Political Economy* 633, 638.

<sup>5</sup> Alfred Müller-Armack, 'The Social Market Economy as an Economic and Social Order' (1978) 36 *Review of Social Economy* 325, 327; Manfred E Streit, 'Economic Order, Private Law and Public Policy – The Freiburg School of Law and Economics in Perspective' (1992) 148 *Journal of Institutional and Theoretical Economics* 675.

<sup>6</sup> In particular, since the adoption of the Commission's 'more economic approach', the influence of the Chicago and Post-Chicago schools has been of great importance.

<sup>7</sup> See recently Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-09291, para 63. Also stressing the ordoliberal influence, see Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact upon EU Competition Law' (2014) 1/14 *Discussion Papers from Europa-Kolleg Hamburg, Institute for European Integration* <<http://econpapers.repec.org/paper/zbwekhdp/114.htm>> accessed 1 December 2015. See also the treatment of rebates in Case T-286/09 *Intel v Commission* [2014] EU:T:2014:547, not yet published in ECR.

<sup>8</sup> See eg the views of Akman who claims that ordoliberal ideas were by and large not incorporated into the drafting of Art 102 TFEU, in Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 *Oxford Journal of Legal Studies* 267; Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart 2012) 55-105; also rejecting the influence of ordoliberal ideas in the scope of Art 102, see Renato Nazzini, *The Foundations of European Union Competition Law: The objective and principles of article 102* (Oxford University Press 2011) 131-132.

tool. Competition law deals with the relationship between the state and the economy,<sup>9</sup> by defining behaviour that due to its pernicious welfare effects undertakings are precluded from entering into. In my view, economic theory has three main functions in competition law: firstly, it serves as the framework of reference for competition policy's design and the laws to be applied; secondly, it enables understanding of the economic consequences of an undertaking's behaviour and welfare effects;<sup>10</sup> and thirdly, it informs the application and interpretation of legal rules to particular economic activities.<sup>11</sup> This context, the application of ordoliberalism to competition policy and law (alone and/or in conjunction with other economic trends) establishes the theoretical framework, goals and guiding principles for determining when conduct jeopardises the economic well-being of society.<sup>12</sup> In other words, the application of ordoliberalism acts as a guiding mechanism for the coherent and consistent design, interpretation and application of competition rules.

The aim of this paper is to promote the understanding of ordoliberalism as a school of thought that can be applied in the design of a coherent competition policy, and to examine its implications. To this end, the paper is structured as follows. Section 2 describes the origins and evolution of ordoliberalism and presents its main representatives. Section 3 addresses the core ideas of ordoliberalism as an economic and social philosophy. Section 4 comprises an analysis of ordoliberal perspectives on competition and its conception. In Section 5, I present my proposals for the adoption of a contemporary ordoliberally-oriented competition policy. Finally, Section 6 concludes with a summary of the findings and further suggestions for the future.

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<sup>9</sup> See Carl Baudenbacher, 'Swiss Economic Law Facing the Challenges of International and European Law' (2012) II *Zeitschrift für Schweizerisches Recht* 419, 427 (mentioning that the concept of economic law (*Wirtschaftsrecht*) is a German concept conceived in the late 1920s and early 1930s — the period in which the ordoliberal school of thought emerged).

<sup>10</sup> Vivian Rose and David Bailey (eds), *Bellamy & Child: European Union Law of Competition* (Oxford University Press 2013) para 1.014.

<sup>11</sup> Judgment of the EFTA Court, E-8/00 *Norwegian Federation of Trade Unions and Others v Norwegian Association of Local and Regional Authorities and Others* [2002], para 55; Judgment of the EFTA Court, E-15/10 *Posten Norge AS v EFTA Surveillance Authority* [2012], para 126.

<sup>12</sup> Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-00527, para 60.

## 2. The Birth of Ordoliberalism

### 2.1. Origins

Ordoliberalism originated in late 1920s and early 1930s Germany, a by-product of its time: on the one hand, emerging from the German crisis of 1921-1923, the Great Depression of 1929, the Weimar Republic's failure in 1933, and the Nazi regime's central planning efforts,<sup>13</sup> and, on the other hand, a reaction to the state-planned economy of the Soviet Union at that time.<sup>14</sup> Ordoliberals recognised that, at this period in time, a weak state could be greatly influenced by private economic market power, as represented by industry cartels, thereby eliminating true competition and generating social chaos.<sup>15</sup> For ordoliberals, the concentration of economic power curbs individual economic freedom and dominates the state's decision-making function. Although market power controls society's economic life, the state is controlled by private powers, leading to historical tropes such as serfdom and slavery.<sup>16</sup> Furthermore, ordoliberals rejected the notion of a central planned economy on the grounds that it was inefficient and restricted individual freedom. Accordingly, ordoliberalism became an alternative to *laissez-faire* and central planning by virtue of promoting the existence of a strong state governing economic activity, as well as nurturing the freedom to compete, enshrined by set rules incorporated into the economic constitution.<sup>17</sup>

Ordoliberals had two sources of inspiration and opposition: classical liberal theory inspired by Anglo-Saxon economics, and the Germanic influence of the Historical School.<sup>18</sup> As 'liberals',<sup>19</sup> they emphasised individual freedom and protection from the

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<sup>13</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 25; cf with Somma (n 1) 105, 110-111. For a discussion of Nazism from an ordoliberal perspective, see Michel Foucault and others, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Graham Burchell tr, Palgrave Macmillan 2008) 109-115.

<sup>14</sup> Oliver Marc Hartwich, *Neoliberalism: The Genesis of a Political Swearword* (The Centre for Independent Studies (CIS) 2009) 1, 6-7.

<sup>15</sup> Walter Eucken, 'El Problema Político de la Ordenación' in Lucas Beltrán (ed), *La Economía de Mercado*, vol I (Sociedad de Estudios y Publicaciones 1948) 45ff; Streit (n 5) 675, 689; Bonefeld (n 4) 633, 634.

<sup>16</sup> Eucken (n 15) 55-56.

<sup>17</sup> Ulrich Kamecke, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy: Comment' (2001) 157 *Journal of Institutional and Theoretical Economics* (JITE) 23, 24.

<sup>18</sup> Peacock and Willgerodt (n 3). For a discussion on the importance and implications of this dualistic source of inspiration, see Joachim Zweynert, 'How German is German Neo-liberalism?' (2013) 26 *Review of Austrian Economics* 109; also highlighting the influence of the Historical School, see Gerber, 'Constitutionalizing the Economy' (n 2) 25, 34; James C Van Hook, *Rebuilding Germany: The Creation of the Social Market Economy, 1945-1957* (Cambridge University Press 2004) 243.

interference of public power in the private sphere. However, unlike classic liberals they argued for the control of private economic power.<sup>20</sup> In ordoliberalism, personal and political freedom cannot be achieved spontaneously as unrestrained economic competition would lead to power struggles: a state of *Vermachtung* (or a self-destructive tendency) would arise in which private market power is abused in contravention to the interests of society.<sup>21</sup> To avoid this, ordoliberalism advocates a strong state that defines the set of economic rules in an institutional framework that directs economic competition.<sup>22</sup> Accordingly, the state acts as a *Marktpolizei* (market police), imposing rules to establish order and coordinate human actions in the economic sphere<sup>23</sup> by virtue of restraining the abuse of market power and securing competition based on a set of rules that protect individual economic freedom.<sup>24</sup> Consequently, ordoliberalism proposes a holistic view of orders in society that separates economics from politics,<sup>25</sup> and counts on a strong state with clearly prescribed functions defined by law.

From a methodological perspective, ordoliberals' ideas were based on the interaction between economic, political and legal orders in an attempt to translate the classical body of economic theory from the language of economics into the language of legal sciences, in a truly multidisciplinary effort.<sup>26</sup> Such translation in practice, however, has been deemed a 'key failure' of ordoliberalism by Grosskettler as it was not sufficiently or properly done.<sup>27</sup> I do not share this view when it comes to reception of ordoliberal ideas

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<sup>19</sup> Alan Peacock and Hans Willgerodt label them 'end-state liberals', meaning that they adopt particular ethical positions that can be translated into economic language, such as individual freedom and just income distribution: see Peacock and Willgerodt (n 3) 3-4; NP Barry, 'Political and Economic Thought of German Neo-Liberals' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy*, vol 1 (MacMillan 1989) 112-133.

<sup>20</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 25, 37; Foucault and others (n 13) 108.

<sup>21</sup> Barry J Rodger, 'Competition Policy, Liberalism and Globalization: A European Perspective' (2000) 6 *Columbia Journal of European Law* 289, 294; Zweynert (n 18) 115.

<sup>22</sup> The concepts of 'ordo' and a strong state are particularly prominent in the work of Eucken (n 15); see also Streit (n 5) 680.

<sup>23</sup> *ibid* 679; Alexander Ebner, 'The Intellectual Foundations of the Social Market Economy' (2006) 33 *Journal of Economic Studies* 206, 213.

<sup>24</sup> Bonefeld (n 4) 634.

<sup>25</sup> For a discussion on the importance and implications of this dualistic source of inspiration, see Peacock and Willgerodt (n 3) 4; Zweynert (n 18) 122.

<sup>26</sup> Similarly, on the interdisciplinary character of ordoliberalism, see Peacock and Willgerodt (n 3) 4; Kiran Klaus Patel and Heike Schweitzer, 'EU Competition Law in Historical Context: Continuity and Change' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical foundation of EU competition law* (Oxford University Press 2013) 207-230, 223.

<sup>27</sup> HG Grosskettler, 'On Designing an Economic Order: The Contribution of the Freiburg School' in Donald A Walker (ed), *Perspectives on the History of Economic Thought, vol 2: Twentieth-Century Economic Thought* (Edward Elgar Publishing Inc 1989) 38; Streit (n 5) 675; Rodger (n 21) 289; Gerber, *Law and Competition in Twentieth Century Europe* (n 2).

in German and EU competition law. As is illustrated in this paper, certain ordoliberal ideas *have* been incorporated into legal sources of EU competition law.<sup>28</sup>

## 2.2. Waves of Ordoliberal Schools of Thought

There is no single approach to ordoliberalism and the term is frequently applied in a rather imprecise manner. In my opinion, this has given rise to misunderstandings regarding the theories that underpin ordoliberalism and over-simplification of the underlying ideas.<sup>29</sup> In an effort to impart some clarity here, I distinguish between three ‘waves’ of ordoliberal scholars.<sup>30</sup> The first wave, known as the ‘Freiburg School’ dates back to the origins of ordoliberalism in the 1930s and 1940s in Germany, at the University of Freiburg, the early proponents of which were Walter Eucken, Franz Böhm and Hans Grossmann-Doerth — at this time, ordoliberalism was used in a rather narrow sense.<sup>31</sup> A second wave of ordoliberal-related thinkers emerged in the 1940s and 1950s. Distinct from the Freiburg school, this wave was championed by Alexander Rüstow, Wilhelm Röpke,<sup>32</sup> Alfred Müller-Armack, Leonhard Miksch and Ludwig Erhard.<sup>33</sup> This second wave of ordoliberal thinkers developed the concept of social market economy<sup>34</sup> and emphasised humanistic values within economic ideas.<sup>35</sup> They had a clear impact on the ‘European project’ (although not necessarily greater impact than the first wave), given the incorporation of the concept of ‘social market economy’ in the Treaty on European Union (TEU) Article 3. Lastly, a third wave of ordoliberals, known as the

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<sup>28</sup> Sharing this view and calling the victory of the legal wing of ordoliberalism ‘remarkably successful’ and supporting the opinion that ordoliberal ideas extended their influence to competition policy within the EU, see Peacock and Willgerodt (n 3); also emphasising the goal and success of this interpretation, see Patel and Schweitzer (n 26) 223.

<sup>29</sup> A similar criticism has been raised by Ebner, in terms of misunderstanding that has arisen concerning the concept of social market economy: Ebner (n 23) 223. Likewise, Gerber acknowledges the confusion regarding this concept that is abound in English works, in Gerber, ‘Constitutionalizing the Economy’ (n 2) 25, 31.

<sup>30</sup> Cf. Nils Goldschmidt and Arnold Berndt, ‘Leonhard Miksch (1901–1950) A Forgotten Member of the Freiburg School’ (2005) 64 *American Journal of Economics and Sociology* 973, 992 (fn 1).

<sup>31</sup> *ibid*; see also Streit (n 5) 675; Viktor Vanberg ‘Freiburg School of Law and Economics’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics*, vol 2 (Palgrave Macmillan 1998); Rodger (n 21) 293. For an overview of the work of Böhm, see J Tumlrir, ‘Franz Böhm and the Development of Economic-constitutional Analysis’ in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy*, vol 1 (MacMillan 1989) 125-141.

<sup>32</sup> Rüstow and Röpke are the main representatives of sociological liberalism.

<sup>33</sup> Cf the ‘second generation’ of ordoliberal scholars which Vanberg refers to, including Hensel, Lenel and Mestmäcker; Vanberg (n 31) 173.

<sup>34</sup> Streit (n 5) 678; Hartwich (n 14) 21.

<sup>35</sup> Vanberg (n 31) 172; regarding Röpke and Müller-Armack, see also Gerber, ‘Constitutionalizing the Economy’ (n 2) 32. Cf Bonefeld (n 4) 633 (who does not distinguish between narrow and broader qualifications of scholars).

'Freiburg Tradition', emerged, represented by Friedrich August von Hayek, Erich Hoppmann, Ernst-Joachim Mestmäcker, Manfred E Streit and Viktor Vanberg. These scholars focussed on economic order and competition policy in particular (most notably Hoppmann and Mestmäcker).<sup>36</sup> They continued the ordoliberal school of thought, incorporating new economic elements and venturing into other areas, such as constitutional economics.<sup>37</sup> As this evolution of schools of thought attests to, it is hard to pinpoint one systematic, unified and condensed exposition of ordoliberal thinking; rather, individual and relatively distinct approaches in ordoliberalism are readily apparent.<sup>38</sup>

### 3. Central Themes of Ordoliberalism

#### 3.1. Ordoliberalism at a Glance

Ordoliberalism advocates a holistic social policy covering most aspects of social life, one not purely limited to the economic aspect of it as a social-philosophy.<sup>39</sup> From an economic perspective, it proposes a 'third way'<sup>40</sup> between neo-liberalism and state-planned economy by preserving a large degree of *laissez-faire* while advocating the creation of 'an institutional framework which brings order to economic processes in a liberal atmosphere'.<sup>41</sup> That said, ordoliberalism should not be understood as a

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<sup>36</sup> Although these scholars are not generally associated with ordoliberal ideas, the concepts they discuss are nevertheless anchored in legal and economic aspects related to ordoliberalism, see further Michael Wohlgemuth, 'Introduction: German Neo-liberalism and its Relevance for Austrian Economics' (2013) 26 *Review of Austrian Economics* 105, 106-108. Linking these thinkers to the Virginia school of constitutional economics, see Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) 3/2013 'CLES Working Paper Series'.

<sup>37</sup> The works of Viktor Vanberg, Wolfgang Kerber and JM Buchanan are particularly good representations of this as they mainly focus on larger constitutional topics; see Wolfgang Kerber and Viktor Vanberg, 'Constitutional Aspects of Party Autonomy and Its Limits – The Perspective of Constitutional Economics' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 49-79.

<sup>38</sup> Bonefeld (n 4) 635; Wohlgemuth (n 36) 105. Also raising the difficulty of defining academic 'schools' in the field of US Antitrust, see Malcolm B Coate and Jeffrey H Fischer, 'Is Market Definition Still Needed After All These Years' (2014) 2 *Journal of Antitrust Enforcement* 422, 431.

<sup>39</sup> Wernhard Möschel, 'Competition Policy from an Ordo Point of View' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy*, vol 1 (MacMillan 1989) 142.

<sup>40</sup> For Eucken, 'the number of organizational forms (of the economy and society), in which the modern economy may be ordered is very small', thus portraying his idea that ordoliberalism is an alternative way between capitalism and centrally planned economies: Eucken (n 15) 79. See also Jack Wiseman, 'Social Policy and the Social Market Economy' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy*, vol 1 (MacMillan 1989); Rodger (n 21) 293; also using the term 'third way', Gerber, 'Constitutionalizing the Economy' (n 2) 35; Foucault and others (n 13) 119-120; Bonefeld (n 4) 634.

<sup>41</sup> Grossketler (n 27). For Foucault this is rather an 'anti-Keynesian' position, see Foucault and others (n 13).

compromise between state-planned economy and pure *laissez-faire* — it proposes adopting an institutional framework for the (better) regulation of the market economy. Its aim is to reinstate law and economic policy in their proper place by setting clear rules; establishing an order and legitimising the rule ‘of [the] state on the basis of a space of freedom for the economic partners’.<sup>42</sup> In this regard, what is known as the ‘Freiburg Imperative’<sup>43</sup> is anchored in regulating the competitive order of market freedom, protection of private property; trust in the market-price system,<sup>44</sup> and institutional pillars governing other societal aspects of human life.<sup>45</sup> Its fundamental pillar is the price system, in order to ensure an efficient outcome and effective use of resources.<sup>46</sup> For ordoliberalism, the efficiency of an economic system is not dependent on the market’s invisible hand but on the appropriateness of the economic constitution’s rules.<sup>47</sup> The underlying philosophy is that by incorporating economic and legal theory into legal regulation, economic efficiency should follow. The logic of the argument is very Smithian: improving the game rules and creating conditions of effective competition enables individuals to pursue their own self-interest, while at the same time promoting society’s interest.<sup>48</sup> The philosophy is that if economic life is organised in accordance with free market principles, disciplining a market participant’s behaviour by clear state-imposed legal-economic rules (in accordance to the rule of law) would be socially beneficial, thus bringing economic order to society.<sup>49</sup> Such order ‘consists in all the forms in which it is carried out the direction of daily economic process’,<sup>50</sup> and should be dictated by the state. The order is not limited to imposing rules — it also encompasses the relationship between different levels of rules: the economic constitution, and economic activities conducted by individuals in society.<sup>51</sup>

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<sup>42</sup> Foucault and others (n 13) 106.

<sup>43</sup> Ebner (n 23) 213.

<sup>44</sup> Such as suppressing price controls, as done by Erhard in Germany in the 1950s.

<sup>45</sup> Ebner (n 23) 213; similarly, see Peacock and Willgerodt (n 3) 7.

<sup>46</sup> Kamecke (n 17) 24.

<sup>47</sup> Vanberg (n 31) 173.

<sup>48</sup> *ibid* 174.

<sup>49</sup> See the rather extreme view of Foucault who claims that for ordoliberalism free market should be the organising principle of the state: ‘a state under supervision of the market rather than a market supervised by the state’, in Foucault and others (n 13) 116.

<sup>50</sup> Eucken (n 15) 36.

<sup>51</sup> Vanberg (n 31) 173.



### 3.2. The Economic Constitution [*Wirtschaftsverfassung*]

To establish the economic process' rules, ordoliberals proposed the adoption of an *economic constitution*.<sup>52</sup> An economic constitution is a political instrument that 'defines the rules of the game under which economic activities can be carried out in the respective jurisdictions'.<sup>53</sup> It imposes positive and negative limits on state intervention in the economy in a normative sense inspired by the *Rechtsstaat* legal traditions.<sup>54</sup> The aim of these limits, or rules, is to enhance private cooperation. The intended outcome is that parties would act in a competitive manner, increasing their economic performance and efficiency and preserving the competitiveness in society.<sup>55</sup> The concept's creator, Böhm, conceived of this strategy as means by which the economic system could be synchronised with the law.<sup>56</sup> This approach therefore deviates from the liberal idea that the economy should be separate from law, *Wirtschaftsordnung*<sup>57</sup> (denoting society's economic structure) entails the incorporation of society's economic structure into legal language.<sup>58</sup> In terms of its normative aspect, it contains both *constitutive principles* and *regulative principles*, which are those necessary for the constitution to work. The former are private property; market price-setting; economic freedom and freedom of contract, while the latter is understood as the state's duty to regulate economic relations to avoid the self-destructive force of competition.<sup>59</sup>

For Böhm, the economic constitution is rooted in the concept of a 'private law society', freedom of contract and voluntary transactions.<sup>60</sup> Private law represents the link between the individual, their peers and the States within the 'private law society'.<sup>61</sup> Böhm's rationale is that the connection between the state and the individual is created through private autonomy rather than as a constituent of the political constitution. In

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<sup>52</sup> Ebner (n 23) 215.

<sup>53</sup> Kerber and Vanberg (2001) 53.

<sup>54</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 46.

<sup>55</sup> Somma (n 1) 109.

<sup>56</sup> Tumlir (n 31) 136.

<sup>57</sup> Vanberg (n 31) 173.

<sup>58</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 45.

<sup>59</sup> Barry (n 19) 114-155

<sup>60</sup> For the function of private law in ordoliberal thinking, see Franz Böhm, 'Rule of Law in a Market Economy' in Hans Willgerodt and Alan Peacock (n 3) 46-67; Tumlir (n 31) 136; Viktor Vanberg, 'Consumer Welfare, Total Welfare and Economic Freedom — On the Normative Foundations of Competition Policy' (2009) 09 *Freiburger Diskussionspapier zur Ordnungsökonomik* 10.

<sup>61</sup> Franz Böhm, Walter Eucken and Hans Grossmann-Doerth, 'The Ordo Manifesto of 1936' in Alan Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution*, vol 2 (MacMillan 1989) 50.

contemporary times (compared to Böhm's characterisation of the economic constitution in 1989), I argue that the economic constitution and the private sphere are connected because the former protects, and defines the limit of, the latter. The economic constitution has influenced EU law in general and competition law specifically. In essence, the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and their predecessors could be seen as manifestations of the 'European economic constitution', regulating the rights and obligations of Member States and individuals within the common market by setting the European economic order and internal market.

Viewed from a different perspective, some have characterised the economic constitution as analogous to the Kelsen's concept of *Grundnorm*.<sup>62</sup> I differ in this regard, however, I understand the concept of *Grundnorm* as a source of sources and the rule against which the validity of derived rules is contrasted. The economic constitution, on the other hand, is an articulation of the *rules of the game* under which social and economic life is *played* in accordance with the rule of the law,<sup>63</sup> and is not a superior norm. Moreover, the Economic Constitution does not only relate to pure positive law, as the Kelsenian *Grundnorm* does, but also includes 'informal conventions and traditions that govern economic activities in the respective communities'.<sup>64</sup> In my view, by setting positive and negative limits on state intervention the economic constitution recognises the primacy of the *rule of law*. It operates as an instrument of coordinating in legal and economic orders by organising the relation between the different economic actors, protecting economic freedom and promoting the competitive process.

### 3.3. Social Market Economy [*Soziale Marktwirtschaft*]

The concept of social market economy [*Soziale Marktwirtschaft*] is another key ordoliberal influence on the European project, as is reflected in Article 3.3 TEU, which states:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth

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<sup>62</sup> Felice and Vatiello (n 2). For the idea of the 'Grundnorm', see Hans Kelsen, *General theory of law and state*, vol 1 (reissued edn, Russell & Russell 1961) 123-161.

<sup>63</sup> Franz Böhm (n 62).

<sup>64</sup> Eucken (n 65) 377.

and *price stability*, a *highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.<sup>65</sup>

Paradoxically, this concept also represents its most state-interventionist line of thought because, as Hayek underlined, it compromises individual freedom. Introduced by Müller-Armack in 1946, it was described as ‘market freedom with social balance’, combining the productive prosperity of a capitalist-driven economy with institutions and regulations guided by the pursuance of social justice.<sup>66</sup> Historically, the idea of promoting an efficient but socially responsible market economy emerged and flourished in the atrocious conditions in Europe post-World War II and the economic failure of liberalism adopted under the Weimar Republic which led to the Nazi regime. The goal of a social market economy is to correlate social balance with entrepreneurship and market competition in order to foster economic productivity.<sup>67</sup> Furthermore, Müller-Armack argues that an objective of social market economy is to maximise individual satisfaction:

(w)here the individual is judge of his own satisfaction and also has the most complete knowledge of the goods and services which will promote that satisfaction. Individual satisfaction, however does require taking a view of the distribution of income and wealth and therefore of the possibility that individuals will increase their own satisfaction by transferring resources to the less fortunate, although not in ways which will defeat the basic aim.<sup>68</sup>

The social market economic rests on three pillars:

- i) A competition policy based on the system of *Ordnungsökonomie* [Constitutional Economics];

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<sup>65</sup> See Art 3 TEU (emphasis added). For an historical account of the evolution of the social market economy, see Gerber, ‘Constitutionalizing the Economy’ (n 2); Van Hook (n 18).

<sup>66</sup> Streit (n 5) 696; Ebner (n 23) 215. In similar terms, see the view of Karel Van Miert, former European Commissioner for Competition, in Van Miert (n 1).

<sup>67</sup> Ebner (n 23) 216

<sup>68</sup> Taken from Peacock and Willgerodt (n 3) 4, who quote the German original by Müller-Armack.

- ii) Abandonment of policies that unsystematically foster state interventionism; and
- iii) An economic policy based on the market economy in rejection of the central planned model.<sup>69</sup>

In an attempt to reconcile the concept with classic ordoliberalism, Barry identifies two more main objectives of social market economy:

- iv) The provision of welfare measures, and
- v) Preservation of freedom and autonomy vis-à-vis the state.<sup>70</sup>

For Müller-Armack, '[t]he concept of a social market economy comprises a wider complex of measures of social policy and a narrower complex of measures of economic policy',<sup>71</sup> which extends beyond mere modification of market principles. 'A light-handed planning process' that inserts social improvements is needed,<sup>72</sup> one which does not disturb the competitive mechanism of market economy.<sup>73</sup> This calls for a certain degree of ordering, '*for the creation and protection of competition economy*'.<sup>74</sup> However, as Hayek remarked, ultimately, the definition of 'social market economy and social justice' is in the hands of politicians — hence his characterisation of 'social' as a 'weasel word' (ie 'a word used in order to evade or retreat from a direct or forthright statement or position').<sup>75</sup> This flaw was recognised by Müller-Armack in 1965, who claimed that at that point in time it still had 'not become very clear in the initial phase of the creation of the social market economy' what role the 'social' aspect was to play.<sup>76</sup> In practice, however, European politicians have placed far more emphasis on the social component than ordoliberals originally expected.<sup>77</sup>

<sup>69</sup> Müller-Armack (n 5) 327-328.

<sup>70</sup> Barry (n 19) 109.

<sup>71</sup> Müller-Armack (n 5) 328.

<sup>72</sup> Alfred Müller-Armack, 'Las Ordenaciones Económicas desde el punto de vista social' in Lucas Beltrán (ed), *La Economía de Mercado*, vol I (Sociedad de Estudios y Publicaciones 1948) 120.

<sup>73</sup> *ibid* 123.

<sup>74</sup> *ibid* (author's translation, emphasis added).

<sup>75</sup> Friedrich August Hayek, 'The Weasel Word Social' (1983) 1 *Salisbury Review*; Merriam Webster online dictionary <<http://www.merriam-webster.com/dictionary/weasel%20word>> accessed 8 December 2015.

<sup>76</sup> Alfred Müller-Armack, 'The Principles of the Social Market Economy' (1965) 3 *German Economic Review*.

<sup>77</sup> For a critical appraisal of this position of an evolutionary understand of the social aspect, see Wiseman (1989) 165-166.

### 3.4. Views on Economic Freedom

Private economic freedom is constituted and enforced by a set of legal rules that to an extent 'define mutually compatible private domains within which individuals are free to act, protected from encroachment by other private law subjects as well as from government intervention'.<sup>78</sup> One of ordoliberalism's pillars is protection from both state intervention and private abuse;<sup>79</sup> threats to economic freedom arise from state intervention and the actions of private actors, such as monopolists or cartel members, who render private individuals dependent on modern private power structures, thereby correlating this concept with competition.<sup>80</sup> In and of itself, protecting economic freedom has inherent economic value, but other non-economic content social considerations are also relevant, which, nevertheless, ought to be protected.<sup>81</sup>

Additionally, the right to free contracting is also necessary in order for a market economy to function well.<sup>82</sup> However, unrestrained contracting freedom may be abused: in the creation of cartels or the imposition of contract terms by a dominant undertaking, for example. Economic freedom, 'can also be used to reduce the possibilities of others to act in a way which is conducive to competition, and they may even agree to this on a contractual basis',<sup>83</sup> this could imply that the transaction is not freely entered into if it is forced by a dominant undertaking, for instance. If left unrestrained, economic market power would result in humans becoming commoditised,<sup>84</sup> as such, 'laws and jurisdiction have to ensure that, in quite general terms, contracts are concluded which are as adequate as possible and that such contracts can be enforced'.<sup>85</sup> Consequently, freedom of contract cannot contravene the economic order, nor should it lead to the

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<sup>78</sup> Vanberg (n 61) 8.

<sup>79</sup> Akman (n 8) 55; Gormsen (n 2) 331. On the views of the role of the entrepreneur, see Böhm (n 62) 58-62; also seeing ordoliberal freedom as freedom of entrepreneurship, see Werner Bonefeld, 'German Neoliberalism and the Idea of a Social Market Economy: Free Economy and the Strong State' (2012) *Journal of Social Sciences* 139.

<sup>80</sup> Walter Eucken, 'What Kind of Economic and Social System' in Alan Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution*, vol 2 (MacMillan 1989) 35.

<sup>81</sup> Vanberg (n 61) 14.

<sup>82</sup> Hans Otto Lenel, 'Evolution of the Social Market Economy' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy*, vol 1 (MacMillan 1989) 29.

<sup>83</sup> Streit (n 5) 688.

<sup>84</sup> Friedrich A Lutz, 'Objeciones al Orden de la Competencia' in Lucas Beltrán (ed), *La Economía de Mercado*, vol I (Sociedad de Estudios y Publicaciones 1953) 275.

<sup>85</sup> Lenel (n 84) 30.

establishment of concentrations of market power,<sup>86</sup> a sentiment that touches upon prohibition cartels and the abuse of market power in EU competition law.

## 4. Competition from an Ordoliberal Perspective

### 4.1. Introduction

Ordoliberal economic freedom cannot be understood without the existence of a regulated competitive economic process. Ordoliberals view competition as an instrument by which economic freedom is expressed, and protected from abuse. This section deals with the conception of competition from an ordoliberal perspective, equates freedom with competition as a process, and also features a discussion of the analytical concepts that inform economic freedom.

Ordoliberal competition is a European competition policy, which is distinct from the Harvard, Chicago and Post-Chicago schools.<sup>87</sup> Its main goal is protection of the freedom to compete [*Wettbewerbsfreiheit*], rather than achieving perfect or imperfect competition.<sup>88</sup> Ordoliberals propose that general competition policy becomes part of society's economic order, based on competition law, rather than advocating a micro-economic modelling for a case-by-case assessment.<sup>89</sup> This competitive order provides the legal framework within which the pursuit of individual freedom is restricted solely by others' freedom.<sup>90</sup>

In stark contrast to the protocol pertaining to industrial organisations and competition economics, ordoliberal scholars did not use the language of mathematics to express their views. Indeed mathematical formulations have been qualified as 'an unfashionable idiom (...) and they may be put forward with missionary zeal which is anathema to "positive"

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<sup>86</sup> Vanberg (n 31) 176.

<sup>87</sup> Akman (n 8) 59. For a short discussion on why ordoliberal competition policy differs from the Chicago School conception of competition, see Möschel (n 39) 147. This also appears to be the view of Van Miert, who remarks 'how much easier it was to convince people of the value of a strong competition policy if one talked the language of the Erhard-style social market economy rather than the language of the Chicago School': Van Miert (n 1).

<sup>88</sup> For more on the idea of 'freedom to compete' see, inter alia Erich Hoppmann, 'Workable Competition – The Development of an Idea on the Norm for the Policy of Competition' (1968) 13 *Antitrust Bulletin* 61; Vanberg (n 61) 09, 10; Heide-Jørgensen (n 90) 98-99.

<sup>89</sup> For Lenel, a 'third wave' ordoliberal, competition simply deals with 'a micro-economic task: it is to regulate the individual economic relationships in such a way that production is in line with consumers' wishes at the least possible cost': Lenel (n 84) 265.

<sup>90</sup> Eucken (n 65) 250.

economics'.<sup>91</sup> Arguably, this has led some to disregard ordoliberalism as mere politics or philosophy, indeed going so far as to dub it a 'political economy unrelated to economic analysis'.<sup>92</sup> However, these views neglect the historical context and overlook the true nature of the interdisciplinary language employed by the ordoliberals to express their views. As stressed by Gerber:

the foremost vehicle for ordoliberal influence in shaping thought in these areas has been *the new language it generated*. This language features both a new grammar and a significantly altered vocabulary. The grammar — ie, the rules that structure the language — is based on the interplay of economic and legal ordering concepts. *Economic analysis supplies the rules necessary for the market to function effectively and thus provides the standards for most economic policy decisions*.<sup>93</sup>

The fact that ordoliberals use non-technical language to express economic ideas does not imply that these concepts are not anchored in economic analysis, far from it. Although, the notable absence of mathematical language very likely accounts for the historical appeal of ordoliberal ideas to lawyers, and in particular, judges, as they tend to employ a legal language whereby abstract concepts are given interpretation and meaning through teleological interpretation.

#### 4.2. Competition as the Focal Point

As far as ordoliberalism is concerned, competition is a necessary consequence of scarcity of goods and it has an indispensable function in terms of coordination and social organisation.<sup>94</sup> The competitive order is deemed the essence of the economy because it enables the system to function effectively.<sup>95</sup> While there is no doubt that the competitive market system is the appropriate tool to be employed in this regard, it is up to the economic constitution to determine the legal terms under which competition is carried

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<sup>91</sup> Peacock and Willgerodt (n 3) 3. Cf this with the view of Möschel, who claims that ordoliberals did use economic models, such as the traditional model of perfect competition, in Möschel (n 39) 142. However, I have not found explicit economic modelling in any of the works reviewed.

<sup>92</sup> James S Venit, 'Article 82: The Last Frontier – Fighting Fire With Fire?' (2004) 28 *Fordham International Law Journal* 1157. In this work, Venit does not directly refer to any of the works of ordoliberal thinkers, with the exception of a single reference (by Moschel), which describes the focal points of ordoliberalism (fn 1).

<sup>93</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 67 (emphasis added).

<sup>94</sup> Müller-Armack (1978) 325-326.

<sup>95</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 43.

out in order for competition to be effective and efficient.<sup>96</sup> The role of competition policy is to control private and public market power in order to guarantee competition as process<sup>97</sup> The idea of 'perfect competition' is a chimera because unregulated competition will tend to self-destruct owing to the accumulation of market power;<sup>98</sup> to counteract this self-destructive tendency, ordoliberalism advocates state-imposed economic regulation by means of competition laws.

For Eucken, market power concentration, monopolies, cartels and centralised planning all kill competition.<sup>99</sup> Indeed, by the same rationale, free competition can only exist if it is organised by the state in accordance with liberal principles. The duty of the state then is to regulate competition and prevent the abuse of economic power.<sup>100</sup> This was also the stance of the former European Commissioner Karel Van Miert, whom, in 1998 stated:

economic reforms are all very well. Privatisation, deregulation, releasing initiative are clearly important. Only market forces will in the end get the collapsed state economies out of the rut. But market forces not only have to be released, they also have to be contained by accepted and enforced rules of the game. The invisible hand is not sufficient. Like a football match it needs rules of the game and a referee. The market is not anarchy but a subtle construct of human ingenuity.<sup>101</sup>

However, competition policy has no value if excluded from the broader conception of the *Ordnungspolitik*. Ordoliberal competition policy is part 'of a framework of a general economic system'<sup>102</sup> and constitutes a key element of social market economy as a component in the ordering of economic freedom.<sup>103</sup> It does so by focusing on the control

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<sup>96</sup> Vanberg (n 61) 7.

<sup>97</sup> Streit (n 5) 685. Cf with the view of Ludvig von Mises who pointed out that, as such, economic freedom does not exist and that 'the market is free for as long as it does precisely what the government wants it to do', Ludwig Von Mises, *Human Action: a Treatise on Economics* (4th edn, The Foundation for Economic Education Inc 1996) 723-724.

<sup>98</sup> Peacock and Willgerodt (n 3) 7. Cf with the view of Akman who argues that ordoliberalism promotes the ideal of perfect competition in Akman who argues that for ordoliberalism economic efficiency is just 'an indirect and derived goal; its results generally from the realisation of individual freedom of action in a market system' in Akman (n 8) 58-60.

<sup>99</sup> Eucken (n 101) 151.

<sup>100</sup> Somewhat similar is the view of Foucault who claims that, for ordoliberals, the state must govern for the market and not because of the market, Foucault and others (n 13) 121.

<sup>101</sup> Van Miert (n 1).

<sup>102</sup> Möschel (n 39) 154.

<sup>103</sup> Townley (n 105) 214.



and correction of price manipulation; maintaining the voluntariness of contracting,<sup>104</sup> and precluding market power abuse — by a sole entity or a group of entities coordinating their behaviour — by an administrative ‘monopoly office’ acting as a market police.<sup>105</sup> Regulated competition is considered a means by which economic order can be maintained, by preserving the status of the market process as a foundation for social cohesion.<sup>106</sup> Freedom to compete should not be restricted by legal rules grounded on inefficient economic grounds, but it cannot be left unregulated either as this would then degenerate into a state of unfair competition and social conflict.<sup>107</sup> To this end, deciding whether:

competition is restricted, whether competition is efficient or obstructive, whether or not price-cutting contradicts the principle of the system — all these issues *can only be decided by investigations conducted by economics* in the various states of the market.<sup>108</sup>

#### 4.3. Types of Ordoliberal Competition

Ordoliberalism distinguishes between two types of competition: performance competition and prevention competition. Performance competition<sup>109</sup> [*Leistungswettbewerb*]<sup>110</sup> denotes the ability to obtain competitive advantage by producing the best goods possible at the lowest price.<sup>111</sup> Prevention competition describes competition as that which prevents a rival from performing at their best capacity.<sup>112</sup> The aim of prevention competition, [*Behinderungswettbewerb*], a concept first coined by Nipperdey,<sup>113</sup> is to damage the competitors’ position, without any

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<sup>104</sup> Kerber and Vanberg (n 32) 64.

<sup>105</sup> Rodger (n 21) 293; Rose and Ngwe (n 2) 8; Bonefeld (n 4) 8.

<sup>106</sup> Ebner (n 23) 213.

<sup>107</sup> Rodger (n 21) 294; Zweynert (n 18) 115.

<sup>108</sup> Böhm, Eucken and Grossmann-Doerth (n 62) 24-25 (emphasis in the original).

<sup>109</sup> Gerber interprets this concept in a slightly different manner and uses the term ‘performance competition’ to denote a similar idea, see Gerber, ‘Constitutionalizing the Economy’ (n 2) 53; Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 253.

<sup>110</sup> As noted by Gerber, the concept of *Leistungswettbewerb* was first coined by Nipperdey — not an ordoliberal himself — in 1930 to delineate the idea of performance competition, which later evolved in ordoliberal thinking to represent consumer preference as the coordinator of the production process, see Gerber, ‘Constitutionalizing the Economy’ (n 2) 53.

<sup>111</sup> Felice and Vatiéro (n 2).

<sup>112</sup> Gerber, ‘Constitutionalizing the Economy’ (n 2) 53.

<sup>113</sup> Nipperdey (n 115).

implication that the undertaking has improved its competition capacity, and as such is comparable to exclusionary abuses. One of the goals of ordoliberalism is to suppress prevention competition by forcing players to behave in accordance with pre-defined market rules.

## 5. A Contemporary View on Ordoliberal Competition Policy

### 5.1. Introduction

I now turn to my suggestions for the understanding and readjustment of a contemporary ordoliberal competition policy based on traditional ordoliberal concepts. This interpretation is made from an analytical, rather than an historical, perspective.<sup>114</sup> Due to the scope of this paper, I discuss the proposals in broad strokes, as these issues can be explored further in future ordoliberal-oriented research.

### 5.2. The Institutional Design of Ordoliberal Competition

#### 5.2.1. An ordoliberal competition law

Ordoliberalism proposes the establishment of an institutional and legal framework for the protection of the competitive process based on three main elements.<sup>115</sup> Firstly, the adoption of an *economic constitution*, which sets the rules of economic behaviour, on a 'constitutional level'. At this macro level, a competition law defining behaviours contrary to the principle of economic freedom in clear terms must be enacted.<sup>116</sup> This is in line with Böhm's idea of the primacy of the *rule of law* over political and economic matters and the suppression of administrative discretion. Secondly, an independent body to act as the watchdog over market players and safeguard the economic constitution and the competitive process, that is to say, the market police [*Marktpolizei*] or competition authority.<sup>117</sup> It is paramount that this competition authority is free from political pressure and private power influence. Thirdly, application of the law to concrete cases

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<sup>114</sup> For a historical, and alternative, perspective regarding the conception of an ordoliberal competition law, see Gerber, 'Constitutionalizing the Economy' (n 2) 49-56, and Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 255. For discussion on contemporary ordoliberal ideas, see Behrens (n 7).

<sup>115</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 54.

<sup>116</sup> The use of the term 'law' here is employed as meaning the product of legislative work of the Parliament and not as body of rules enacted by the executive power.

<sup>117</sup> Highlighting the importance and novelty of the autonomy of the *Marktpolizei*, see Gerber, 'Constitutionalizing the Economy' (n 2) 55.

should be impartial; in accordance with the appropriate interpretation of the law, and subject to judicial review.<sup>118</sup>

As part of the ‘economic constitution’, ordoliberals advocated the creation of a competition law objective, which was achieved in Germany with the 1957 enactment of the Act Against Restraints of Competition, which was in part modelled in line with ordoliberal thinking.<sup>119</sup> The Act continues to be the competition law in force in Germany and, despite being amended on several occasions, still retains its ordoliberal influence.

The main goal of an ordoliberal competition law is the protection of economic freedom, facilitated by ensuring that the competitive process and market structure are not distorted.<sup>120</sup> This entails setting positive and negative limits on the freedom to compete in accordance with the rule of law and the economic constitution. As suggested earlier, such a law should foster performance competition and preclude undertakings from entering into prevention competition, focusing on exclusionary abuses.

Such an instrument was proposed by Böhm during the enactment of the Act Against Restraints of Competition<sup>121</sup> and rests on three main provisions:

- i) A general prohibition of anticompetitive agreements among undertakings [*Verbotsprinzip*];
- ii) Prohibition of the abuse of market power by a single undertaking [*Missbrauchprinzip*]; and
- iii) A concentration control regime [*Konzentrationsprinzip*].

The *Verbotsprinzip*, outlawing anticompetitive agreements among undertakings, was formulated as a general and total prohibition, with no exceptions, and as such it

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<sup>118</sup> *ibid* 54.

<sup>119</sup> For a detailed historical account of the development of Germany’s competition law and the ordoliberal influence, see Neumann (n 123) 37; Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 266-333.

<sup>120</sup> Similarly, see Protocol 27 of the Treaty of the European Union. See also Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1975] ECR 00495, para 26; Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 00461, para 125; more recently, see the opinions of AG Kokott in Case C-95/04 P *British Airways v Commission* [2007] ECR I-02331, para 68; and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 58; and the opinions of AG Ruiz-Jarabo Colomer in joined cases C-468/06 to C-478/06 *Sot Lélös kai Sia v GlaxoSmithKline* [2008] ECR I-07139, para 49.; See also Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart 2011) 195-201; Lianos (2013) 23-28.

<sup>121</sup> Möschel (n 39) 150. Also stressing Böhm’s influence when drafting the law, see Vanberg (n 31) 172-173. Highlighting the political influence of Böhm as a member of the Bundestag, see Foucault and others (n 13) 103.

exemplifies the more narrow ordoliberal approach adopted by ‘first wave’ of ordoliberal scholars. However, developments in ordoliberal thinking since then have (as they should) departed from such a stringent view. In this regard, I advocate allowing certain exceptions on the grounds of economic efficiency. A *per se* prohibition of all agreements makes little sense from an economic perspective: for example, vertical agreements solve the problem of double marginalisation and are largely pro-competitive. From a legal perspective, prohibiting all agreements constitutes a non-proportional restriction of economic freedom.

The next principle, the *Missbrauchprinzip*, prohibition of the ‘abuse of market power’ by a single undertaking, limits the exercise of market power whenever it could curb parties’ economic freedom, including other undertakings and final consumers. The *Missbrauchprinzip* should not be based on precluding an undertaking from legitimately gaining market power under performance competition, nor ‘guesstimating’ how competition would have been had it lacked market power, albeit this is debatable as competition authorities consider counterfactual evidence when making an assessment. It should only prohibit a conduct whenever market power is abused by infringing economic freedom and/or whenever market power is exercised in such a manner that it has a measured negative impact on the legitimate interest of consumers in accordance with the principle of *Leistungswettbewerb*.

The third principle, the *Konzentrationsprinzip*<sup>122</sup> of control of concentrations was foreseen by Böhm and Erhard but not incorporated in either the Act Against Restraints of Competition or the Treaty of Rome.<sup>123</sup> A concentration operation would be prohibited whenever a sole undertaking may significantly impede performance competition or unduly restrict the freedom to compete by either creating or strengthening a dominant position.

Finally, the law should include an *efficiency defence* that can be applied for all three ‘principles’, enabling the competition authority to declare any of the three provisions inapplicable when it comes to precluding specific behaviour or operation on the grounds

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<sup>122</sup> Term coined by the author.

<sup>123</sup> Neumann (n 123) 38. On the ECSC Treaty (the Treaty establishing the European Coal and Steel Community) there was an article dealing with concentration operations (Art 66) and only a rudimentary provision dealing with abuse of a dominant market position.

of duly justified and proven economic reasons in the interest of consumer welfare.<sup>124</sup> This disposition could either be drafted in general terms, covering all three principles or specifically for each of them. The latter is a better legislative option as it could address the specificities of each of the principles. The difficulty, no doubt, lies in the precise content of such efficiency (or efficiencies) clause(s) as administrative discretion is admitted, as recognised by the ECJ in *Remia v Commission*.<sup>125</sup>

### 5.2.2. *The competition authority*

Ordoliberal competition law should be enforced by the *Marktpolizei*, an independent administrative competition authority. Initially introduced in Europe via ordoliberalism,<sup>126</sup> this authority differed from the institutions created as a corollary of US antitrust.<sup>127</sup> The competition authority, as envisaged by Böhm and Josten, is intended to be an independent agency with the competence to investigate and sanction breaches of competition law.<sup>128</sup> If the competition authority were under undue influences of the executive power then it will be prone to pressure from political and economic powers that could impede its function as guarantor of the competitive process. Furthermore, cases should be decided by expert teams that include both lawyers and economists. Lastly, all decisions of the competition body must be subject to appeal at the judiciary level, not before an administrative body.

### 5.3. **Protecting Competition and Economic Freedom**

Ordoliberal competition policy's goals are the protection of individual economic freedom to compete in the economic sphere and preservation of the competitive order.<sup>129</sup> Protecting the competitive process and parties' economic freedom ensures that

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<sup>124</sup> For a thorough discussion on consumer welfare as the standard adopted by ordoliberalism, see section 15.3.

<sup>125</sup> Case C-42/84 *Remia v Commission* [1985] ECR I-02545, para 34.

<sup>126</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 54-55.

<sup>127</sup> The Federal Trade Commission, the federal agency that deals with antitrust violations and consumer protection, preceded ordoliberal ideas and was established in 1914 by the Federal Trade Commission Act. For an account of the American Antitrust influences on EU competition law, and particular the work of the Commission and the EU judiciary, see Brigitte Leucht and Mel Marquis, 'American Influences on EEC Competition Law: Two Paths, How Much Dependence' in Patel and Schweitzer (n 26). See also the opinion of Gerber, who rejects the leading role of US antitrust as an influence on Germany and EU competition law in Gerber, 'Constitutionalizing the Economy' (n 2); Gerber, *Law and Competition in Twentieth Century Europe* (n 2).

<sup>128</sup> Van Hook (n 18) 245.

<sup>129</sup> Supporting this view, see Foucault and others (n 13) 120-121; Möschel (n 39) 146; Vanberg (n 61) 52; Hoppmann (n 90) 62. Arguably, this is one of the main differences between EU competition law and

the interests of consumers are satisfied and their wellbeing is guaranteed.<sup>130</sup> Quite in line with this approach was the interpretation made by the ECJ of the goal of Art 101 TFEU in stating that it ‘aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’<sup>131</sup>

Economic freedom and freedom to compete should be protected as they are ‘public goods’<sup>132</sup> that derive from the preservation of individual freedom.<sup>133</sup> To do so, the prime objective of this competition policy is the protection of the competitive process [*Wettbewerbsfreiheit*] by setting a competitive standard of performance competition that implies adherence to the ‘constitutional rules’ and satisfies customers’ needs in accordance with the lawful capacities of undertakings and the security of individual freedom.<sup>134</sup> The theory is that if the competitive process is protected, economic efficiency and social peace can be achieved. Such freedom to compete, however, requires that economic players have equal legal standing, whereby voluntary contracting and exchange are the means by which economic activities are coordinated.<sup>135</sup>

This concept of freedom to compete demands that private parties behave in accordance with a set of pre-existing rules enshrined in the economic constitution, which serve as a guarantor and grantor of such individual freedom.<sup>136</sup> For Vanberg, ordoliberalism should pursue the protection of freedom to compete because consumer welfare should then follow. Vanberg held that economic freedom would be violated if competition

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ordoliberalism, in the sense that for the former the primary goal is securing economic integration — while others argue that nowadays economic efficiency is the main concern, see eg, supporting this view, Case C-56/64 *Consten and Grundig v Commission of the EEC* [1966] ECR 00429. For non-ordoliberal views where it is argued that the goal of competition should be the protection of economic process, see Gregory J Werden, ‘Monopsony and The Sherman Act: Consumer Welfare in a New Light’ (2007) 74 *Antitrust Law Journal* 707; Eleanor M Fox, ‘Against Goals’ (2013) 81 *Fordham Law Review* 2157.

<sup>130</sup> Vanberg (n 31) 176. Cf this with the view of the European Court of Justice, in stating that Art 102 ‘is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure’, recognising the need for protecting competition as a process itself, in Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1975] ECR I-00495. Cf this with the view of Gerber, who suggests that economic freedom is secured via complete competition in which no firm can coerce the behaviour of another, in Gerber, ‘Constitutionalizing the Economy’ (n 2) 43.

<sup>131</sup> Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-09291 para 63. Cf this with the broad approach by the ECJ in Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-00527, para 60.

<sup>132</sup> Vanberg (n 31) 177.

<sup>133</sup> E Maier-Rigaud ‘On the Normative Foundations of Competition Law — efficiency, political freedom and the freedom to compete’ in Zimmer D (ed), *The Goals of Competition Law* (Edward Elgar 2012) 132-168, 136.

<sup>134</sup> Möschel (n 39) 142; Akman (n 8) 273.

<sup>135</sup> Vanberg (n 31) 175.

<sup>136</sup> Vanberg (n 61) 10.

authorities were to prohibit conduct otherwise permitted by the economic constitution or if they were to allow it based on economic efficiency considerations but without legal provision.<sup>137</sup> Thus, economic efficiency arguments have to 'fit' the set of rules.

Freedom to compete is limited and secured by rules that preclude or allow specific conducts, which are legally incorporated at a '*constitutional level*' (ie having the rank of a law) and which affect how competition policy is formed. Such a hierarchy precludes private parties from bending or renegotiating their content by means of private contracting.<sup>138</sup> At a '*sub-constitutional*' level, the competition authority applies the rules: monitoring, evaluating and sanctioning behaviours of individual actors. The content of these competition rules at a sub-constitutional level is determined by the text of the law and interpretation of the rules.<sup>139</sup> I advocate that in order to effectively secure freedom to compete this interpretation must be *teleological*. Consequently, competition as a goal is neither void, nor an empty formula but is rather construed through the agreements that polity reaches regarding its legislation, even though this could open the door for some political discretion.

#### 5.4. Competition itself as Economically Efficient

Protecting competition is efficient and desirable because it prevents society from playing out competition's prisoner dilemma. The competitive process minimises two risks: cheating and under-competitive choices. Some actors will be tempted to circumvent the market's rules for their own benefit at the expense of the other players. Consequently, the rest will then choose the under-competitive option — a protectionist regime —<sup>140</sup> that benefits no one, to prevent 'cheating'. The prisoner's dilemma is by and large resolved if the members of society adhere to a competitive *order* imposed by the state in accordance to the rule of law.<sup>141</sup> Provided the rules are properly designed then lawful behaviour by economic players will result in an economically efficient outcome. Herein lies the rational justification for an ordoliberal competition policy: it allows

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<sup>137</sup> *ibid* 10-11.

<sup>138</sup> Vanberg (n 31) 176.

<sup>139</sup> Vanberg (n 61) 10.

<sup>140</sup> Vanberg (n 31) 178.

<sup>141</sup> Cf with the view expressed by Foucault who stated that '(...) competition and only competition can ensure economic rationality. How does it ensure economic rationality? Well, it ensures it through the formation of prices which, precisely to the extent that there is full and complete competition, can measure economic magnitudes and thus regulate choices', in Foucault and others (n 13) 119.

undertakings to avoid the prisoner's dilemma and punishes agents who deviate from the competitive outcome by cheating.<sup>142</sup>

Another argument supporting the efficiency of competition as a goal in itself is that freedom to compete would be Pareto-efficient if 'individual decisions have only a negligible influence on the market prices'.<sup>143</sup> Accordingly, market power would be kept in check and there would not be any significant detrimental effect on market prices. Alternatively, in the absence of truly 'free competition' it would be possible to apply 'competition as if' to guide the behaviour of players (I discuss this concept in detail in section 5.7).<sup>144</sup> However, I find the logic of this argument to be unsatisfactory: in practice, freedom to compete and efficient outcomes will not necessarily coincide, for example, the freedom to compete will be dictated by the adoption of legal rulings that, by their very nature, might be sub-optimal from a welfare perspective. Another example would be that, in order to achieve a more efficient economic outcome, certain trading agreements and practices would be prohibited and, thus, economic freedom would be limited, particularly if the decision to prohibit certain practices is taken *ex-post*. This touches upon the fundamental issue of informing legal texts with appropriate economic foundations: the essence of modern ordoliberal policy.

These arguments trump claims that protecting competition as a goal is economically unjustified,<sup>145</sup> or that it protects 'inefficient competitors which would conflict with the objective of enhancing welfare', as Akman believed,<sup>146</sup> or that 'ordoliberalism is based on humanist values rather than efficiency or other purely economic concerns', as Gormsen maintained.<sup>147</sup> The criticisms are founded on the (mis)understanding that securing economic freedom does not always coincide with fostering economic efficiency, from either a total or consumer perspective, and protecting inefficient firms.<sup>148</sup> Ordoliberalism does not advocate the protection of inefficient competitors, nor does it advocate the adoption of an interventionist industrial policy. Akman makes the

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<sup>142</sup> Vanberg reaches a similar conclusion in his explanation of the tasks of the *Ordnungspolitik* in Vanberg (n 31) 178.

<sup>143</sup> Kamecke (n 17) 24.

<sup>144</sup> For a discussion of the concept of 'competition as if' see section 4.2, and also Goldschmidt and Berndt (2005). For the discussion of workable competition see John M Clark, *Competition as a Dynamic Process* (The Brookings Institution 1961).

<sup>145</sup> For a general discussion on this topic, see Maier-Rigaud (n 137) 134.

<sup>146</sup> Akman (n 8) 268-269.

<sup>147</sup> Gormsen (n 2) 334.

<sup>148</sup> Akman (n 8) 276-277.



important distinction that ordoliberalism does not promote efficiency as an aim but as a result. The distinction appears to me more dialectical than of any practical importance, as for as long as the competitive process is free, the practical result is economic freedom.<sup>149</sup>

### **5.5. Control of Market Power**

Unrestrained market power, whether public or private, restricts personal economic freedom and corrupts and impairs the political system. On the one hand, private market power was a source of concern during the Weimar Republic (and even before this) when legal cartels were seen as an extrapolation of the freedom of contract, regardless of negative welfare consequences or reduction of competitive freedom to non-members of the cartel. On the other hand, state intervention in economic affairs was pernicious and ordoliberals opposed decisions such as the imposition of trade barriers, subsidies, price controls, and compulsory mediation for labour conflicts.<sup>150</sup> These state actions were not excluded from private market power due to the considerable influence of economic groups.<sup>151</sup> Such critical views against the accumulation of public or private market power do not prohibit dominant positions as such. Nor does ordoliberalism advocate stripping legally-earned market power through performance competition. What ordoliberalism does advocate is the imposition of legal limits on the exercise of individual or collective market power with a two-fold aim: preclude prevention competition that would restrict individual freedom, and avoid any undue intervention of private market power in public decision-making. The appropriate instruments for establishing limits regarding the exercise of market power are the economic constitution and competition law.

### **5.6. Ordoliberalism and the 'More Economic Approach'**

Some supporters of a 'more economic approach' to EU competition law have rallied against ordoliberal ideas in an 'attempt to replace the protection of the competitive process by a welfare maximisation goal in stark contrast to an Ordoliberal

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<sup>149</sup> *ibid* 275. See also the view of Gormsen, who argues that this protection 'is linked to social justice and civil liberties, not to consumer welfare', in Gormsen (2007) 334.

<sup>150</sup> Streit (n 5) 690.

<sup>151</sup> *ibid*.

conception.<sup>152</sup> The contention is that EU competition policy (arguably the Commission's view on EU competition policy)<sup>153</sup> has departed from an ordoliberal approach and a 'more economic approach' has been adopted: once which is less form-based and more economically anchored. For example, Venit holds that the ordoliberal conception is outdated, formalistic, old-fashioned and even utopian.<sup>154</sup> Recently, the 'more economic approach' has also been subject to strong criticism, particularly by Wils, who advocates a more 'form based approach' that can be traced to ordoliberal input.<sup>155</sup>

Arguably, on occasion such objections have arisen due to misrepresentations of ordoliberal ideas, or by recourse to the works of Röpke and Müller-Armack (predominantly), authors who advocate more extreme versions of political interventionism; social and distributive concerns, and formalistic approaches to competition policy. However, these ideas are not representative of the majority view among ordoliberals.<sup>156</sup> Furthermore, at times attacks against ordoliberalism result from the less 'economically inclined' teleological interpretation of the law by EU judiciary, which is then confused with ordoliberal ideas, rather than ordoliberalism itself.<sup>157</sup>

Ordoliberalism does not reject the application of economic insights to resolve specific cases or improve the quality of legal standards and legislation. Arguments to this effect overlook the fact that ordoliberal competition is part of an institutional economics policy with the aim of achieving societal order based on rules that are imposed to govern the market and not a microeconomic trend of competition economics or industrial organisation,<sup>158</sup> operating at different levels of application.

An ordoliberal conception of competition policy is not incompatible with the 'more economic approach', nor has it disappeared from EU competition policy altogether. An ordoliberally-inspired EU competition policy is not necessarily at odds with a more

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<sup>152</sup> Patel and Schweitzer (n 26) 223. See also, for a discussion of the more economic approach, Giorgio Monti, 'EU Competition Law from Rome to Lisbon – Social Market Economy' in Heide-Jørgensen (n 90) 44-49.

<sup>153</sup> Behrens (n 7).

<sup>154</sup> Venit (n 94); Cf the moderate opinion of Gerber who claims that some ordoliberal positions are obsolete whereas others are still valid: Gerber, 'Constitutionalizing the Economy' (n 2) 75-83.

<sup>155</sup> Wouter Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 *World Competition: Law and Economics Review* 405-434.

<sup>156</sup> Patel and Schweitzer (n 26) 223.

<sup>157</sup> See eg the criticism of Venit, levelled at the lack of serious economic assessment by the EU Courts in Case T-219/99 *British Airways v Commission*, and the subsequent appeal C-95/04P *British Airways v Commission*, in Venit (n 94).

<sup>158</sup> Vanberg (n 61) 13.

detailed microeconomic analysis of competition practices or a ‘more economic approach’; such an assessment would indeed be overly simplistic. Ordoliberalism does not preclude drawing on expertise to refine competition law decision-making and improve the legal regime. What it does reject is departure from the rule of law by adoption of a case-by-case assessment based purely on welfare considerations employed as a guiding policy instrument, in the absence of more formal or structured rules, which define the economic game.<sup>159</sup> The claim is that a case-by-case assessment based purely on welfare considerations, without regard to general and previous rules, can improve competition and furnish legal uses with a fair degree of predictability.<sup>160</sup> If a more economic approach is understood as an advocacy of the application of modern economic insights (in accordance with the rules),<sup>161</sup> then in fact ordoliberalism is congruent with examples of ‘more economically informed’ analyses of cases’. Consequently, an ordoliberal competition policy is in line with what Schweitzer and Patel qualified a ‘light’ approach, the proposal is that a review of the established application of competition law to better correlate with modern economic theory be conducted so that ‘EU competition (law) can be interpreted in a more concise and definitive manner.’<sup>162</sup>

To resolve this apparent contradiction, regarding the merits of a more “economic approach” vs a case-by-case assessment, I propose reconciling ordoliberal competition-institutional policy with neo-classical microeconomics, through an understanding of the level of application of these economic tools. An ordoliberal inspired policy *shapes and sets the rules of an institutional framework*, whereas a neo-classical microeconomic analysis of cases is the *concrete application* of the competition policy.<sup>163</sup> By distinguishing these levels of application, it is possible to introduce economic efficiency

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<sup>159</sup> Somewhat similar to this position is the view of Vanberg, who claims that in an ordoliberal-based competition policy, ‘competition policy cannot make the right of private law subjects to exercise such freedom contingent on how economic advisors assess the welfare effects in particular instances, and that welfare considerations can have their legitimate place only at the constitutional level where the rules of the economic game are chosen’, *ibid* 27; see also the opinion of Gormsen, where it is stated that ordoliberal competition policy ‘is shaped by the rule of law rather than by ad hoc political decision-making’, in Gormsen (n 2) 334.

<sup>160</sup> Vanberg (n 61) 24.

<sup>161</sup> *ie* Art 101(3) TFEU and the interpretation by the ECJ for efficiency considerations to be taken into account in cases on Art 102 TFEU.

<sup>162</sup> Schweitzer and Patel distinguish three aspects of the ‘more economic approach’, one arguing for changing the goals of EU competition law, another for using economics to establish the relevant facts and deciding accordingly, and the ‘light’ version, which advocates the application of modern economics, see Patel and Schweitzer (n 26) 207-230, 220.

<sup>163</sup> Vanberg (n 61) 10.

analysis when deciding upon specific cases, through the interpretation of competition law applied to concrete cases, provided this possibility is foreseen by the legislator or the judiciary, as is the case in Art 101(3) TFEU. This does not mean, however, that a case-by-case economic approach influences competition policy, but rather the opposite: it is competition policy that allows for a case-by-case economic assessment, as noted by Vanberg:

The advocates of economic freedom and *Leistungswettbewerb* have no reason to deny that comparing the prospective welfare effects of alternative rules of the market game is an essential prerequisite in choosing an economic constitution, and that economics can provide an important service by informing about the working properties of potential alternative systems of rules. What they reject is the claim that a '*more economic approach*' can help to improve competition policy by informing about the specific welfare effects *in particular instances*.<sup>164</sup>

Therefore, ordoliberalism is compatible with a contemporary competition policy that advocates the use of microeconomic theory to guide the proper application of the law in order to guarantee, as much as is possible, an economically coherent interpretation of the law. The key to such harmonisation lies in distinguishing the different levels at which competition policy and competition cases operate.

### 5.7. 'Competition as if'?

Concerning the limitation of the abuse of market power, an ordoliberal concept occasionally linked to the ECJ's interpretations of Article 102 TFEU,<sup>165</sup> and the doctrine of special responsibility, the theory of 'competition as if', developed by Leonhard Miksch,<sup>166</sup> a disciple of Walter Eucken, comes into play.<sup>167</sup> Robert O'Donoghue and A

<sup>164</sup> *ibid* 19 (emphasis added).

<sup>165</sup> See the analysis of Nazzini, who concludes that there is no historical indication that the concept of 'competition as if' was proposed when drafting the now Art 102 TFEU during the Rome Treaty negotiations, in Nazzini (n 8) 132. See also Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 *Competition Policy International* 197-231.

<sup>166</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 25, 52-53; Goldschmidt and Berndt (2005) 973.

<sup>167</sup> Supporting this view, see Gerber, 'Constitutionalizing the Economy' (n 2) 52; Ebner (n 23) 206; Liza Lovdahl Gormsen, 'Article 82 EC: Where are we coming from and where are we going to?' (2006) 2 *The Competition Law Review* 5, 10; Rose and Ngwe (n 2) 8. Cf with the view of Akman who claims that ordoliberal ideas and the concept of 'competition as if' is 'not the "abuse" concept of the drafters of Art 82

Jorge Padilla go so far as to claim that '[o]rdoliberal thinking on the goal of competition law was based on notions of "fairness" and that firms with market power should behave "as if" there was effective competition'.<sup>168</sup> 'Competition as if' employs legal competition framework which sets the 'standard conduct' that a dominant undertaking ought to follow whenever acting in the market. This concept resembles the special responsibility doctrine of dominant undertakings, whereupon stricter limits are imposed regarding dominant undertakings' freedom to act, compared to non-dominant firms. In the words of the ECJ:

an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.<sup>169</sup>

By 'competing as if', undertakings should behave as though they lack market power and consistent with performance competition.<sup>170</sup> According to Gerber, this standard would not require governmental intervention as it is an objectively applicable measure which provides clear answers.<sup>171</sup> From this perspective, the concept of 'competition as if' appears to be formalistic and almost *per se*.

However, one of the main problems of 'competition as if' is that it is an impractical concept because competition is a 'discovery process' (put in Hayekian terms).<sup>172</sup> The argument is that the competition authority would not invariably be able to determine how competition 'would have been' had parties been deprived of their market power. Furthermore, there are two different possible interpretations of 'competition as if':

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EC since they were mainly concerned with the customers who dealt with the dominant undertakings, not their competitors', Akman (n 8) 276; Anne C Witt, 'The Commission's Guidance Paper on Abusive Exclusionary Conduct - More Radical than it Appears?' (2010) 35 *European Law Review* 214, 220-221.

<sup>168</sup> Robert O'Donoghue and A Jorge Padilla, *The Law and Economics of Article 82 EC* (Hart 2006) 9.

<sup>169</sup> Case C-322/81 *Michelin v Commission* [1983] ECR I-03461, para 57. This doctrine has been reiterated several times by the EU judiciary with regard to buyer power cases, such as in Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* [2000] I-01365, para 37; Case T-155/06 *Tomra Systems and Others v Commission* [2010] ECR II-04361, para 207; Case T-219/99 *British Airways v Commission* [2003] ECR II-05917, para 242; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-02969 para 112; and in general cases, more recently in Case C-457/10 P *AstraZeneca v Commission* [2012], para 134; Case C-202/07 P *France Télécom v Commission* [2009] ECR I-02369, para 105.

<sup>170</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 52, 65.

<sup>171</sup> *ibid* 52-53.

<sup>172</sup> Friedrich von Hayek, *Die Theorie komplexer Phänomene* (JCB Mohr 1972). For a brief discussion of competition as a discovery process, see Behrens (n 7) 20.

either ‘competition as if’ undertakings had no substantive market power, or ‘competition as if’ there were perfect competition.<sup>173</sup> Viewed from a different perspective, ‘competition as if’ becomes imprecise and gives rise to legal uncertainty. Hayek’s criticism of ‘competition as a discovery process’, however, is a valid argument when it comes to *any* competition standard that does not employ a pure *per se* approach because any balancing act based on counterfactual evidence implies that the competition authority needs to foresee how ideal competition would have been.

Furthermore, the idea of ‘competition as if’ has also been criticised because it arguably contradicts economic freedom and is therefore discordant with core ordoliberal ideas.<sup>174</sup> The fundamental aspect of this argument is that ‘competition as if’ implies that a dominant undertaking ought not to behave ‘as if’ it had market power and that it bears ‘special responsibility’ to observe a far higher degree of care than undertakings which lack substantive market power. The argument is that, consequently, this standard would impose limitations on economic freedom. I agree in part with this criticism but argue that imposing limits on the behaviour of a dominant undertaking does not in fact contradict the precepts of ordoliberal economic freedom. What it does do is impose negative limits in order to secure the protection of competition and prevent abuses of market power vis-à-vis consumers. Nevertheless, I agree with the position that a dominant undertaking should not be deprived of its right to exercise performance competition [*Leistungswettbewerb*], in accordance to the limits imposed by an ordoliberal competition law.

To conclude, I propose that contemporary ordoliberal competition policy should distance itself from the idea of ‘competition as if’ owing to its deficiencies, instead clear competitive rules should be set that define which types of behaviour *Missbrauchprinzip* should encompass.

### **5.8. Formalistic Approach or Case-by-Case Assessment based on Efficiency Concerns**

Ordoliberalism favours imposing negative limits on undertakings’ economic freedom by determining certain behaviours that are precluded in principle. In this regard, I propose

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<sup>173</sup> Gerber, ‘Constitutionalizing the Economy’ (n 2) 52.

<sup>174</sup> Maier-Rigaud (n 137) 146.

adopting a '*form-effect*' policy grounded on a two-tier test, as a compromise between the pure *per se* and rule of reason approaches,<sup>175</sup> which also differs (albeit slightly) from the 'object/effect' doctrine elaborated by the ECJ.

According to such an approach, rules would prohibit certain conducts based on their form, as prescribed by the law. All cases that do not expressly fit the precepts established by the norm and appear to have anti-competitive effects should be analysed in terms of performance competition to determine whether they infringe the competitive process and economic efficiency from a consumer-welfare perspective. The competition authority would only be able to prohibit a conduct when it proves that either the conduct qualifies as one of the prohibited behaviours or that it contravenes the principle of performance competition.

Secondly, closely following the rule of reason approach, in all cases undertakings are entitled to invoke the inapplicability of the legal rule which prohibits the alleged conduct, requesting the application of an efficiency defence clause. If the behaviour is consumer-welfare enhancing and proportional as regards the restriction of economic freedom of market participants then it should be declared compatible with the legislation. With this second tier, the form-effect approach rejects a *per se* approach by banning certain types of conduct, regardless of their economic consequences. However, ordoliberal authors such as Böhm advocated the introduction of *per se* behaviours in cases of predatory pricing, boycotts and loyalty-enhancing rebates.<sup>176</sup> The suggested policy, nevertheless, also rejects a competition policy based on pure 'rule of reason' due to the legal uncertainty it creates, which can be understood as simply deciding on cases based on pure efficiency concerns, according to administrative discretion.<sup>177</sup>

The main benefits of the two-tier structure are its efficiency and flexibility. Most of the conducts that 'fit' the defined prohibited behaviours will not be pro-competitive and therefore undertakings will have scant interest to claim efficiencies that do not exist. Those cases will, by and large, be decided swiftly and with a small margin of

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<sup>175</sup> For literature on the topic of rule of reason, see Phillip E Areeda, *The 'Rule of Reason' in Antitrust Analysis: General Issues* (Federal Judicial Center 1981) 37-38; Ernest Gellhorn, Stephen Calkins and William E Kovacic, *Antitrust Law and Economics in a Nutshell* (Thomson/West 2004) 259-262; Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart Publishing Ltd 2011) 82-83.

<sup>176</sup> Gerber, 'Constitutionalizing the Economy' (n 2) 53.

<sup>177</sup> Streit (n 5) 689.

administrative discretion. Nevertheless, in those few cases in which the conduct may be efficient will not be declared outright as incompatible with the competitive market. The problem facing the form-effect approach is of a practical nature. Competition investigations would demand economic and legal expertise, which would be time-consuming and therefore costly for both undertakings and society.

### 5.9. Which Welfare Standard?

The EU Commission, and a segment of the literature,<sup>178</sup> advocate adoption of a consumer-welfare standard, based on the understanding that the competitive outcome should be beneficial to consumers.<sup>179</sup> The academic and practical debate regarding whether consumer policy is also the standard adopted by EU law is well known and beyond the scope of this paper. In this section, I discuss the welfare standard that is employed by ordoliberalism.<sup>180</sup>

The first wave of ordoliberals did not discuss welfare standards in modern economic language.<sup>181</sup> Research shows that an *'aggregated consumer welfare'* standard has been

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<sup>178</sup> See, inter alia, in the Commission's official documents, various endorsements of the adoption of a consumer welfare standard: 'the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources': Communication from the Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 13; 'Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms' in Communication from the Commission, 'Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings' [2004] OJ C031/5; 'The objective of Article 101 is to ensure that undertakings do not use agreements — in this context, vertical agreements — to restrict competition on the market to the detriment of consumers' in Communication from the Commission, 'Guidelines on Vertical Restraints' [2010] OJ C130/1, para 7; Neelie Kroes, Commissioner for Competition of the European Commission remarks that '(...) it is competition and not competitors, that should be protected. Ultimately, the aim is to avoid consumer harm', in Neelie Kroes, 'The European Commission's Enforcement Priorities as Regards Exclusionary Abuses of Dominance — Current thinking' (2008) 4 *Competition Law International* 4, 5. For more on the topic, see Svend Albæk, 'Consumer Welfare in EU Competition Policy' in Heide-Jørgensen (n 90) 67-90; Behrens (n 7) 1. On why choosing a welfare standard matters, see Roger D Blair and Daniel Sokol, 'The Rule of Reason and the Goals of Antitrust: An Economic Approach' (2012) 78 *Antitrust Law Journal* 471, 474.

<sup>179</sup> Cf with the expression of Bork, who argues that economic efficiency should be the goal of competition law, in Robert H Bork, *The Antitrust Paradox: A policy at war with itself* (1978). Blair and Sokol argue that, although he used the wording 'consumer welfare', in actuality he meant 'total welfare', in Blair and Sokol (2012) 476. Also arguing that Bork's expression is confusing and meant aggregated welfare, see Peter C Carstensen, 'Emerging Issues in Buyer Power Analysis' (2012) 3 *Agriculture and Food Committee e-Bulletin, American Bar Association* 2, 4.

<sup>180</sup> See also, discussing consumer welfare standard and ordoliberalism, Ahlborn and Grave (n 169).

<sup>181</sup> I did not find any explicit reference in my research to the preferred welfare standard of any of the ordoliberals of the first or second wave. Cf this with the views of Vanberg, who argues that the debate should not be focused on which welfare standard to use but on the protection of economic freedom and



embedded in the discourse, particularly in the works of Böhm and Eucken in terms of the concept of *Leistungswettbewerb* (performance competition). Indeed, according to Böhm, the criterion determining where the line is drawn between permissible and forbidden behaviour is *consumer interest*. This view is far from universal however, for instance, Akman holds that ‘ordoliberal ideas are inconsistent with the “consumer welfare” approach.’<sup>182</sup> In a similar fashion, Gormsen argues that protection of economic freedom and consumer welfare are incompatible and that consumer welfare is not a motivation for economic freedom whatsoever.<sup>183</sup> Other views suggest that ordoliberalism supports total welfare standard ‘as the result of a truly competitive process’, as Behrens puts it,<sup>184</sup> or that it supports soft total welfare standard and was an influential precedent for the position of the Chicago School in such matters.<sup>185</sup> However, in ordoliberalism, consumer interest is the director of the decisions of economic actors and the justifiable economic interest of any economic activity.

These different positions reveal that ordoliberal ‘aggregated consumer welfare’ is a compromise between pure consumer welfare standard and full total welfare standard, in accordance with the principle that the consumer’s interest should be measured in a medium to long term.<sup>186</sup> This compromise is the result of a balance between consumer protection and protection of competition as a process, which is not entirely successful. The essence of the compromise is the understanding that, for ordoliberalism, the consumer should not be understood as solely an end consumer in the downstream market but also in relation to other consumers in the competitive process and according to the interest in preserving competition as a desirable process.<sup>187</sup>

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the need to determine whether the discussion should focus on the constitutional level or the sub-constitutional level of policy choices: Vanberg (n 61).

<sup>182</sup> Akman (n 8) 268.

<sup>183</sup> Gormsen (n 2) 330-331, 343.

<sup>184</sup> Behrens (n 7) 27-32.

<sup>185</sup> Such is Bonefeld’s interpretation of Foucault’s perspective on ordoliberalism as *Vitalpolitik*, see Bonefeld (n 4) 139.

<sup>186</sup> Bundeskartellamt, *Buyer Power in Competition Law — Status and Perspectives*, ‘Meeting of the Working Group on Competition Law on 18 September 2008 (2008) 13 <[http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Buyer%20Power%20in%20Competition%20Law.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Buyer%20Power%20in%20Competition%20Law.pdf?__blob=publicationFile&v=3)> accessed 1 December 2015.

<sup>187</sup> In similar terms, see the ‘Order of the EFTA Court President in E-18/14’ *Wow air ehf v The Competition Authority, Isavia ohf and Icelandair ehf* [2014], para 37, where it is held that ‘[t]o guarantee fair and effective competition is one of the most important goals of the EEA Agreement. Effective competition benefits both consumers and competitors and contributes to the common good.’

In terms of consumer interest, for Böhm a hallmark of the private law society is that 'not only is the *satisfaction of consumer needs* well above the average for the members of the wealthy class but also they are offered totally different possibilities of productive activity within society'.<sup>188</sup> He claims that consumer concerns are 'the sole directly justifiable economic interest'.<sup>189</sup> In terms of performance competition [*Leistungswettbewerb*], the yardstick for measuring competitive outcome is therefore consumer interest. *Leistungswettbewerb* describes competition among undertakings that aims for the production of better services and products for consumers.<sup>190</sup> For Vanberg, establishing the *Leistungswettbewerb* standard implies adopting rules that would put consumer's preferences as the 'ultimate controlling force in the process of production'.<sup>191</sup> In this regard, as Röpke puts it, market order seeks to ensure 'that the only road to business success is through the narrow gate of better performance in service of the consumer and not through many back doors of unfair and subversive competition'.<sup>192</sup>

On the other hand, the ordoliberal construct argues for an aggregated view because the aim is protection of the competitive process, this in turn implies concern for the well-being of the competitive structures and balancing gains and losses across all parties.<sup>193</sup> A focus which is exclusively rooted in short-term consumer welfare may well lead to a 'disproportionate focus on the selling side of the market and an under appreciation' of other competitive risks, such as buyer power, which is at odds with the protection of the freedom to compete.<sup>194</sup>

In my view, the implication of this rationale is that pure consumer welfare standard is not consistent with ordoliberalism. In addition to the wellbeing of end consumers, it is necessary to take the interest of all consumers in the production chain into account, as well as the medium and long-term consequences affecting the competitive structure

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<sup>188</sup> Böhm (1989) 59 (emphasis in the original).

<sup>189</sup> Franz Böhm, 'The Non-State ("Natural") Laws Inherent in a Competitive Economy' in Wolfgang Stützel et alia (eds), *Standard Texts on the Social Market Economy* (Gustav Fisher 1982). For a through discussion of the ordoliberal ideas of 'consumer choice', see Behrens (2014).

<sup>190</sup> Vanberg (1998) 177.

<sup>191</sup> Vanberg (2009) 15.

<sup>192</sup> Wilhelm Röpke, *A Humane Economy* (3rd edn, ISI Books 1998) 31.

<sup>193</sup> Peter C Carstensen, 'Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy' (2010) 1 *William & Mary Business Law Review* 1, 23.

<sup>194</sup> *ibid* 46; see also Carstensen (2012) 46.

both upstream and downstream. A similar posture to this compromised approach was recently suggested by Kirkwood, who argues that:

the purpose of antitrust law — of competition law — is to combat *conduct that both diminishes competition and reduces consumer welfare*. For this reason, the fundamental goal of antitrust law is best described as protecting ‘consumers from anticompetitive conduct — conduct that creates market power, transfers wealth from consumers to producers, and fails to provide consumers with compensating benefits’.<sup>195</sup>

This compromise implies that behaviours impacting the competitive structure upstream and downstream that are not necessarily directly detrimental to end consumers in the short-run could still endanger the competitive process. Should this be the case then the ordoliberal welfare approach argues that such conduct does indeed warrant competition intervention, even in the absence of short-term detriment to consumer conditions.<sup>196</sup>

## 6. Conclusion

In this paper, I have analysed and revisited the main concepts and ideas espoused by ordoliberalism as a social and economic policy, which applies competition law as one of the main instruments in the pursuit of the protection of individual freedom and of freedom to compete. Additionally, I embarked upon the rather ambitious task of proposing reinterpretation of ordoliberal ideas to align them with the development of EU competition policy as an economic analytical framework that guides the interpretation and application of competition law.

As this paper shows, ordoliberalism is neither out-dated, nor is it an extinct trend of economic thought. Rather, it remains a valid means by which to guide the application of competition law. Furthermore, by acknowledging the limitations of ordoliberalism and reinterpreting its main postulates in a contemporary setting, it remains compatible with a contemporary economic approach to competition law (understood in terms of approving the application of microeconomics and industrial organisation models, which

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<sup>195</sup> John B Kirkwood, ‘Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy’ (2014) 69 *University of Miami Law Review* 1, 30 (emphasis added).

<sup>196</sup> See Bundeskartellamt (2008) 13; arguing that this position can be interpreted from the EU case law in buyer power cases, see also Ariel Ezrachi and Maira Ioannidou, ‘Buyer Power in European Union Merger Control’ (2014) 10 *European Competition Journal* 69, 73.

guide decision-making regarding cases and, more importantly, suggesting changes to current legal standards and legal interpretations by the courts). Ordoliberalism adopts an interdisciplinary approach by virtue of its nature, and also because such a position results from interpretation that takes into account the goals of the legislation and the economic circumstances of each case.

In addition, ordoliberalism is a well-suited analytical tool for EU competition policy due to two main factors. Firstly, it provides an indigenous European perspective when it comes to designing a coherent competition policy that is in line with goals of European integration; a system based on the social market economy, protection of the competitive process and the European economic constitution. Secondly, ordoliberal ideas, have historically and conceptually, been highly influential in terms of EU competition rules and their interpretation by the EU judiciary. These factors justify the need to re-open the debate regarding whether or not ordoliberal ideas are shaping and/or should continue to shape, the future of the EU's competition policy.