

The Goals of Competition Law

Edited by

Daniel Zimmer

*Professor of Law, University of Bonn, Germany, and Member
of the German Monopolies Commission*

ASCOLA COMPETITION LAW

The Fifth ASCOLA Workshop on Comparative Competition Law

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

© The Editor and Contributors Severally 2012

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2011936414



ISBN 978 0 85793 660 8

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound by MPG Books Group, UK

Contents

<i>List of contributors</i>	viii
<i>Preface</i>	x
PART I NORMATIVE FOUNDATIONS OF COMPETITION LAW	
1 On the choice of welfare standards in competition law <i>Louis Kaplow</i>	3
2 What is competition? <i>Maurice E Stucke</i>	27
3 Characteristic aspects of competition and their consequences for the objectives of competition law – comment on Stucke <i>Andreas Fuchs</i>	53
4 The multiple personalities of EU competition law: time for a comprehensive debate on its objectives <i>Laura Parret</i>	61
5 The goals of European competition law: some distortions in the literature – comment on Parret <i>David J Gerber</i>	85
6 Thinking inside the box: why competition as a process is a <i>sui generis</i> right – a methodological observation <i>Oles Andriychuk</i>	95
7 Legal interpretation and practice versus legal theory: a reconciliation of competition goals – comment on Andriychuk <i>Anca Daniela Chiriță</i>	118
8 On the normative foundations of competition law – efficiency, political freedom and the freedom to compete <i>Frank Maier-Rigaud</i>	132
9 Efficiency, political freedom and the freedom to compete – comment on Maier-Rigaud <i>Heike Schweitzer</i>	169
10 Economic content of competition law: the point of regulating preferences <i>Adrian Künzler</i>	182

8. On the normative foundations of competition law – efficiency, political freedom and the freedom to compete

Frank Maier-Rigaud*

In every society conflicts of interest among members of that society must be solved. The process by which that resolution (not elimination!) occurs is known as *competition*. Since, by definition, there is no way to eliminate competition, the relevant question is what kind of competition shall be used in the resolution of conflicts of interest.†

1 INTRODUCTION

The advent of a more economic approach to EU competition law has spurred the most substantial debate on the normative justifications of competition law in recent history. Nevertheless, and despite limited literature to the contrary, these are not times of fundamental debate concerning the ultimate aims of competition policy. This is evidenced by the limited practical importance of the normative foundations of competition law in

* Max Planck Institute for Research on Collective Goods, Bonn, Germany; Competition Division, Organisation for Economic Co-operation and Development (OECD), Paris, France. This chapter has benefited from comments and remarks received from participants during the 5th Academic Society for Competition Law (ASCOLA) Conference on the Goals of Competition Law, in Bonn, Germany from 27–29 May 2010. I would like to thank in particular Michael Adam, Rainer Becker, Anca Chiriță, Julia Fischer, Volker Hallwirth, Liza Lovdahl-Gormsen, Gerhard Maier-Rigaud, Remi Maier-Rigaud, Kay Parplies, Wulf-Henning Roth, Christian Vollrath, Carl Christian von Weizsäcker, Thilo Wienke, Wouter Wils and Andrea Heiny of the German Federal Ministry of Economics and Technology and the Max Planck Library Team for discussions and comments on earlier versions and for help in assembling the necessary documents and literature.

† AA Alchian *Economic Forces at Work* (Indianapolis Liberty Press, 1977), 127.

the enforcement practice of competition authorities and even in policy debates.

As to the ultimate goal of competition law, there appears to be, with the notable exceptions of the positions discussed here, broad agreement as to the hegemony of an efficiency justification.¹ This broad agreement has led to a focus on subsidiary questions, for instance on whether efficiency should be oriented on a consumer or a total welfare standard or even more specific and technical issues such as the debate on the ‘as efficient competitor’ test in the context of Article 102 of the Treaty on the Functioning of the European Union (TFEU) review. In the enforcement of competition law by competition authorities, the question of the normative foundations has been even further removed than in policy debates.

The day-to-day business of a competition authority consists essentially in conducting investigations with the aim of detecting, remedying and ultimately deterring competition law infringements. In that day-to-day work, the role normative foundations play is necessarily remote. Besides the existence of relevant precedents in law and a sound factual basis for establishing possible infringements, fundamental preconceptions appear more relevant than more or less clearly articulated normative goals. Fundamental preconceptions are captured for instance by different political approaches concerning the role of markets on the one side and the role of market regulators in society on the other. Such preconceptions typically encompass a view to what extent markets are intrinsically efficient, to what extent they require ‘intervention’ and what constitutes over- and under-enforcement of competition law.²

¹ The seemingly more differentiated perspective emanating from the ICN Unilateral Conduct Working group is superficial as the majority of the goals identified can be subsumed under an efficiency orientation as understood here. See International Competition Network (2007) *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, presented at the 6th Annual Conference of the ICN, Moscow, May 2007.

² See for instance the statement of Christine A Varney, Assistant Attorney General in charge of the Department of Justice’s (DoJ) Antitrust Division in her first speech in that function (US Department of Justice (2009), Vigorous Antitrust Enforcement in this Challenging Era, delivered on 11 May, to be found at <http://www.justice.gov/atr/public/speeches/245777.htm> and US Department of Justice (2009), Justice Department withdraws report on antitrust monopoly law, Press Release of Monday 11 May 2009, to be found at http://www.justice.gov/atr/public/press_releases/2009/245710.htm): ‘Withdrawing the section 2 report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers.’ The withdrawal is hardly

In addition to such preconceptions concerning the functioning of markets and the role of economic activity in society, the direct vested interests of concerned parties play an important role.³ Substantial efforts to try to influence the decision-making of the authority, either directly or indirectly through an effective lobbying of politicians, who in turn intervene on behalf of the company in question, can be observed.⁴ This influence of course varies depending on the authority but also depending on the sector and the company in question. In any case it is by no means restricted to the aim of directly influencing the outcome of a competition case but extends to the analysis stage, where lawyers and economists alike are hired to defend but also to reframe and redirect the analysis and present the conduct in a more favorable light in an effort to convince the authority of its benign character. Such efforts have in the past even led to the creation of new strands of economic literature not in existence prior to such consultancy efforts.⁵ As a result, there is not much left to discuss on the normative foundations of competition law once a certain level of abstraction is abandoned. Consequently, the following analysis will remain on a rather abstract level focusing on three topics all relating to the normative foundations of competition law.

In the discussion surrounding the more economic approach to EU competition policy, the increasing role of economic analysis and in particular efficiency as the ultimate goal of competition policy has been attacked.⁶

due to a shift in the normative foundations of US competition policy but rather reflects different preconceptions associated and brought to bear with a change in the White House. The report (US Department of Justice (2008), Competition and Monopoly: Single Firm Conduct under section 2 of the Sherman Act, to be found at <http://www.justice.gov/atr/public/reports/236681.pdf>.) was issued without support of the Federal Trade Commission (FTC) in September 2008 after a series of joint hearings, involving more than 100 participants, that the DoJ and the FTC held from June 2006 to May 2007 to explore the antitrust treatment of single-firm conduct.

³ The influence of such vested interests is not limited to individual cases but naturally extends to policy debates where the role of law firms and economic consultancies as almost exclusive direct interlocutors of competition authorities should not be underestimated.

⁴ See, e.g., P Marsden, S Kinsella, R McLeod, T Haines, J Lafitte, B Mitchener, and C Harris (2009) 'Lobbying competition law and policy', *Concurrences*, 1/2009, 11–33.

⁵ The literature on two-sided markets is possibly the most prominent example of this. Most of the pioneering work in this area can directly be traced back to consultancy contracts aimed at establishing an economic justification for interchange fees originally concerning checks and today credit card payments.

⁶ Efficiency is used as a catch-all concept for a welfare orientation of competition law irrespective of the existing subsidiary debates on consumer versus

It has been argued that an efficiency orientation threatens to displace the central idea of 'freedom to compete' (Wettbewerbsfreiheit) as the ultimate normative justification for competition law.⁷ The criticism is twofold. First, according to some of those critics, the ultimate goal of competition law, as supposedly posited by ordoliberalism, is not the increase in economic efficiency but maintaining the freedom to compete of market actors.⁸ Secondly, some argue that adopting an efficiency goal 'would represent a fundamental change in the goals of Article 82⁹ that may not be compatible with the Treaty on the Functioning of the European Union.¹⁰

total welfare approach or the various efficiency concepts. On this, see W Kerber, 'Should Competition Law Promote efficiency? Some reflections of an economist on the normative foundations of competition law', in J Drexler, L Idot and J Moneger (eds), *Economic Theory and Competition Law* (Cheltenham: Edward Elgar, 2009), 93–120.

⁷ The notion of 'Wettbewerbsfreiheit' is closely related to the notion of protection of the competitive process. It is translated here as 'freedom to compete'. V Vanberg, 'Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy' (2009) *Freiburg Discussion Papers on Constitutional Economics* 09/3, or L Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer welfare in the Modernisation of Article 82 EC', (2007) 3 *European Competition Journal* 2, 329–44, translated 'Wettbewerbsfreiheit' as 'economic freedom'.

⁸ See E Hoppmann, *Wirtschaftsordnung und Wettbewerb* (Baden Baden, Nomos, 1988); W Möschel, 'Competition Policy from an Ordo point of view' in A Peacock and H Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Macmillan, London, 1989), 142–59; H Willgerodt and A Peacock, 'German Liberalism and Economic Revival' in A Peacock and H Willgerodt (eds) *Germany's Social Market Economy: Origins and Evolution* (St Martin's Press, New York, NY, 1989); A Peacock and H Willgerodt, 'Overall View of the German Liberal Movement' in A Peacock and H Willgerodt (eds) *German Neo-Liberals and the Social Market Economy* (Macmillan, London, 1989), 1–15; and C Ahlborn and C Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a consumer welfare perspective' (2006) *Competition Policy International* 2(2), 197–217; and critically P Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29 *Oxford Journal of Legal Studies* 2, 267–303 or L Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer welfare in the Modernisation of Article 82 EC' [2007] *European Competition Journal* 3(2), 329–44.

⁹ DJ Gerber, 'The Future of Article 82: Dissecting the Conflict' in CD Ehlermann and M Marquis (eds) *European Competition Law Annual 2007: A reformed approach to Article 82 EC* (Hart Publishing, Oxford, 2008) cited in P Akman, 'Searching for the Long-Lost Soul of Article 82EC', (note 8 above), 269.

¹⁰ See T Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses' (2005) 42 CMLR 129 or H Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC', in CD Ehlermann and M Marquis (eds), *European Competition Law Annual*

This criticism raises several questions. The first question concerns the issue of whether indeed, the freedom to compete of market participants was the original goal of competition policy in so-called ordoliberal thought or whether it is not rather an interpretation of the original ordoliberal position if not simply a distorted representation of that thought. This question, which of course is independent of the merit of both 'candidates' for ultimate competition goal, is addressed in the first section concerning the content and continuity of ordoliberal thought. It confronts the ordoliberal with the so-called neoliberal¹¹ position on the normative foundations of competition policy.

It is argued that the original ordoliberal thought concerning the normative foundations of competition policy as expressed for instance by Eucken, Miksch and Böhm has been narrowed down and reduced to the neoliberal notion of 'freedom to compete'. This development did not take place abruptly but started slowly in the wake of the introduction of the German competition law in 1958.

The goal of ordoliberal competition policy is the preservation of a free society. This is to be achieved by the systematic elimination of private economic power concentrations and more specifically the establishment and enforcement of 'complete competition' (vollständiger Wettbewerb).¹² Under complete competition, not only the negative repercussions of market power are checked allowing a more efficient allocation but, and this is of central importance in ordoliberal thought, a free society is preserved as the state can no longer fall prey to powerful private economic interests. In particular this latter reason for a strong stance vis-à-vis any form of market power has been ignored and replaced by the more or less absolute goal of preserving the freedom to compete as a *raison d'être* for competition law by neoliberals.

2007: *A reformed approach to Article 82 EC* (Hart Publishing, Oxford, 2008), 162, who writes 'EC law cannot make consumer harm the ultimate test of anticompetitive conduct'.

¹¹ The term neoliberal is not without difficulty. Despite its many meanings, it is used here as authors such as Möschel, Willgerodt and Peacock use it to label their line of thought. It is also particularly suited as a contrasting term to ordoliberal thought as Eucken, the central proponent of ordoliberal thought, considered it misleading and rejected it. For him ordoliberalism is a fundamentally different concept not to be associated with a revival of the liberal tradition.

¹² Note that complete competition, ie 'vollständiger Wettbewerb' in Eucken's work is defined differently than perfect competition in neoclassical price theory. See W Eucken, *Grundsätze der Wirtschaftspolitik* (7th edn, Mohr Siebeck, Tübingen, 2004 [1952]), 228f and W Eucken, *Die Grundlagen der Nationalökonomie* (Springer Verlag, Berlin Göttingen Heidelberg, 1950 [1939]), 95ff.

Linked to the first, the second question concerns the claim that an efficiency orientation would represent a fundamental change in EU competition law and that such a change at best creates a tension with the Treaty and at worst requires a Treaty modification. This concern is dealt with in the second section on the conflict between the efficiency goal and the goal of freedom to compete. It is argued that the protection of the freedom to compete, i.e. the protection of the competitive process, has historically neither been presented as the ultimate goal of competition law during the deliberations leading up to the German competition law nor, as has recently been argued convincingly,¹³ been invoked in the discussions preceding EU competition law. This is not surprising as the focus on the preservation of the freedom to compete as the ultimate goal of competition law is a development that took place later in time and therefore could not have been influential during the creation of the German and EU competition laws. As a result, in addition to the fact that the notion of freedom to compete is a debatable heir of the original ordoliberal position, one cannot point to the deliberations and discussions leading up to both laws as an argument against a more economic approach. Furthermore, as will be discussed, even the influence of ordoliberal thought on EU and German competition law is limited.

After having established in the first section the distinction between so-called ordoliberal and neoliberal thought and having analyzed to what extent the ideas of freedom to compete and preservation of a competitive process influenced EU and German competition law, the final section concerns the neglected original notion of freedom in ordoliberal thought closely related to Eucken's view of the interdependence of the economic and the socio-political order.

One of the key ordoliberal objections to accumulated private economic power was its inevitably undesirable impact on the political process and the stability of democracy. It is argued that the introduction of a more economic approach with the explicit aim of increasing economic efficiency is not necessarily incompatible with the original goals of ordoliberal competition policy as long as the primary goal of ordoliberal competition policy is not endangered. In light of substantial and often unrepresentative lobbying efforts being deployed in competition matters and in political decision-making in general, the ordoliberal perspective, with its emphasis on the dangers of economic power not only for efficiency and consumer welfare but for democracy, remains important

¹³ See P Akman (2009), 'Searching for the Long-Lost Soul of Article 82EC', (note 8 above), 267–303.

and should be an integral part of the debate on the ultimate goals of competition law.

Besides clarifying some misperceptions and recalling the clear distinction between neoliberal and ordoliberal thought, the purpose of this chapter is to assemble some arguments for the compatibility of a more economic approach to EU law with the TFEU and argue in favour of reinvigorating the fundamental ordoliberal question concerning the dangers of private economic power for society. The chapter does therefore neither attempt a complete description of the debate on the more economic approach to EU competition law, nor of ordoliberal or neoliberal positions in general.¹⁴ It also does not pretend to fully describe the history and the processes that ultimately led to the first version of German and EU competition law. All these topics are only touched upon to the extent necessary for developing the arguments.¹⁵

¹⁴ Although it certainly contributes to an increased understanding of ordoliberal thought by clarifying the distinction between both 'schools' and arguing against the continuity thesis that views neoliberal thought as the mature and more sophisticated brother of ordoliberal thought, a picture that has been painted repeatedly throughout the years and has fuelled the current conceptual confusion.

¹⁵ This implies for instance that the distinction between the catholic social school of ordoliberalism and the Freiburg school of ordoliberalism is not made, that the controversy between Kantzenbach and Hoppmann is not touched upon, that US influences on German competition law are left largely untreated and that the more economic approach is simply equated with an efficiency goal treating such an orientation as monolithic and discarding not only different welfare approaches but also the undeniable tensions and inconsistencies of a consumer-harm approach with, for instance, an as efficient competitor test (on this see for instance M Adam and F Maier-Rigaud, 'The Law and Economics of Article 82 EC and the Commission Guidance Paper on Exclusionary Conduct' (2009) *Journal of Competition Law (ZWeR – Zeitschrift für Wettbewerbsrecht)* 1, 131, 139) and the case law of the court (see for example *Tomra v Commission* (Case T-155/06) and *Deutsche Telekom v Commission* (Case T-271/03)). Another important, but for present purposes subsidiary, question concerning the level on which economic analysis should be brought into competition law is also treated only briefly. For such a discussion see F Maier-Rigaud, 'Article 82 Rebates: Four Common Fallacies' [2006] *European Competition Journal*, 2(2), 85, 99f, treating in particular the question whether a case-by-case analysis is warranted or whether economic insights can also be used to design general competition rules. See also V Vanberg (2009), 'Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy' (note 7 above), who points to the clear analytical distinction to be made between the question of the normative foundations of competition policy and the controversy whether competition policy should adopt an approach that takes account of the specific effects in each particular case.

2 THE ORDOLIBERAL VERSUS THE NEOLIBERAL POSITION

This section aims at establishing the key differences between the ordoliberal and neoliberal positions concerning the normative foundations of competition law allowing for a clear distinction between these separate lines of thought. It furthermore broadly retraces some of the reasons for the slow paradigm shift that eventually led to a break and the clear distinction between ordoliberal and neoliberal thought today.

Distinguishing neoliberal from ordoliberal thought is difficult because the concept of freedom is central to both. The fact that the former is a younger line of thought than the latter does not necessarily help as this largely precluded any direct debate between the advocates of the two and the neoliberal one has often been considered the natural and more sophisticated extension of the former. What is often overlooked is that ordoliberals never attached intrinsic value to *economic* freedom and that although the concept was important to them, this importance was embedded in the overall purpose of finding a humane order for society, what Eucken¹⁶ termed 'menschenwürdige Ordnung'.¹⁷ The economic order was seen as interdependent with the social political order and the concept of freedom applied much more broadly to the democratic order of society not just to economic transactions and market participants. In order to guarantee a functioning economy, a 'Privatrechtsgesellschaft'¹⁸ was embraced not only because of its superior economic properties but due to the perceived incompatibility of any other order with the overall aim of establishing a free society.¹⁹ Rüstow, for instance, made this argument quite vividly

¹⁶ W Eucken (2004 [1952]), *Grundsätze der Wirtschaftspolitik* (note 12 above).

¹⁷ See L Miksch, 'Walter Eucken' (1950) *Kyklos*, 4(4), 279–90 and DJ Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (OUP, Oxford, 1998), 239ff, who provides one of the few extensive English descriptions of ordoliberalism in a competition law context.

¹⁸ F Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 17, 75–152. See also WH Roth, 'Kartell und Wettbewerbsrecht' in K Riesenhuber (ed.), *Privatrechtsgesellschaft – Entwicklung, Stand und Verfassung des Privatrechts* (Mohr Siebeck, Tübingen, 2007), 186.

¹⁹ See HO Lenel, 'Walter Euckens ordnungspolitische Konzeption, die wirtschaftspolitische Lehre in der Bundesrepublik und die Wettbewerbstheorie von heute' (1975) *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 26, 22, 49ff, or, for instance, C Mantzavinos, *Wettbewerbstheorie. Eine kritische Auseinandersetzung* (Duncker & Humblot, Berlin, 1994), 72, who writes 'Die Bedrohung der Freiheit durch private und staatliche Macht ist einer der wichtigsten Gründe dafür, dass Eucken die Wettbewerbsordnung vor den anderen

in an article entitled 'The Economy as Servant to Humanity' where he argued that 'we need to be prepared and would be prepared to defend that economic system that for non-economic reasons is the more desirable one, even if it were less productive than others. We would be prepared and should be prepared to accept economic sacrifices for that.'²⁰

More important, however, is the fact that an unconstrained freedom to compete was indeed what separated the ordoliberalism from the liberal tradition.²¹ Ordoliberal thought is based on the instrumental value of competition. The ordoliberal objective was the design of proper rules, i.e. establishing a constitutional economic order that would allow only

Ordnungen bevorzugte', i.e. the threat to freedom through private and state power is one of the most important reasons for Eucken's preference for the competitive over all other orders. The interaction between accumulated economic power and the political process is, however, not to be understood as a fundamental incompatibility of free markets with dictatorial regimes as for instance C Mantzavinos, *Wettbewerbstheorie. Eine kritische Auseinandersetzung* (Duncker & Humblot, Berlin, 1994), 75, argues. L Miksch, *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (2nd edn, Verlag Helmut Küpper, Godesberg, 1947), 216, states that 'Ein totaler Staat ist auch ohne Staatswirtschaft möglich, aber die reine Staatswirtschaft führt mit Sicherheit zum totalen Staat', i.e. that a dictatorial regime is possible even without a centrally planned economy whereas a centrally planned economy necessarily leads to a dictatorial regime.

²⁰ The original text is 'Wir müssen bereit sein und wären bereit, für das aus überwirtschaftlichen Gründen vorzugswürdigere Wirtschaftssystem auch dann einzutreten, wenn es weniger produktiv wäre als andere. Wir wären bereit und müssten bereit sein, dafür wirtschaftliche Opfer zu bringen.' A Rüstow, 'Wirtschaft als Dienerin der Menschlichkeit' in W Hoch (ed.) *Alexander Rüstow – Rede und Antwort* (Ludwigsburg, 1963 [1960]), 76, 79. See also A Rüstow, *Das Versagen des Wirtschaftsliberalismus* (3rd revised edn, based on the 2nd edn from 1950), F Maier-Rigaud and G Maier-Rigaud (eds) (Metropolis-Verlag: Marburg, 2001 [1945]), 153.

²¹ See for example L Miksch, *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (2nd edn, Verlag Helmut Küpper, Godesberg, 1947), 14: 'Wir wissen heute oder wissen wieder, daß es unter allen Umständen die Aufgabe des Staates ist, die Wirtschaft zu ordnen, und zwar durch eine einheitliche und widerspruchsfreie Wirtschaftsverfassung', i.e. 'we know today or know it again that it is under all circumstances the duty of the state to order the economy through a uniform and consistent economic constitution.' Or at 12f: 'Man vergaß, daß eine freie Wirtschaft nur eine vom Staat unter Benützung freiheitlicher Prinzipien organisierte Wirtschaft sein kann und entleerte so den Begriff der Wirtschaftsfreiheit seines positiven Gehalts. Es blieb nur die negative Seite, die Abneigung gegen den Staatseingriff. [. . .] Der Begriff der "Wirtschaftsfreiheit" wurde in sein Gegenteil verkehrt, er wurde zum Schlachtruf gegen den Staat, der damit vollends jede Ordnungs-idee einbüßte, nur noch planlos und auf Wunsch der Interessenten eingriff und so in das Schlepptau anonymer Wirtschaftsmächte geriet.'

democratically legitimized economic and political power in society and would in addition entail good economic outcomes.²²

In any case it makes no sense to demand an absolute freedom to compete. [. . .] It has been shown under what conditions complete competition is possible. If these conditions are given or if they can be guaranteed by economic policy measures, then free competition is the only appropriate organizing principle.²³

The conditionality could not be clearer; the freedom to compete can only prevail and develop its positive results under an appropriate framework of rules and in the absence of private economic power. According to the founding father of the Ordo idea Franz Böhm, the basic problem of any economic order is the problem of economic power.²⁴ It is in this context that the idea of competition as instrument to dethrone economic power, 'Entmachtungsinstrument', was born. Unsurprisingly, the solution to this problem is 'Rücksichtslose Entmachtung der Privatwirtschaft, Entprivatisierung der dann noch verbleibenden Marktmacht'²⁵ i.e. the ruthless deconcentration of the economy, deprivatization of the then remaining market power.²⁶ From

²² *Ibid* at 16: 'Das Ziel des wirtschaftlichen Wettkampfes ist es, der besten Leistung den größten Erfolg zu sichern und so zur Leistung anzuspornen. Ein harmonisches Zusammenspiel der wirtschaftlichen Kräfte entsteht aus dem Wettkampf nicht immer, sondern nur dann, wenn er sich innerhalb bestimmter Spielregeln vollzieht', i.e., 'the goal of economic competition is to secure the greatest success to the best efforts and to thereby incite for performance. A harmonious interaction between market forces not always emerges from competition but only if the competition takes place within specific rules.'

²³ *Ibid*, 221. The original reads: 'Jedenfalls hat es keinen Sinn, absolute Wettbewerbsfreiheit zu fordern. [. . .] Es ist gezeigt worden, unter welchen Bedingungen vollständige Konkurrenz möglich ist. Sind diese Bedingungen gegeben oder können sie durch wirtschaftspolitische Maßnahmen hergestellt werden, so ist der freie Wettbewerb das allein angemessene Ordnungsprinzip.'

²⁴ See F Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung* (Berlin, 1933) and F Böhm, 'Das Problem der privaten Macht. Ein Beitrag zur Monopolfrage', (1928) *Die Justiz* 3, 324–45, where the idea is first discussed.

²⁵ F Böhm, 'Kartellauflösung und Konzernentflechtung, Spezialistenaufgabe oder Schicksalsfrage?' (1947) *Süddeutsche Juristenzeitung*, Jg. II, 503.

²⁶ Böhm, *ibid*, writes 'Verhinderung, Bekämpfung und Rückbildung des Vermachtungsprozesses mit allen zu Gebote stehenden Mitteln des Rechts [. . .], [um so] die Marktvermachtung auf das Mindestmaß (Machtminimum) zurückzudrücken.'

an ordoliberal point of view, the threat of accumulated economic power is essentially twofold.²⁷

In the economy, market power distorts the allocation of resources as prices no longer fulfill their role as indicators of scarcity. Ordoliberal thinkers not only used direct historical evidence at their disposal to support their arguments but also argued theoretically with the effects of market power on prices and the allocation, some also distribution, of resources.

Besides these negative economic aspects of accumulated market power, the ordoliberals saw the danger of the state being captured by powerful private interests undermining the economic order and ultimately threatening democracy.²⁸ Again ordoliberals had historical evidence at their fingertips. According to their perspective, the *laissez-faire* liberalism of the late nineteenth and early twentieth century was not only associated with the formation of cartels²⁹ and monopolies and their negative economic impact,³⁰ but also, seemingly paradoxically, with increased subsidies

²⁷ This position was also known in the US antitrust world at the time. JS Bain, *Industrial Organization* (2nd edn, New York, 1968), 37, for instance stated in reference to the ordoliberal position that the 'policy conclusion drawn from this line of theorizing is that concentration of the control of economic affairs, through concentrated big business or other similar concentrations, should be opposed per se as a matter of political principle. Its development should be limited, and existing concentration should be reduced as feasible. This is quite aside from the explicit impacts of various forms of industrial organization on the strictly material welfare of the populace. The preservation of (or reversion to) a situation in which economic units are very numerous, individually small, and relatively powerless, becomes an end in itself.' CD Edwards, *Big Business and the Policy of Competition*, Cleveland (1956), 4, concludes, 'Thus competition is valued for its own sake, as the economic equivalent of political democracy, and also as a necessary aid in preserving that democracy by averting dangerous extension of the power of private organizations.'

²⁸ W Eucken, 'Staatliche Strukturwandlungen und die Krisis des Kapitalismus', (1932) *Weltwirtschaftliches Archiv*, 36(2), and A Rüstow (1963 [1932]), 'Freie Wirtschaft – Starker Staat (Die staatspolitischen Voraussetzungen des wirtschaftspolitischen Liberalismus)' in W Hoch (ed.) *Alexander Rüstow – Rede und Antwort* (note 20 above), pp 249–58, made that point quite forcefully already very early on.

²⁹ See e.g. J Basedow, 'Kartellrecht im Land der Kartelle – Zur Entstehung und Entwicklung des Gesetzes gegen Wettbewerbsbeschränkungen' (2006) 58 *Wirtschaft und Wettbewerb* 3, 270–73.

³⁰ See, however, JR Kinghorn, 'Kartells and Cartel Theory: Evidence from Early Twentieth Century German Coal, Iron and Steel Industries' (1996) 14 *Essays in Economic and Business History* 339–63, presenting an institutional and transaction cost-based analysis in contrast to the received view of negative economic consequences at least for the steel and coal cartels in the late nineteenth and early twentieth century in Germany.

and state granted privileges to the same effect.³¹ This led to the ordoliberal position that the existence of private economic power concentrations is not only economically problematic but also incompatible with a democratic society.³²

In order to avoid repeating the mistakes of the past, competition policy – at the time not necessarily institutionally separated from other state functions – had to combat any form of market power. Only once complete competition was achieved in most markets and remaining natural monopolies were put under public control, could one speak of freedom to compete.³³ For Eucken more than others, the concept of economic freedom in its positive sense was not only associated with but could only be brought about by complete competition. In light of his skepticism regarding the possibilities of a competition authority to 'regulate' oligopolies and any government intervention in general, this was of course an elegant albeit theoretical solution.³⁴ If complete competition could be brought about in most sectors

³¹ L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (note 20 above), 5: 'Freiheit des Wettbewerbs hieß damals in erster Reihe Freiheit von staatlicher Bevormundung. Daß das Streben nach wirtschaftlicher Macht, das nicht weniger natürlich ist als das Wettbewerbsstreben, bei staatlicher Zurückhaltung zu einem monopolistischen Mißbrauch der Freiheit führen müsse, wurde von vornherein verkannt.'

³² E Günther, 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' in H Saueremann and EJ Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm zum 80. Geburtstag* (Mohr-Siebeck, Tübingen, 1975), 183, 191f, describes this position as follows: 'Wirtschaftliche Macht strebe über die Einflußnahme auf die politische Willensbildung nach Konsolidierung und Ausweitung, der Staat werde unter dem Druck starker Interessengruppen gezwungen, die selbstgewählte Abstinenz auf wirtschaftlichem Gebiet zugunsten eines gruppengesteuerten und destabilisierenden Interventionismus aufzugeben. Die Entwicklung führe schließlich zwangsläufig vom "Wirtschaftsstaat" des Interventionismus zur Entstehung autoritärer wirtschafts- und gesellschaftspolitischer Systeme, für die das Dritte Reich im nationalsozialistischen Deutschland und die kommunistische Sowjetunion historische Beispiele abgaben.'

³³ See also e.g. L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (note 20 above), 62 ff, who distinguishes between a general competition law and a specific competition law that would deal with natural monopolies.

³⁴ Eucken was criticized for not having seen the difficulties of the 'as if' approach to monopolies and also for having underestimated the intermediate market form of oligopolies that according to him would not require special oversight as this would be too difficult for the authority and would anyhow not be necessary as he deemed the threat of falling under monopoly oversight sufficient to deter deviations from competitive behavior. The idea that the threat of regulatory intervention may be sufficient to deter certain conduct can be considered an early version of the contestability concept.

of the economy, the state would only need to worry about the regulation of residual market power. In Eucken's own words, the policy of the state should aim at dismantling economic power concentrations or limiting their functioning.³⁵ For ordoliberalism freedom to compete is a description of the state reached once these conditions are fulfilled.

With the quickly eroding appeal of the concept of complete competition as empirical benchmark, even before the advent of modern industrial organization theory, efforts were made to replace this goal. It is in this context that the liberal concept of economic freedom was reborn in its neoliberal guise as a normative foundation for competition policy. Supported by the works of Hayek and in particular his article on the use of knowledge in society and more importantly the meaning of competition and competition as a discovery procedure, the static notion of complete competition as an ideal state of the economy was replaced with a more dynamic process-oriented view.³⁶ If competition is a discovery process, then the freedom to discover and the protection of the discovery process is crucial. While these developments were undeniably important theoretical leaps forward in the understanding of competition and market behavior more generally, the original idea behind the concept of complete competition, and in particular its important political corollary, was lost.³⁷ The neoliberal position therefore not only provided an appealing substitute for the ordoliberal concept of complete competition but also rendered the distinction between the level of market actions and market rules more salient. Indeed, if the process is viewed as the main goal, one no longer has to be too much concerned with the results thereby avoiding discretionary temptations at the root.³⁸

³⁵ 'Die Politik des Staates sollte darauf gerichtet sein wirtschaftliche Machtgruppen aufzulösen oder ihre Funktionen zu begrenzen.' W Eucken, *Grundsätze der Wirtschaftspolitik* (7th edn, Mohr Siebeck, Tübingen, 2004 [1952]), 334.

³⁶ FA Hayek, 'Der Wettbewerb als Entdeckungsverfahren' in *Freiburger Studien*, (Mohr Siebeck, Tübingen, 1969 [1968]), 249–65; FA Hayek, 'The Meaning of Competition' in FA Hayek (ed.), *Individualism and Economic Order* (University of Chicago Press, Chicago, 1948), 92–106; and FA Hayek, 'The Use of Knowledge in Society' (1945) *American Economic Review* 35(4), 519–30.

³⁷ That the concept of the interdependency of the economic and the social and political order was already neglected in the 1970s has been noted by HO Lenel, 'Walter Euckens ordnungspolitische Konzeption, die wirtschaftspolitische Lehre in der Bundesrepublik und die Wettbewerbstheorie von heute', (1975) *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 26, 22, 75.

³⁸ This was in particular appealing to those concerned with abusive state power, for instance in regulating natural monopolies that, in the absence of a need for discretionary policy, could be more effectively constrained.

The neoliberal position with its ultimate (if not intrinsic) goal of protecting the freedom to compete was born.³⁹ What the neoliberals shared with the ordoliberals and the liberals was their skepticism of state action. What was first neglected and then abandoned was the equal concern the ordoliberals had vis-à-vis private economic power positions – irrespective of whether this power resulted from cartel agreements, internal or external (merger) growth or state privileges and subsidies.⁴⁰ The idea of a market order was, however, maintained although its focus was no longer on trying to achieve a certain market form but to combat and eliminate any 'discretionary' intervention into what was considered a free market process.⁴¹

This new orientation subsequently led to quite some confusion although the break did not remain unnoticed.⁴² In more recent times, the original aim of competition law i.e. establishing and preserving a free democratic society by eliminating market power, irrespective of its origin, has been watered down, if not abandoned altogether.⁴³ In contrast to this justification of

³⁹ One of the reasons for such developments is also the outcome of the debate focusing on an appropriate replacement for Eucken's concept of complete competition. This discussion was labeled the Hoppmann-Kantzenbach controversy based on the names of the two most prominent adversaries, but cannot be discussed here.

⁴⁰ See L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (note 20 above), 212: '[Die Wettbewerbsordnung] zerstört die Machtstellungen radikal, indem sie alle Unternehmer dem gleichen Prinzip unterwirft, der freien Konkurrenz im Regelfalle, der gebundenen Konkurrenz und der staatlichen Lenkung in der Form der Monopolaufsicht in Sonderfällen.'

⁴¹ 'Solange wir aber nichts Besseres zur Verfügung haben, stehen wir vor der Wahl zwischen zwei Übeln: Weitere Auslegung des Mißbrauchsprinzips, als sie den Vertretern des "freien Wettbewerbs" vorschwebt, und damit größeres Ermessen des Bundeskartellamts oder Laissez faire gegenüber dem Mißbrauch wirtschaftlicher Macht in wichtigen Bereichen. Ich halte die Gefahren der letzteren Haltung für weit größer als die Gefahr willkürlicher oder zu weitgehender Entscheidungen des Bundeskartellamts, zumal es gegen diese hinreichende Rechtsmittel gibt.' HO Lenel (1975), 'Vollständiger und freier Wettbewerb als Leitbilder für die Wettbewerbspolitik gegenüber mächtigen Unternehmen' in H Sauerermann and EJ Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm zum 80. Geburtstag* (note 32 above), 317, 337.

⁴² In an article focusing on Eucken's 'as if' concept, HO Lenel (1975) *ibid.*, 317–40, also discusses the criticism 'seitens der Vertreter des "freien Wettbewerbs"' i.e. from those in favor of a free-competition concept, thereby clearly delineating Eucken and ordoliberal thought on the one hand and the neoliberal concept of freedom to compete on the other.

⁴³ The most vocal ordoliberal on this aspect was probably Alexander Rüstow. For a specific treatment of his position, see F Maier-Rigaud and R Maier-Rigaud, 'Rüstows Konzept der Sozialen Marktwirtschaft: Sozial- und wettbewerbspolitische Dimensionen einer überwirtschaftlichen Ordnung' in M Abländer and P Ulrich (eds), *60 Jahre Soziale Marktwirtschaft* (Haupt Verlag, 2009); A Rüstow

competition law, more recent authors have proclaimed the freedom to compete as such to be the ultimate goal of (ordoliberal) competition policy. According for instance to Hoppmann, the freedom to compete is a goal in itself.⁴⁴ Möschel,⁴⁵ insisting on stating an ordoliberal position, writes that the 'actual goal of the competition policy of ordoliberalism lies in the protection of individual economic action as a value in itself'.⁴⁶

From that perspective it is only logical that neoliberals consider the 'special responsibility' of dominant companies to be an unjustified restriction of the freedom to compete. If the goal of competition policy is the protection of every individual market actor's freedom to compete, dominant companies, at least when the dominant position has been obtained through legitimate means, should also be protected and be able to benefit from this freedom to compete. Mestmäcker⁴⁷ speaks in this context of a contradiction or 'antinomy of competition policy' suggesting that the ordoliberal founders overlooked the fact that even dominant companies should be entitled to free competition.⁴⁸

(2001 [1945]), *Das Versagen des Wirtschaftsliberalismus* (note 20 above); and also F Maier-Rigaud and G Maier-Rigaud (2001), 'Das neoliberale Projekt' in A Rüstow, *Das Versagen des Wirtschaftsliberalismus*, 201–306.

⁴⁴ The freedom to compete is 'ein Ziel in sich selbst, weil sich in ihm wirtschaftliche Freiheit manifestiert.' E Hoppmann, *Wirtschaftsordnung und Wettbewerb* (Baden Baden, Nomos, 1988), 199 and at 87: 'Die Wettbewerbspolitik hat [. . .] als Ziel die Wettbewerbsfreiheit.' See HO Lenel, 'Walter Euckens ordnungspolitische Konzeption, die wirtschaftspolitische Lehre in der Bundesrepublik und die Wettbewerbstheorie von heute' (1975) *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 26, 22, 72f, again emphasizing the difference.

⁴⁵ W Möschel, 'Competition Policy from an Ordo point of view' in A Peacock and H Willgerodt (eds) *German Neo-Liberals and the Social Market Economy* (Macmillan, London, 1989), 142, 147.

⁴⁶ See V Vanberg (2009), 'Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy' (note 7 above), for an effort to reinterpret these unscientific categorical imperatives as conditional imperatives open to scientific scrutiny.

⁴⁷ EJ Mestmäcker, *Der verwaltete Wettbewerb: eine vergleichende Untersuchung über den Schutz von Freiheit und Lauterkeit im Wettbewerbsrecht* (Mohr Siebeck, Tübingen, 1984).

⁴⁸ The focalization on individual freedom by neoliberals has spawned an utterly useless debate on whose freedom to compete one should protect. While it is clear that the freedom of one constrains the freedom of the other, questions such as to whether retail price maintenance (RPM) should be allowed or not can hardly be solved under the freedom to compete paradigm as either certain freedoms to compete on the level of producers (in case of a prohibition) or on the level of retailers (in case RPM is allowed) are curtailed, necessitating additional criteria (I thank Carl Christian von Weizsäcker for this clear example). The reason ordoliberals did not go down this often-trodden path is not a lack of understanding but the fact

For the ordoliberals such a critique simply misses the point. For ordoliberals economic freedom is a direct result of an appropriate market order.⁴⁹ The intrinsic value lies therefore not in the freedom to compete as such, but in the political, human freedom. Economic freedom is certainly considered an essential basis for a democratic society, but this is explicitly only recognized for the economic freedom that reigns within a constitutionally constrained market economy such as the social market economy (Soziale Marktwirtschaft). From that perspective it is far-fetched to consider the freedom to compete to be an argument against any particular legitimate market constitution and its competition rules. For Günther, the first president of the Bundeskartellamt, this neoliberal focus on the 'freedom to compete' is a regression to old liberal ideas.⁵⁰ Günther⁵¹ concludes that the state should not only focus its efforts on the preservation of the freedom to compete but that a solution also needs to be found for the problem of economic power.⁵²

that such problems are solved on the level of the economic order. It is exactly in reaction to classical liberalism and the notion that economic freedom brings about desirable results that ordoliberal thought was formed, with its emphasis on the decisive role of institutions within which economic activity takes place.

⁴⁹ This crucial aspect, obviously equally true for freedom in general, is typically overlooked. See L Mürach-Brand, *Antitrust auf deutsch. Der Einfluss der amerikanischen Alliierten auf das Gesetz gegen Wettbewerbsbeschränkungen (GWB) nach 1945* (Mohr Siebeck, Tübingen, 2004) for a notable exception also providing a very detailed description of the formation of the first German competition law after WWII and the Allied influences. According to her, the ordoliberals did not base the concept of freedom on individual rights but rather saw individual freedom as the consequence of the ideal order. 'Eucken gründete die Freiheit also nicht wie das amerikanische Antitrustrecht auf das Recht des Individuums. Die individuelle Freiheit folgte vielmehr als eine Konsequenz aus der idealen Ordnung.' L Mürach-Brand (2004) at 106. See also V Vanberg (2009), 'Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy' (note 7 above), who is somewhat prudent in attributing the goal of protecting 'Wettbewerbsfreiheit' directly to the ordoliberal founding fathers and prefers to say that this goal has been stressed in the German ordoliberal tradition.

⁵⁰ 'Die angedeutete wirtschaftspolitische Entwicklung [. . .] in Zusammenhang mit der unter dem Einfluß des kalten Krieges zunehmenden Polarisierung führten nun jedoch zu einem teilweisen Rückfall einiger Vertreter des neuen deutschen Liberalismus in die Vorstellungswelt des traditionellen Liberalismus, deren Überwindung gerade die Zielrichtung des Ordo-Liberalismus gewesen war.' E Günther (1975), 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' (note 32 above), 183, 202.

⁵¹ E Günther (1975) (note 32 above), 183, 203f.

⁵² The original text reads 'der Staat im Bereich der Wettbewerbsordnung [sich] nicht auf die Sicherung der Wettbewerbsfreiheit beschränken darf. Dies ist nur eine Seite der Medaille. Hinzukommen muß die Lösung des Problems der

Freedom undeniably plays the central role in the design of the market order.⁵³ If that freedom is to be guaranteed, the market order has to bring about the freedom to compete, i.e. it has to tackle market power that would eliminate that very freedom.

Some of the ordoliberalists have made the subservient role of the economic system and the priority of guaranteeing a free society very explicit. Representative of the view that monopolies and dominant companies cannot be tolerated for the benefit of preserving greater democratic values is the following passage from Rüstow:

Unser Kampf gegen die Monopole richtet sich nicht in erster Linie gegen die Monopolrenten [. . .], sondern unser Kampf richtet sich dagegen, dass die Monopole eine Bedrohung der Freiheit sind. Es ist unter dem Gesichtspunkt der Staatsstruktur nicht erträglich, dass man es in einem Land, das demokratische Freiheit auf seine Fahne geschrieben hat, duldet, dass sich private Machtpositionen nach privatem Belieben bilden, dass mitten in unserem demokratischen Gefilde sozusagen Raubritterburgen errichtet werden, die von den vorüberziehenden Kaufleuten und Konsumenten Tribute erheben. Das ist ein grundsätzlich unerträglicher Zustand, ganz gleich, wie groß oder wie klein die Tribute sind; davon hängt es gar nicht ab.⁵⁴

wirtschaftlichen Macht.' According to Günther it is clear that 'nur über die umfassende und konsequente Lösung des Machtproblems in einer Marktwirtschaft kompetitive Marktstrukturen zu erhalten und wirksamer Wettbewerb zu sichern sind.' E Günther (1975) (note 32 above), 183, 204, i.e., competitive market structures and effective competition can only be maintained through the encompassing and strict solution of the problem of market power.

⁵³ That Eucken was very much concerned with this aspect becomes clear in the following passage: 'Today there is the risk that the anarchy of powerful groups leads to the control of more threatening forces than absolutism – in fact to a tyranny.' The quote in the original language is 'Heute besteht die Gefahr, daß die Anarchie der Machtgruppen zur Herrschaft bedrohlicherer Gewalten führt, als der Absolutismus es war – eben zur Tyrannis', W Eucken (2004 [1952]), *Grundsätze der Wirtschaftspolitik* (note 12 above), 335. The argument is also made by Böhm who argues that the bad economic and political consequences of private economic power concentrations ultimately helped in the rise of the National Socialist party: 'Eine solche privatvermachtete Marktwirtschaft, wie es die deutsche Wirtschaft vor der Machtübernahme Hitlers war, ist eine Vorstufe für autoritäre politische oder wirtschaftspolitische Systeme, fordert die Entstehung solcher Systeme geradezu heraus und erleichtert ihnen die Machteroberung und Machtbefestigung außerordentlich.' F Böhm (1947), 'Kartellauflösung und Konzernflechtung, Spezialistenaufgabe oder Schicksalsfrage?' (note 25 above) 504. See also L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (note 21 above), 210.

⁵⁴ A rough translation goes as follows: 'Our fight against monopolies is not primarily directed at monopoly profits [. . .], but our fight concerns the threat monopolies pose for freedom. [. . .] it cannot be tolerated that in a country that has

Even if monopolistic conduct can be in contradiction to the freedom to compete, as understood by Mestmäcker⁵⁵ or Hellwig⁵⁶ and would therefore be prosecuted by a neoliberal competition law, the position of the ordoliberalists in their categorical view concerning any accumulation of economic power is neither based on the notion of freedom to compete nor exclusively on the negative economic consequences of market power but on the threat such concentrated economic power poses to a democratic society. Essential is the fear that the government is captured by interest groups as this would cripple and eventually undermine freedom in society. In that sense, the ordoliberalists are very conscientious of limiting the freedom of companies to compete in particular as they view such limitations as an essential and constitutive element guaranteeing a free society.

If, however, there is no room for market power in a market economy due to the overarching goal of preserving democracy and liberty and if for ordoliberalists the freedom to compete is the state in which economic actors are once a market economy is realized, companies with market power can hardly claim an individual freedom to compete in contradiction with the market constitution. The freedom to compete, as understood by the ordoliberalists, exists only within the confines of a market order that guarantees the absence of market power. The freedom to compete by economic actors is clearly subservient to the liberty of natural persons and the primacy of

taken up the cause of democratic freedom, private power positions are privately formed at will, that robber baron castles are established in the midst of our democracy that demand tribute from passing merchants and consumers. This is a fundamentally unacceptable state irrespective of how big or small the tribute is; in fact it is fully independent thereof.' The quoted passage continues as follows: 'Es macht außerdem unsere Front gegenüber der Planwirtschaft unglaublich. Denn wenn wir derartige planwirtschaftliche Enklaven zulassen, wo private Monopolinhaber innerhalb ihres Bereichs nach eigenem Gutdünken Planwirtschaft betreiben, dann kann man mit Recht sagen: "Hier lasst ihr es ja selbst zu! Aber wenn schon Planwirtschaft, dann soll wenigstens die öffentliche Hand sie betreiben, nicht irgendein beliebiger Unternehmer!" Dagegen lässt sich dann sehr wenig einwenden.' A Rüstow (1963 [1960]), 'Wirtschaft als Dienerin der Menschlichkeit' (note 20 above), 76, 83f.

⁵⁵ EJ Mestmäcker (1984), *Der verwaltete Wettbewerb: eine vergleichende Untersuchung über den Schutz von Freiheit und Lauterkeit im Wettbewerbsrecht*, (note 47 above).

⁵⁶ M Hellwig, 'Effizienz oder Wettbewerbsfreiheit? Zur normativen Grundlegung der Wettbewerbspolitik' in C Engel and W Möschel (eds), *Recht und spontane Ordnung. Festschrift für Ernst-Joachim Mestmäcker zum 80. Geburtstag* (Baden Baden, 2006), 231–68.

such freedom remains untouched also by efficiency considerations as will be seen in the next section.

3 FREEDOM TO COMPETE VERSUS EFFICIENCY

This section indirectly treats the supposed contradiction between a competition law based on efficiency considerations as the ultimate normative justification and a competition law aimed at preserving the freedom to compete.⁵⁷ It analyzes to what extent the authors that do claim a fundamental inconsistency between the two goals can also claim that the more economic approach is (legally) incompatible with the Treaty on the Functioning of the European Union based on the debates that took place leading up to its creation. Although, the argument has not been made explicitly, these authors are even more likely to claim that introducing efficiency considerations into German competition policy is incompatible with German competition law based on an analysis of the original intent of the legislator.⁵⁸ Assuming first that the posited incompatibility of the goals is true, for the second claim to be correct, i.e. that adopting an efficiency goal 'would represent a fundamental change',⁵⁹ one presumably would have to demonstrate that it was the normative goal of protecting the freedom to compete that motivated the European and German competition law to begin with. This is not a trivial exercise, in particular, as in the previous section it was demonstrated that the protection of the freedom to compete as an individual right is not the (ultimate) goal of ordoliberal competition policy.

The argument of a fundamental incompatibility of the two approaches has widely been made in literature.⁶⁰ However, such a fundamental

⁵⁷ The treatment is indirect as the section neither addresses the question whether there is a fundamental incompatibility nor does it address the question which normative foundation should be preferred in the hypothetical that the fundamental incompatibility of the concepts is correct.

⁵⁸ In other words, considering that the basis of German competition law is instrumental also to the EU debate as surely the preservation of the freedom to compete and the protection of the competitive process must have been much more clearly articulated in the home country of ordoliberal thought that is said to have decisively shaped EU competition law.

⁵⁹ DJ Gerber, 'The Future of Article 82: Dissecting the Conflict' in CD Ehlermann and M Marquis (eds) *European Competition Law Annual 2007: A reformed approach to Article 82 EC* (Hart Publishing, Oxford, 2008).

⁶⁰ In fact the author finds the arguments concerning a fundamental incompatibility rather convincing albeit of no consequence for the question whether an efficiency goal can be made the ultimate aim of EU competition law.

incompatibility, as will be argued below, is of limited relevance and certainly does not allow the conclusions the authors subsequently draw. Neither the original German competition law, nor the relevant parts of the Treaty on the Functioning of the European Union ever focused on the protection of the freedom to compete as a competition policy goal. Surprisingly, the specific justifications given for the draft German law, but also the 'travaux préparatoires' to the Treaty of Rome and the debates at the time, suggest that the focus was much more on efficiency considerations than on the protection of the freedom to compete and the competitive process. Indeed, if one goal had to be picked, the concern on the EU level was on total welfare and in Germany on consumer benefits.

As has been argued in the previous section, the freedom to compete as the ultimate (intrinsic) goal of competition law is essentially a later reduction of ordoliberal thought and consequently is not present in its current form in these early debates.⁶¹ In order to analyze this question, the run-up period of both competition laws is considered whereas the focus is mainly on Germany.⁶² The relevant period that would allow an analysis of what competition law goals were being discussed are the years between 1948 and the coming into force of the German competition law (GWB)⁶³ and the Treaty of Rome⁶⁴ in 1958.

⁶¹ This is of course not incompatible with the fact that in Germany, the freedom to compete is currently considered to be the goal of competition policy in particular in the legal community and that indeed the GWB, the German competition law, defines as its goal the protection of the freedom to compete, without providing any specific definition of the term. In any case, it makes a decisive difference if the goal to protect the freedom to compete is believed to be achievable, for instance via the implementation of complete competition, or whether the concept is interpreted as a direct individual right rather than the outcome of an appropriate constitutional economic order.

⁶² The reasons for this are twofold. First, if the concept of freedom to compete cannot even be traced in Germany, there is arguably not much point in trying to identify it on the European level. Second, a specific analysis of the debates surrounding the Treaty of Rome and supporting the arguments advanced here has already been made so that there is no need to repeat the arguments. See P Akman (2009), 'Searching for the Long-Lost Soul of Article 82 EC' (note 8 above), 267–303, who, reflecting the literature, does, however, not distinguish between ordoliberal and neoliberal thought.

⁶³ The German competition law was announced on 27 July 1957 and came into force on 1 January 1958, the same moment as the EU competition law.

⁶⁴ The Treaties of Rome refer to the European Economic Community (EEC) Treaty and the European Atomic Energy Community (EURATOM) Treaty, which both came into force on 1 January 1958.

As has been convincingly argued by Akman,⁶⁵ there is a complete absence of neoliberal arguments concerning the protection of the freedom to compete in the debate leading to the Treaty of Rome. This is also the case for Germany itself where the GWB was hotly debated for years before it came into force in 1958. Indeed, as will be shown, based on the justifications for the law submitted in parliament in 1955 and also based on the parliamentary debate, the submissions of the Bundesrat and the public studies submitted by the 'Beirat',⁶⁶ it was rather efficiency considerations that played an important role. With the notable exception of the so-called Josten-draft of 1949, produced under the chairmanship of Franz Böhm and clearly revealing an ordoliberal influence,⁶⁷ traces of ordoliberal thought are scarce and neoliberal thought is unsurprisingly inexistent.

In 1955 the draft law against restrictions of competition (GWB) was introduced in the German parliament together with a detailed justification (Regierungsbegründung). That justification is revealing as the first two sentences clearly demonstrate that free competition should *only* be secured and economic power *only* be eliminated to the extent that it encroaches upon the effectiveness of competition and its inherent tendencies for increasing productivity and the best possible supply of *consumers*.

Das "Gesetz gegen Wettbewerbsbeschränkungen" stellt eine der wichtigsten Grundlagen zur Förderung und Erhaltung der Marktwirtschaft dar. Es soll die Freiheit des Wettbewerbs sicherstellen und wirtschaftliche Macht da beseitigen, wo sie die Wirksamkeit des Wettbewerbs und die ihm innewohnenden Tendenzen zur Leistungssteigerung beeinträchtigt und die bestmögliche Versorgung der Verbraucher in Frage stellt.⁶⁸

In section II of the justification entitled 'The liberal economy' the problems associated with 'laissez-faire' are discussed. It is argued that towards the end of the nineteenth century, Germany saw developments that

⁶⁵ P Akman (2009), 'Searching for the Long-Lost Soul of Article 82 EC', (note 8 above), 267–303.

⁶⁶ The 'Wissenschaftlicher Beirat' is the economic advisory board of the German Federal Ministry of Economics (although created earlier than the Ministry in 1948) largely composed of economics professors.

⁶⁷ 'Aus dem Kreis der Ordo-Liberalen war ja bekanntlich kein eigener Entwurf eines Wettbewerbschutzgesetzes vorgelegt worden, so daß der Josten-Entwurf heute zu Recht als jenes Wirtschaftsordnungskonzept anzusehen ist, das versuchte, das ordo-liberale Modell [. . .] auf wettbewerbsrechtlichem Gebiet zu realisieren.' E Günther (1975), 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' (note 32 above), 183, 202.

⁶⁸ Deutscher Bundestag (1955), *Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen*, Drucksache Nr 1158, 21.

undermined the effectiveness of the market economy and led to social and political tensions. These problems are identified as being due to the forces inherent in a market-based economy and to state measures. The analysis concludes that this development has led to consumer harm and economic stagnation.⁶⁹

Section IV entitled 'competition order', emphasizes again the central role of the consumer and economic efficiency.⁷⁰ Furthermore, this time with undeniable ordoliberal traits, it is noted that the proposed economic order has to be seen as the counterpart of the democratic order where the former guarantees consumer sovereignty and the latter participatory rights of citizen:

Eine derart geordnete Wirtschaftsverfassung bildet das wirtschaftspolitische Gegenstück zur politischen Demokratie. Während deren Inhalt als das politische Mitbestimmungsrecht jedes Staatsbürgers anzusehen ist, stellt die Wettbewerbsordnung die wirtschaftlichen "Grundrechte" der Freiheit der Arbeit und der Verbrauchswahl sicher.⁷¹

Section V is also very explicit on the subservient, efficiency enhancing role of competition. In that section it is stated that competition cannot be seen as a goal in itself and that it is only a mean to increased efficiency.⁷² Furthermore, if competition policy cannot assure competitive markets as such, regulatory measures are to be taken as a last resort to constrain the behavior of market participants in order to incite them to strive for cost

⁶⁹ 'Übervorteilung der Konsumenten und der Hemmung oder gar Erstarrung des wirtschaftlichen Fortschritts', Deutscher Bundestag (1955) (note 68 above), 21. Section III contrasts a centrally planned economy with a market-based economy. The problem is identified as one of finding a constitutional economic order that is in line with the principles of a democratic order. The consequences of a centrally planned economy are not only that the entrepreneurial initiative is eliminated with the resulting negative impact for the efficacy of the economy, but also that the consumer stops being the key driver of economic activity: 'daß der Konsument aufhört, Lenker des Wirtschaftsgeschehens zu sein', Deutscher Bundestag (1955), 21. The section concludes by stating that free entrepreneurship, the freedom of consumer choice and free price formation result in the best performing and general welfare enhancing economic system. '[. . .] daß die freie Unternehmerwirtschaft, die Freiheit der Konsumwahl und die freie Preisbildung das leistungsfähigste und der allgemeinen Wohlfahrtsförderung am ehesten dienende Wirtschaftssystem ist', Deutscher Bundestag (1955), 21–22.

⁷⁰ 'Durch die wirtschaftliche Macht [. . .] ergibt sich die Gefahr der Übervorteilung des Verbrauchers.', Deutscher Bundestag (1955), 22.

⁷¹ *Ibid*, 22.

⁷² 'Wettbewerb [ist] nicht Selbstzweck, sondern Mittel der Leistungssteigerung und Fortschrittsförderung [. . .]', *Ibid*, 22.

reductions.⁷³ These are measures that resemble closely the proposals by Eucken, indicating in addition a clear preoccupation with economic efficiency and the complete absence of any notion of freedom to compete to be protected as such.⁷⁴

In the proposed changes to the law introduced by the Bundesrat, (Änderungsvorschläge des Bundesrates), the role of consumers is further emphasized several times.⁷⁵

In 1952, on the basis of an earlier draft law, Ludwig Erhard, at that time Minister of Economics and politically responsible for the legislative project, introduced the draft law in the German parliament with a speech that is of relevance to the argument made here as Erhard is literally hammering in the consumer orientation as the ultimate goal. Indeed, during this initial parliamentary debate Erhard emphasizes the Leitmotif of consumer welfare as the goal of the law three times throughout his speech:

Wir wollen durch diese Gesetzgebung dafür Sorge tragen, daß durch einen wirklich freien und ungehemmten Leistungswettbewerb sich die Fortschritte der wirtschaftlichen Entwicklung, der Rationalisierung, der Leistungssteigerung in einer Verbesserung der Lebenshaltung unseres Volkes auch auswirken können.⁷⁶

Die Verbotsgesetzgebung wird dafür sorgen, daß aller Fortschritt in der Wirtschaft sich in einer Verbesserung der Marktversorgung und der Lebenshaltung unseres Volkes auswirkt. Der freie Leistungswettbewerb soll . . . sicherstellen, daß alle Vorteile der Rationalisierung, der Leistungsverbesserung, der höheren Effizienz der menschlichen Arbeit sich nicht in Monopol- oder Differentialgewinnen niederschlagen, sondern an den Verbraucher zum Zwecke der Verbesserung und Erhöhung seiner Lebenshaltung weitergegeben

⁷³ 'Nötigenfalls durch Auflagen und Bedingungen das Verhalten der Marktteiligen so gestaltet wird, daß sie nach Kostensenkung bei steigender Leistung streben.' *Ibid.*, 22.

⁷⁴ Additional indications for the lack of the 'freedom to compete' goal can be found for instance in the restrictions of competition that are envisioned in periods of crisis or in the tolerated exemptions allowing companies to cartelize in order to compete on foreign markets where competitors may not be subject to equivalent competition rules. *Ibid.*, 23.

⁷⁵ See e.g. para 8, *ibid.*, p 63, but also in paras and 71: 'Da Kartellverstöße schwerwiegende Auswirkungen auf die Gesamtwirtschaft und die Lage der Verbraucher haben. . .'

⁷⁶ 'Through this legislative act we want to assure that the advances in economic development, the rationalization and productivity increases, can result in an improvement of the living conditions of our population', Deutscher Bundestag (1952), *Erste Beratung des Entwurfs eines Gesetzes gegen Wettbewerbsbeschränkungen*, 220. Sitzung des Deutschen Bundestag, Bonn, Donnerstag den 26 Juni 1952, Drucksache Nr 3462, 9749, 9749B.

werden. . . Insofern bedeutet dieses Wettbewerbsgesetz ein Korrelat zu der politischen Demokratie, weil es die Freiheit des Verbrauchers sicherstellt [. . .].⁷⁷
[. . .] dieses Gesetz wird dafür Sorge tragen, daß der Drang und Zwang zu Leistung in der deutschen Wirtschaft lebendig bleiben und daß diese Vorteile – um es ein drittes Mal zu erwähnen – dann auch tatsächlich dem gesamten Volk, dem Verbraucher, zugutekommen. Das ist der Sinn dieses Gesetzes'.⁷⁸

References to consumers are also to be found in other speeches by parliamentarians that day. For instance Member of Parliament (MP) Eitzel (speaking on behalf of the CDU) mentions the protection of consumers as one of the goals of the law⁷⁹ and MP Dr Schöne (speaking on behalf of the SPD) elaborates on the need to protect consumers from the abuse of market power.⁸⁰ MP Dr Preusker (speaking on behalf of the FDP) among other things makes the ordoliberal point of the interdependence of the economic and the social and political order: '[. . .] es dreht sich für uns um die Grundfragen der Erhaltung einer freiheitlichen und sozialen Ordnung'⁸¹ and emphasizes that his party sees the introduction of the law as one of the fundamental tenets of a free and social market economy.⁸²

In addition, in a passage clearly reminiscent of Rüstow, Preusker draws a relevant parallel between a centrally planned economy and dominant firms stating that business cannot be against governmental paternalism

⁷⁷ 'The law based on a prohibition standard will guarantee that all economic advances result in an improved market supply and standard of living of the population. Free performance competition [. . .] should guarantee that all advantages [. . .] of higher efficiency [. . .] are passed on to consumers improving and raising their living conditions [. . .] In that sense the competition law is a correlate to political democracy because it secures the freedom of the consumer', Deutscher Bundestag (1952), (note 76 above), 9749D–9750A.

⁷⁸ '[. . .] this law will make sure [. . .] that these advantages – to say it for a third time – are to the benefit of the whole population, the consumers. This is the spirit of this law.' Deutscher Bundestag (1952) (note 76 above), 9750B. Erhard later takes the word again and among other things not only declares that the draft law is based on the scientific ideas of the Freiburg school – a statement probably due to the fact that there was a need to motivate the law as a German product as opposed to an Allied or US order – but also that he 'is far away from considering the competitive process as a holy principle.' Deutscher Bundestag (1952), (note 76 above), 9756A, B: 'Ich bin weit davon entfernt, etwa den Wettbewerb als Prinzip heilig zu sprechen.'

⁷⁹ Deutscher Bundestag (1952) (note 76 above), 9752A.

⁸⁰ *Ibid.*, 9753B.

⁸¹ *Ibid.*, 9759B.

⁸² 'Wir sehen [. . .] ein Gesetz zur Sicherung eines fairen Wettbewerbs als eines der grundlegenden Ordnungsgesetze einer freiheitlichen und sozialen marktwirtschaftlichen Gesellschafts- und Wirtschaftsordnung an.' *Ibid.*, 9758A.

on the one hand and favor the type of paternalism that would ensue from economic power concentrations on the other:

Wir müssen [. . .] der Wirtschaft sehr deutlich sagen: wenn sie die staatliche Bevormundung nicht wünscht und wenn sie selber feststellt, zu welchen verheerenden Folgen die staatlich gelenkte Wirtschaft in der Vergangenheit geführt hat, dann muß sie auch konsequent genug sein, um nicht gegen sich selbst das Mißtrauen, das dann in noch viel stärkerem Maße notwendig in der Bevölkerung aufkommen muß, zu mobilisieren, indem sie die gleiche Vollmacht für sich beansprucht.⁸³

Although this evidence speaks for itself, it may be worthwhile moving away from the deliberations in parliament and the political debate that took place prior to the adoption of the law and consider the expert reports of the 'Beirat', i.e. the independent scientific board of professors attached to the German Federal Ministry of Economics.

In its report of October 2 1954, the Beirat, just as in its report of July 24 1949 on competition policy, does not allow the identification of either specific ordoliberal influences or neoliberal thought and, for instance, while discussing retail price maintenance, argues for a general prohibition with exceptions only in cases that are in the obvious interest of and for the protection of final consumers.⁸⁴

Only in the third report of June 23 1962 is individual freedom discussed in two paragraphs (3 and 4), although paragraph 8 emphasizes the role of 'effective competition' for consumers and consumer choice.⁸⁵ In

⁸³ *Ibid.*, 9758C.

⁸⁴ 'Das Gesetz gegen Wettbewerbsbeschränkungen sollte die Pflicht der Wirtschaftspolitik zum schrittweisen Abbau der Preisbindung zweiter Hand eindeutig festlegen. Aus den praktischen Erfahrungen mit der Mißbrauchsaufsicht werden sich anwendbare Kriterien ergeben, um das System vertikaler Preisbindung künftig immer stärker einzuschränken und die gesetzliche Bekämpfung von Wettbewerbsbeschränkungen auf diesem Gebiet auf ein System umzustellen, nach dem grundsätzlich die vertikale Preisbindung verboten und etwaige individuelle Genehmigungen der Kartellbehörde an die Bedingung geknüpft werden, daß die Erlaubniserteilung in jedem einzelnen Falle im offenbaren Interesse und zum Schutz des Endverbrauchers getroffen wird.' Wissenschaftlicher Beirat (1949), *Grundsatzfragen der Monopolgesetzgebung*, Gutachten vom 24 Juli 1949, part II, para 12.

⁸⁵ 'Ein wirksamer Wettbewerb ist auch notwendig für eine im Sinne der Verbraucher mehr befriedigende Steuerung der Produktion.' Wissenschaftlicher Beirat (1962) (note 84 above), para 8. The consumer orientation is also apparent in para 11 where it is noted that oligopolistic markets exhibit competition even if the function of competition in the sense of a consumer oriented market economy is no longer satisfactorily met. 'Auch auf unvollkommenen Märkten und im Oligopol

paragraph 17 however, one of the key arguments of ordoliberal thought is highlighted, namely the interdependence of the social and economic order and the importance of competition policy for democracy:

Die Wettbewerbsordnung wurde hier zunächst im Hinblick auf die Ordnung des wirtschaftlichen Geschehens betrachtet; ein geordneter und gesicherter Wettbewerb wirkt aber weit über den Bereich der Wirtschaft hinaus und erweist sich als eine Angelegenheit von verfassungspolitischer Bedeutung. Wirtschaftliche Machtstellungen sind dazu angetan, eine 'Verfassungswirklichkeit' zu schaffen, die der geschriebenen Verfassung demokratischer Staaten zuwiderläuft und dahin tendiert, die Funktion der verfassungsmäßigen Organe zu beeinträchtigen. Indem Wettbewerb wirtschaftlichen Machtstellungen entgegenwirkt, sie entweder gar nicht entstehen läßt oder schon bestehende durch immer wiederholte Angriffe schwächt, unter Umständen sogar auflöst, trägt er dazu bei, das gesellschaftliche und staatliche Leben vor eigennützigem Einflüssen unkontrollierter Macht zu schützen und das Walten der allein legitimen, demokratisch kontrollierten Macht zu sichern; damit sichert er zugleich den Rechtsstaat.⁸⁶

In contrast to the draft GWB presented in 1955 to parliament, the Josten-draft in its introduction starts with the fundamental ordoliberal idea:

Where the economic policy of a state renounces regulating the market, market participants cannot arrogate such regulation. Where the economic policy of a state entrusts the order of the markets [Ordnung der Märkte] to competition [Leistungswettbewerb], individual market actors are not entitled to withdraw themselves from such competition [Leistungswettbewerb]. In

gibt es Wettbewerb, der die Anbieter zu Leistungen anreizt, auch wenn er seine Lenkungsfunktion im Sinne einer verbraucherorientierten Marktwirtschaft nicht mehr zufriedenstellend erfüllt.' See also para 15 where the negative repercussions of monopolistic concentrations are described as falling mainly upon consumers.

⁸⁶ Wissenschaftlicher Beirat (1962), (note 84 above), para 17. After a discussion of market power and dominance where the Beirat basically discusses the need for merger control, the footnote to para 47 states the minority opinion of one of the members of the Beirat that such measures are insufficient to also properly address the political and constitutional concerns and in particular the abuse of socioeconomic power. 'Ein Mitglied ist der Meinung, daß Regelungen gemäß Ziffern 39 bis 46 nicht ausreichen, wenn auch den verfassungspolitischen Bedenken Rechnung getragen werden soll, die marktbeherrschenden und zugleich überragend großen Unternehmen entgegengehalten werden müssen. In diesen Fällen dürften nicht nur Maßnahmen gegen mißbräuchliches Verhalten im Wirtschaftsleben getroffen werden. Nötig seien vielmehr auch Vorschriften über die willensbildenden Organe dieser Unternehmen bzw. Konzerne, durch die politischer Mißbrauch der entstehenden sozialökonomischen Macht verhindert wird, oder gleichwertige Maßnahmen.'

order to bring to bear the principle of competition [Leistungswettbewerb] in the market and in order to preserve the population and the state from dangers that the formation and exercise of economic power can bring about, the parliament [. . .].⁸⁷

It is characteristic of the ordoliberal Josten-draft not to refer to the freedom to compete but rather to emphasize the dual danger of economic power for the economy and for democracy. Despite explicit warnings that the military government of occupied Germany would not be able to agree to such a law should it include measures of deconcentration of the German economy, the draft explicitly foresees such measures and considers them unavoidable.⁸⁸ The committee comes to the conclusion that it would be illogical and economically dangerous not to treat the problem of market power holistically and to only prohibit the creation or exercise of certain forms of market power and otherwise only remedy symptoms without moving to the source of the problem.⁸⁹ The authors argue that any unequal treatment of market power would inevitably result

⁸⁷ See Sachverständigen-Ausschuss der Verwaltung für Wirtschaft zur Ausarbeitung einer deutschen Monopolgesetzgebung (1949), *Entwurf zu einem Gesetz zur Sicherung des Leistungswettbewerbs und zu einem Gesetz über das Monopolamt mit Stellungnahme des Sachverständigen-Ausschusses und Minderheitsgutachten*, dem Direktor der Verwaltung für Wirtschaft, Professor Dr Erhard am 5.7.1949 vorgelegt, 9, also called Josten-Entwurf or Josten-draft. The original quote is: 'Wo die Wirtschaftspolitik des Staates auf Marktregelung verzichtet, dürfen Markteteiligte sich Marktregelungen nicht anmaßen. Wo die Wirtschaftspolitik des Staates die Ordnung der Märkte dem Leistungswettbewerb anvertraut, dürfen Markteteiligte den Markt dem Ordnungsprinzip des Leistungswettbewerbs nicht entziehen. Um dem Grundsatz des Leistungswettbewerbs im Markt Geltung zu verschaffen und Volk und Staat vor Gefahren zu schützen, die Bildung und Ausübung wirtschaftlicher Macht auf dem Märkte mit sich bringen können, hat der Bundestag [. . .].'

⁸⁸ 'Die Einbeziehung der Entmachtungsmaßnahmen gegenüber Machtgebilden ohne Kartelleigenschaft in die gesetzliche Regelung erscheint aus sachlichen Gründen unerlässlich.' Sachverständigen-Ausschuss der Verwaltung für Wirtschaft zur Ausarbeitung einer deutschen Monopolgesetzgebung (1949), (note 87 above), 119.

⁸⁹ '[. . .] daß man sich mit dem Problem der wirtschaftlichen Macht als einem Ganzen auseinandersetzen müsse und daß es unlogisch und volkswirtschaftlich gefährlich wäre, nur bestimmte Formen, unter denen wirtschaftliche Macht sich bildet oder betätigt, zu verbieten, im übrigen aber Symptome zu behandeln, ohne zu ihren Ursachen vorzudringen.' Sachverständigen-Ausschuss der Verwaltung für Wirtschaft zur Ausarbeitung einer deutschen Monopolgesetzgebung (1949), (note 87 above), 120. Interestingly, the focus on symptoms continues in the current practice of preferring behavioral remedies over structural measures in abuse of dominance/monopolization cases.

in substitution into privileged forms entailing economically unjustified structural changes.⁹⁰

Although German competition law and the debates surrounding its introduction should represent the best case scenario for proponents of the view that efficiency considerations cannot become the goal of German or EU competition law as this would be in contradiction with the original intent of the legislator, the exercise fails.⁹¹ Not even traces of neoliberal thought, i.e. a focus on the protection of the individual freedom to compete, can be found. Nevertheless, the results of the analysis of the historic records are mixed. While the actual debates surrounding the GWB at least partially show distinct ordoliberal traits, the main ordoliberal goals were in the end not included in the law. As Günther noted, it was in particular the half-hearted treatment of market power (Halbherzigkeit gegenüber dem Phänomen der wirtschaftlichen Macht) that rendered the first version of the GWB a watered-down political compromise.⁹² This is in particular due to the fact that existing market power was left untouched and no merger control regime⁹³ was introduced, both clear contradictions to the ordoliberal postulate of equal treatment irrespective of the shape and form of economic power.⁹⁴

As a result it is difficult to pinpoint and trace the creation of the GWB to distinct normative foundations. While ordoliberal thought can clearly

⁹⁰ 'Jede unterschiedliche Behandlung von Trägern wirtschaftlicher Macht und jede Verhinderung oder Hemmung nur einer ihrer Erscheinungsformen führt notwendig zu einem Ausweichen der Wirtschaft in die begünstigte Form und damit zu strukturveränderungen aus wirtschaftsfremden Ursachen.' Sachverständigen-Ausschuss der Verwaltung für Wirtschaft zur Ausarbeitung einer deutschen Monopolgesetzgebung (1949), (note 87 above), 120.

⁹¹ Obviously this legal debate typically does not primarily refer to the intentions of the legislators but rather focuses on the wording of the text and subsequent case law.

⁹² E Günther (1975), 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' (note 32 above), 202.

⁹³ In fact Germans had to wait until 1973 before merger control was introduced into the German competition law and the law remains tainted by the possibility of an exemption through the Federal Ministry of Economics and Technology till this day.

⁹⁴ 'Dadurch, daß es bestehende wirtschaftliche Machtpositionen jedoch unangetastet ließ und dem externen Unternehmenswachstum keine Grenze zog, privilegierte es in gewisser Weise die "Wettbewerbsbeschränkungen durch Zustand" (Fikentscher) und verstieß gegen das ordo-liberale Postulat der wettbewerbsrechtlichen Gleichbehandlung aller Erscheinungsformen wirtschaftlicher Macht.' E Günther (1975), 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' (note 32 above), 202.

be found in the Josten-draft,⁹⁵ the discussions surrounding the draft GWB until its adoption provide only limited evidence of ordoliberal traits.⁹⁶ This is confirmed by those ordoliberals still alive at its adoption.⁹⁷ Rüstow for instance, who had already been disappointed with the German competition law adopted in 1923 and had held high hopes for a less compromising result, was once again disappointed.⁹⁸

That the freedom of market participants to compete did not reign at the center of the debate and that in contrast efficiency arguments and consumer benefits were dominant make it difficult to maintain the implicit argument that a consumer orientation is incompatible with the GWB. In contrast it seems much more plausible that an efficiency goal as articulated in a consumer welfare orientation is compatible not only with the intentions of the authors of the Treaty of Rome, as has been argued by Akman (2009), but also with the founding fathers of the GWB for some of which consumer welfare was even the ultimate aim of the law.⁹⁹ The question

⁹⁵ According to E Günther (1975), 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' (note 32 above), 189f, the Josten-draft came the closest to the original ordoliberal position.

⁹⁶ This is somewhat in contrast to the claim advanced by Gerber for EU competition law. According to him, 'Ordoliberal influence has been particularly direct and obvious [...] [O]rdoliberal thought set the tone for thinking about competition law within the Communities. The Rome Treaty reflects this influence', DJ Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe', (1994) 42 *American Journal of Comparative Law* 25, 73. See also DJ Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (OUP, Oxford, 1998). In any case, even if the influence of ordoliberal thought is greater than argued here, it would imply that one has to consider the compatibility of ordoliberal, not neoliberal, thought with efficiency considerations, an issue that will be raised in the last section.

⁹⁷ Both, Walter Eucken and also Leonhard Miksch died unexpectedly in 1950.

⁹⁸ See K Meyer-Rust, *Alexander Rüstow – Geschichtsdeutung und liberale Engagement* (Stuttgart, 1993) and F Maier-Rigaud and G Maier-Rigaud, 'Alexander Rüstow: Leben und Werk' in A Rüstow, *Das Versagen des Wirtschaftsliberalismus*, F Maier-Rigaud and G Maier-Rigaud (eds) (Metropolis-Verlag, Marburg, 2001), 307, 308.

⁹⁹ As Erhard put it, the law is intended to guarantee that the economic advantages that emanate from competition result in benefits for consumers. See Deutscher Bundestag (1952) (note 76 above), 9750B. To some extent a consumer orientation can also be found in early ordoliberal works. See, e.g., L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung*, (note 21 above), 14: 'Denn die Wirtschaft hat keine andere Aufgabe als die, die Bedürfnisse des Verbrauchers zu befriedigen.' Or *ibid.*, 214f.: 'Wenn man die wirtschaftliche Macht aus politischen und menschlichen Gründen ablehnt, so muß in erster Linie gefordert werden, daß der Verbraucher wieder in seine Rechte eingesetzt werde. [...] Auf dieser Rolle des autonomen Konsumenten beruht der friedli-

that remains and that will be dealt with in the next section is whether such an efficiency orientation is compatible with ordoliberal – as opposed to neoliberal – thought.

4 POLITICAL FREEDOM VERSUS EFFICIENCY

This section deals with the question if the application of modern economic tools and an efficiency orientation of competition law is compatible with ordoliberal thought. Although the differences between ordoliberal and neoliberal thought and also the respective influences on these distinct lines of thought on the legislative process leading up to the first draft GWB have been described, a confrontation between the ordoliberal foundations of competition policy and an efficiency foundation has so far only occurred indirectly. While one may argue that such a treatment is of pure theoretical interest, as the question whether an efficiency orientation is compatible with the original legislative intent has already been answered, the confrontation of the two goals may be instrumental to recall the role of competition policy for democracy. This is also warranted by the fact that in contrast to the direct economic tenets of the ordoliberal approach, i.e., the goal of establishing complete competition, the political repercussions of market power have not attracted much scientific research in competition and appear to have simply vanished from the competition policy debate.

A possible explanation for the prominence of the economic justifications over the political ones that may also be responsible for the lack of attention this ordoliberal concern has received subsequently has been provided by Miksch. Already in 1947 Miksch was warning of the political forces that were traditionally against a strong competition law.¹⁰⁰ According to him, these forces would try to present any effective competition law as an Allied idea against German interests aimed solely at weakening the

che und demokratische Charakter der Wettbewerbsordnung, den keine andere Wirtschaftsverfassung in gleichem Maße besitzt.'

¹⁰⁰ Miksch anticipated not only the fate of the Josten-draft that was particularly hated and politically discredited by the Bundesverband der Deutschen Industrie (BDI) not least due to its deconcentration elements but also the whole debate surrounding the GWB namely on whether competition law should be based on a prohibition standard (Verbots- versus Genehmigungsprinzip) or not. According to E Günther (1975), 'Die geistigen Grundlagen des sogenannten Josten-Entwurfs' (note 32 above), 200, and the sources therein, the BDI prided itself on having eliminated the Josten-draft.

German economy in the spirit of the Morgenthau plan.¹⁰¹ His hope was that such developments may be halted by emphasizing the economic benefits and reasons for the elimination of economic power to the detriment of the political ones.¹⁰²

It may therefore be worthwhile not only to speculate to what extent the specific economic concepts proposed by the ordoliberalists would have evolved with the advent of modern industrial organization theory, but also to recall the 'lost role' of protecting democratic processes. The following section therefore seeks to explore to what extent the shift towards a more economic approach and a focus on efficiency is in contradiction with ordoliberal thought.

There can be no doubt that economics and in particular the branch of industrial organization, both as a theoretical but also as an empirical field, has increased the understanding of market behavior from the time ordoliberalism was conceived. If one disregards the rather static concept of complete competition and considers rather the underlying motivation that led to a preference for complete competition, it is far from evident that an efficiency orientation based on modern economic tools is incompatible with ordoliberal concepts. On the contrary, there is much to say in favor of recurring to modern economics in the design of a competitive market order, i.e. the design of general market rules.

Although speculative, it is not unreasonable to believe that ordoliberal thought would be embracing of modern economic tools as long as those tools were brought to bear on the appropriate level, i.e., to inform the proper design of the market rules as opposed to tools being applied on a case-by-case basis. The key concern from an ordoliberal point of view would be with the proper distinction between economically informed general competition rules on the one hand, the specific analysis that may still be needed to decide whether a particular conduct falls under the general rule or not on the other, and a situation where the economics only

¹⁰¹ In his writings, in contrast, Miksch emphasized the political reasons behind the Allied goal, i.e. to eliminate political abuse of economic power: 'Die Alliierten haben sich die Beseitigung wirtschaftlicher Machtstellungen in Deutschland zum Ziele gesetzt, um ihren politischen Mißbrauch zu unterbinden und eine freiheitliche demokratische Entwicklung zu sichern.' L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (note 21 above), 210f.

¹⁰² 'Eine derartige äußerst bedenkliche Entwicklung kann vermieden werden, wenn die aus politischen Gründen gewünschte Beseitigung der Machtstellungen durch die Begründung einer Wettbewerbsordnung erfolgt, da durch diese die Leistungskraft der deutschen Wirtschaft nicht geschädigt, sondern im Gegenteil erhöht wird.' L Miksch (1947) (note 21 above), 212.

come in on a case-by-case level.¹⁰³ There does not seem to be a reason in ordoliberal thought that would exclude efficiency considerations based on modern economic tools when such considerations are used to inform and guide the framework within which market transactions take place. In fact it is not excluded that some of the economic concepts used by the ordoliberalists can be interpreted as proxies for what at the time could not be analyzed more precisely.

A potential incompatibility is therefore rather to be found in the goal of preserving a functioning democratic order and in particular the categorical view that accumulations of private economic power, eliminated in a state of complete competition, are incompatible with a free democratic order. So whereas ordoliberalists are likely to embrace modern economic tools in assessing for instance the economic impact of particular pricing practices, the risks of market concentrations cannot exclusively be analyzed in economic categories.¹⁰⁴

¹⁰³ See V Vanberg (2009), 'Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy' (note 7 above), for a more elaborated discussion of this issue.

¹⁰⁴ The concern is therefore not with direct negative economic repercussions but rather with the threat concentrated economic power poses for the competitive order (and therefore indirectly for economic efficiency) and for the socio-political order. See, e.g., L Miksch (1947), *Wettbewerb als Aufgabe – Grundsätze einer Wettbewerbsordnung* (note 21 above), 217, who writes that: 'Would one leave the past private accumulations of power in place, these power concentrations would certainly be the basis from which efforts to undermine and destroy the competitive order are made. It is, in particular considering the past experiences, very doubtful if a democratic state is capable of permanently resisting such powerful interests and would remain capable of enforcing with the necessary vigor the basic tenets of its competition policy on which the whole order is necessarily based.' Or in the original language: 'Würde man die aus der Vergangenheit stammenden privaten Machtzusammenballungen als solche bestehen lassen, so würde später von hier aus sicherlich der Versuch gemacht werden, die Wettbewerbsordnung zu unterminieren und zu sprengen. Es ist, wenn man nach früheren Erfahrungen urteilen darf, sehr zweifelhaft, ob ein demokratischer Staat auf die Dauer dem Druck mächtiger Interessenten gewachsen und imstande sein würde, die wettbewerbspolitischen Grundätze, auf denen die ganze Ordnung beruhen muß, ihnen gegenüber mit jener unnachsichtigen Strenge anzuwenden, auf die es ankommt.' See also Miksch at 210, stating that 'only the competitive order (Wettbewerbsordnung) is capable of preventing a concentration of economic power. Both, the negative defense of an economically and politically dangerous accumulation of power and the positive foundation of a uniform and performing economic constitution [. . .]' or in the original language: 'Nur die Wettbewerbsordnung ist fähig, eine Konzentration wirtschaftlicher Macht wirksam zu unterbinden. Beides, die negative Abwehr einer wirtschaftspolitisch und politisch gefährlichen

A government constrained by law can only carry through, if in addition to its laws, an adequate economic constitution is realized. Monopolies are not compatible with a government constrained by law and should therefore not be part of such an economic order. [. . .] In addition there exists the major problem of how the political structure of a modern state in general and in particular the formation of policy is influenced by monopolies.¹⁰⁵

The concern with private economic power, as described previously, emanates from the risk that such power transgresses from the economic to the political sphere where it potentially undermines not only the competitive order – resulting again in negative repercussions in the economic sphere – but ultimately threatens the democratic polity.¹⁰⁶ This concern is quite independent of the direct economic welfare or efficiency effects of private market power and would therefore not vanish if certain forms of private economic power were found to be welfare increasing or at least not welfare reducing. In fact the concern with the political impact of economic power may even be detached from market power as such.¹⁰⁷

Machtzusammenballung und die positive Fundierung einer einheitlichen und leistungsfähigen Wirtschaftsverfassung [. . .].

¹⁰⁵ W Eucken (2004 [1952]), *Grundsätze der Wirtschaftspolitik* (note 12 above), 52f. The original text is: ‘Der Rechtsstaat kann sich nur dort vollständig durchsetzen, wo zugleich mit seiner rechtlich-staatlichen Ordnung eine “adäquate” Wirtschaftsordnung verwirklicht ist. Monopole und Teilmonopole aber sind dem Rechtsstaat nicht adäquat, dürfen also nicht Bestandteile einer solchen Wirtschaftsordnung sein. [. . .] Darüber hinaus besteht das große Problem, wie die politische Struktur des modernen Staates überhaupt, vor allem die Willensbildung des Staates durch Monopole beeinflusst wird.’ After this passage Eucken continues by stating that this influence reaches very far and that it has transformed the state.

¹⁰⁶ *Ibid*, 188f, voices the concern that the state ‘zunehmend in die Hand wirtschaftlicher Machtgruppen gerät, die nicht nur seine Willensgebung maßgebend bestimmen sondern ihm auch wichtige Bereiche seiner früheren Tätigkeit abnehmen,’ i.e. that the state is more and more dependent on powerful economic groups that not only decisively influence its policy but also take over large parts of its former activities. ‘Sobald aber Machtgruppen vorhanden waren, machte sich ein circulus vitiosus geltend. Die Machtgruppen gewannen wirtschafts- und rechtspolitisch Einfluß [. . .] Der Interventionismus ist eine Fortsetzung und Steigerung der Politik des Laissez Faire. In dem die Machtgruppen vom Staat gestützt wurden, gewannen sie neue Macht – auch auf staatliche Willensbildung’, W Eucken, ‘Die Wettbewerbsordnung und ihre Verwirklichung’, (1949) *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 2, 6.

¹⁰⁷ There are essentially two reasons why the ordoliberal concern with market power has to be interpreted more broadly today. First of all, market power and economic power may not correspond in cases where economic power arises on the national level while competition in the respective industry is global and highly competitive. While the market for cell phones for instance is global and highly

If, however, the ordoliberal concern with private economic power, both for economic and for political reasons, is taken seriously, there is no reason to postulate a fundamental incompatibility. Interpreted in this fashion, both the impact on the economic sphere but also the impact of private economic power on the political sphere are open to scientific analysis. While the immediate historical experience of the ordoliberals led them to be very suspicious of private economic power, the question how far one has to go in the elimination of private economic power in order to prevent the threats articulated by the ordoliberals is in principle an empirical question open to scientific investigation. While this is at least partly the approach that was undertaken in the economic sphere, where the impact of market power has been analyzed in much more detail than was possible before, an equivalent analysis for the more important political repercussions of the existence of powerful economic groups is lacking in the field of competition policy.

As a result, there are good reasons to believe that at least some if not all ordoliberals would remain open to the usage of modern economic tools and to an economic analysis of competition problems as long as the threat of economic power for the democratic polity is taken into account.¹⁰⁸ Rüstow is not the only one who argues that the increase in productivity is a supra-economic, a social, and an ethical demand¹⁰⁹ and would therefore

competitive, the economic power that Nokia is likely to have in Finland, even without market power, can hardly be disputed. Similar considerations apply to rating agencies. Second, industry organizations and lobby groups may unite substantial economic power in jurisdictions where its individual members exert no market power. Such organizations may indirectly have similar economic power, and therefore similar effects on the political process, as firms with substantial market power.

¹⁰⁸ The distinction to be drawn within the ordoliberal tradition concerns those ordoliberals that would have been able to agree to an economic analysis as long as two conditions are fulfilled: (a) that the overarching goal of preserving liberty as discussed above is met; and (b) that the economic analysis comes in at the level of the competition rules and not in a discretionary fashion at the case level. There are arguments that would put Eucken, Böhm and Grossmann-Doerth into this category whereas Müller-Armack, Miksch, Rüstow and Röpke would have been more open also to less general rules.

¹⁰⁹ A Rüstow (1963 [1960]), ‘Wirtschaft als Dienerin der Menschlichkeit’ (note 20 above), 80, writes: ‘die Steigerung der Produktivität [ist] eine überwirtschaftliche Forderung, eine soziale Forderung, eine ethische Forderung’. See also, e.g., HO Lenel (1975), ‘Walter Euckens ordnungspolitische Konzeption, die wirtschaftspolitische Lehre in der Bundesrepublik und die Wettbewerbstheorie von heute’ (note 37 above) 71, who notes that Eucken’s efforts towards a realization of complete competition is not exclusively motivated by the good economic results it produces.

not disagree with the usage of modern economic tools to the extent that the primary goal of competition law, the preservation of the democratic order, is guaranteed. Economic arguments concerning efficiency or consumer welfare would, however, just as arguments concerning an absolute economic liberty or freedom to compete, not be allowed to undermine the overarching goal of a democratic and free society.

Whether competition law currently fulfills this condition is difficult to assess in the almost absolute absence of research concerning the link between market power, economic power, trade associations and lobby groups on both the decision-making of competition authorities but also political decision-making more generally.¹¹⁰

As discussed, one of the key historical lessons so prominently advanced by the ordoliberalists was the concern of the repercussions of concentrated market power on the democratic functioning of society and the role competition policy plays in maintaining a free society. Modern economic tools can be used to refine competition law on the level of the general market rules, i.e., influencing the economic constitution within which market transactions take place. The danger that remains concerns the impact of economic power on the democratic process. The ordoliberal stance concerning such accumulation of economic power may have been categorically harsh but the desirability of an undistorted functioning of democratic processes remains and the question necessitates study. Such an analysis would not only have to take into consideration the direct effects that large and powerful globally operating companies may have on the political process¹¹¹ but also the power such firms have in the context of

¹¹⁰ For a related discussion of possible institutionally induced biases concerning EU merger enforcement see F Maier-Rigaud and K Parplies, 'EU Merger Control Five Years after the Introduction of the SIEC test: What Explains the Drop in Enforcement Activity?' (2009) 11 *European Competition Law Review (ECLR)* 565–79. For US merger enforcement see LM Frankel, 'The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement' (2008) *Utah Law Review* 159–219.

¹¹¹ The banking sector, where the view that some banks are too big to fail prevailed for years only for taxpayers to learn the hard way that in moments of crisis they are also too big to be allowed to fail for systemic reasons, is certainly an additional concern. Of relevance in the current crisis are certainly also the views expressed by A Rüstow, *Zwischen Kapitalismus und Kommunismus* (Godesberg, 1949) concerning limited liability companies. Rüstow is strongly opposed to the concept as according to him it tends to privatize profits and socialize losses in cases of bankruptcy. The analogy to the use of state aid in saving banks and other companies in times of economic crisis without a corresponding transfer of company shares to the government is obvious. See also on this PI Blumberg, 'Limited Liability and Corporate Groups' (1986) *Journal of Corporation Law* 573–631.

antitrust investigations. No attentive observer or competition practitioner either on the side of an authority or defending clients is able to overlook the highly political nature of large antitrust and merger cases. But if companies, even under antitrust scrutiny, can mobilize such support, what does that say about the scope for influencing policy more widely when no procedure against the company is ongoing?

If political interventions in individual competition cases are a sound proxy for the latent political power of companies or industry associations with economic power, the question of the role of competition policy for a free society certainly remains topical and in need of empirical analysis.¹¹²

5 CONCLUSION

This chapter set out three theses with respect to the normative foundations of competition law.

The first section showed that the normative foundations of ordoliberal thought as expressed by eminent representatives such as Eucken, Miksch, Böhm and Rüstow are different from the neoliberal concept and its focus on the protection of the freedom to compete. The fact that the paradigm shift, already noted with concern for instance by Lenel and Günther in the 1970s, took place over almost half a century is one of the possible reasons why the concept of freedom to compete as understood today is wrongly associated with ordoliberal thinking. It was argued that while the neoliberal approach to competition policy may be viewed by some as the natural and superior successor of the ordoliberal concept, the lines of thought are distinct and on decisive points incompatible with each other.

The second section analyzed the perceived conflict between the neoliberal goal of competition law, i.e., the preservation of the freedom to compete, and the reorientation of EU competition law in the context of the more economic approach. It was argued that the protection of the freedom to compete was not and could not have been presented as the ultimate goal of EU and German competition law in the deliberations and debates leading up to the Treaty of Rome and the GWB as the deformation of the ordoliberal thought, which in turn only had a limited impact on the competition law itself, had not yet taken place. On the contrary, efficiency considerations, and in particular a focus on consumer welfare, apparently played a more important role in these debates than ordoliberal thought.

¹¹² See I Schmidt, *Wettbewerbspolitik und Kartellrecht* (6th edn, Lucius & Lucius, Stuttgart, 1999), 35.

Traces of neoliberal thought could not be found, putting the credibility of the argument that the legislative intent of both EU and German competition law was the protection of free competition, in serious doubt.

The third section dealt with the original notion of freedom in ordoliberal thought and the necessarily speculative question of how the ordoliberal position would have evolved in light of modern economic tools. In particular the question of the compatibility of ordoliberal thought with an efficiency approach to competition law was considered. It was argued that the fundamental ordoliberal goal of competition law, i.e. the preservation of a free society, continues to be of relevance today, while some of the answers given by the ordoliberals, such as for instance the concept of complete competition, would warrant revision. While the answers given by the ordoliberals may no longer be convincing, the underlying ordoliberal questions remain relevant. In particular the impact of economic power on the body politic in general and competition law and policy in particular remains of high relevance today where economic power and market power are often dissociated.

9. Efficiency, political freedom and the freedom to compete – comment on Maier-Rigaud

Heike Schweitzer*

In his interesting contribution on the 'Normative Foundations of Competition Law', Maier-Rigaud tries to array important intellectual schools of competition policy with a view to their guiding goals. The 'more economic approach' – the approach which Maier-Rigaud seems to follow – takes efficiency to be the predominant goal of EU competition law. The debate which has evolved around the 'more economic approach' has frequently been described as a 'battle of goals', namely of 'efficiency versus freedom', where the 'freedom to compete' (or 'Wettbewerbsfreiheit') marks a widely recognized normative reference point in the German tradition of competition law. According to Maier-Rigaud, the focus on 'economic freedom' is, however, not truly 'ordoliberal' – it is, rather, a 'neoliberal' aberration from the original ordoliberal position. The 'real' ordoliberals were not, or so he claims, concerned with economic liberties. They were concerned with fighting economic power with a view to protecting the foundations of democracy. According to Maier-Rigaud, the much debated 'more economic approach' is compatible with the early ordoliberal focus on economic power. It merely breaks with the 'neoliberal' tradition – which never had a strong basis in German or EU competition law anyway.

This comment takes issue with Maier-Rigaud's reconstruction of the history of German and EU competition law. More importantly, it strives to present a more nuanced picture of the lines of conflict which the debate surrounding the 'more economic approach' has brought to the fore, and which are not adequately captured by the catchy headline of 'efficiency versus freedom'. In the first section, the efficiency goal and consumer orientation of EU competition law will be considered: are they truly controversial, as Maier-Rigaud suggests, and if so, in what respects? The second

* Professor of Law (University of Mannheim), LLM (Yale).

Contributors

Thomas Ackermann, Dr iur (Bonn), Professor of Law, University of Munich, Germany.

Abayomi Al-Ameen, Swansea University, United Kingdom.

Oles Andriychuk, PhD in Law, Post-Doctoral Research Fellow, ESRC Centre for Competition Policy, University of East Anglia, United Kingdom.

Mor Bakhoun, Dr iur (Lausanne), Max Planck Institute for Intellectual Property and Competition Law, Munich, Germany.

Josef Bejček, Dr iur (Brno), Professor of Law, Masaryk University Brno, Czech Republic, Member of the Remonstrance Commission of the Czech Antitrust Authority.

Anca Daniela Chiriță, Dr iur (Saarland), Lecturer in Law, Durham Law School, United Kingdom.

Karounga Diawara, LLD (Laval), Professor of Law, Laval University, Quebec City, Canada.

Andreas Fuchs, Dr iur (Göttingen), Professor of Law, University of Osnabrück, and Judge at the Court of Appeals Celle, Germany.

Michal S Gal, JSD (Toronto), Associate Professor of Law, University of Haifa, Israel.
Co-author: **Eran Fish**, LLM (NYU), LLB (Haifa).

David J Gerber, Distinguished Professor of Law, Chicago-Kent College of Law, Chicago, United States of America.

Juan David Gutiérrez Rodríguez, Professor of Law, Universidad Javeriana, Bogotá, Colombia, and Advisor to the Minister of Justice of Colombia.

Deborah Healey, Senior Lecturer of Law, University of New South Wales, Sydney, Australia.

Louis Kaplow, Finn M W Caspersen and Household International Professor of Law and Economics, Harvard University, and Research Associate, National Bureau of Economic Research, United States of America.

Adrian Künzler, Dr iur (Zurich), Branco Weiss Fellow of Society in Science at Yale Law School, New Haven, United States of America.

Frank Maier-Rigaud, Dr rer pol (Bonn), OECD Competition Division, Paris, France, and Max Planck Institute for Research on Collective Goods, Bonn, Germany.

Carlos Pablo Márquez, PhD in Law (Oxford), Superintendent for Antitrust and Competition Policy, Government of Colombia.

Matteo Negrinotti, Assistant Professor of Law, Tilburg University, The Netherlands.

Paul Nihoul, Dr iur (Louvain), Professor of Law, University of Louvain, Louvain-La-Neuve, Belgium, and University of Groningen, The Netherlands.

Laura Parret, Dr iur (Tilburg), Belgian Competition Council and Senior Lecturer of Law, Tilburg University, The Netherlands.

Heike Schweitzer, Dr iur (Hamburg), Professor of Law, University of Mannheim, Germany.

Maurice E Stucke, Associate Professor, University of Tennessee College of Law, and Senior Fellow, American Antitrust Institute, United States of America.

Iwakazu Takahashi, PhD in Law (Tokyo), Professor of Law, Meiji University, Tokyo, Japan.

Jörg Philipp Terhechte, Dr iur (Bielefeld), Professor of Law, University of Siegen and Research Fellow, Europa Kolleg Hamburg, Germany.

Luboš Tichý, Dr iur (Prague), Professor of Law, Charles University, Prague, Czech Republic.

Xiaoye Wang, Dr iur (Hamburg), Distinguished Professor of Law, Graduate University of Chinese Academy of Sciences, China.
Co-author: **Jessica Su**, PhD (London), Postdoctoral Fellow, Chinese Academy of Social Sciences, China.

Daniel Zimmer, Dr iur (Göttingen), Professor of Law, University of Bonn, and Member of the German Monopolies Commission, Germany.