

# DRAFT

## **The ordoliberal concept of “abuse” of a dominant position and its impact on Article 102 TFEU**

Peter Behrens, Hamburg (Germany)\*

### **I. INTRODUCTION**

The Treaty on the Functioning of the European Union (TFEU) states in Article 3(3) as one of its goals the establishment of an “internal market”. Protocol 27 on “the internal market and competition”, which has the same legal force as the Treaty to which it is annexed, explains that the “internal market” includes “a system ensuring that competition is not distorted”. This latter concept is based on four legal pillars: the prohibition of cartels (Article 101 TFEU), the prohibition of abuse of a dominant position (Article 102 TFEU), the prohibition of anti-competitive concentrations between undertakings (Article 2(3) Regulation 139/2004), and the prohibition of state aid (Article 107 TFEU). The control of dominant undertakings based on the notion of “abuse” is therefore a core element of EU competition law.

“Abuse” is a rather vague term which lends itself easily to controversies about its meaning. It should therefore not come as a surprise that even within the specific context of EU competition law it has been interpreted from the very beginning in very different ways. Even its origin is disputed, and even more so its purpose and the way it should be applied. These disputes are not merely a matter of academic debates, but even between the Commission of the EU which is competent to implement Article 102 TFEU and the European Court of Justice (ECJ) which is competent to supervise the Commission, there has not been full agreement as to how “abuse” should be properly conceptualized. Such disputes have been particularly fuelled by the Commission's quest for a more welfare economic rather than legal approach to competition law in general and to the concept of “abuse” of a dominant position in particular.<sup>1</sup> Nevertheless, the prevailing normative understanding of “abuse” may still be said to reflect ordoliberal ideas which have accompanied the drafting as well as the interpretation and application of EU competition law from the very beginning up to the present.

In order to support this hypothesis, I shall first briefly discuss the origin of the “abuse” concept that became the core element of Article 102 TFEU (II.). It is important to appreciate though that the ideological origin of the “abuse” concept does not necessarily also

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\* Professor em. of Law (University of Hamburg, Faculty of Law), Dr. iur. (University of Hamburg), MCJ (New York University), Director at the Institute for European Integration of the Europa-Kolleg Hamburg.

<sup>1</sup> See Communication from the Commission, *Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings*, OJ 2009 C 45, 7–20.

determine the ideological basis for its interpretation after the signing of the Rome Treaty. As times change, so do theories about “abuse”. So, whether or not the notion of “abuse” is rooted in ordoliberal thinking is not necessarily determining the question whether or not the jurisprudence of the Commission and especially the ECJ has been and still is informed by an ordoliberal approach, and if so, by which ordoliberal approach. We have to adopt a dynamic perspective in order to understand what ordoliberalism meant at the time the Rome Treaty was negotiated, what it meant in the following decades when especially the ECJ established its jurisprudence, and what it means today when it is coming under attack from a welfare economic approach. I shall, therefore, explain in some more detail what – contrary to many misunderstandings in the English-speaking world – the characteristic elements of ordoliberal thinking about the “monopoly problem” are and how they have developed over time (III.). I shall then analyze the Commission’s and the CJEU’s jurisprudence as to how they have reflected and still reflect an ordoliberal approach as far as the control of dominant undertakings is concerned (IV.) as well as the application of ordoliberal concepts to specific types of “abuses” (V). After a brief discussion of the proper role of efficiency considerations in ordoliberalism (VI), I shall finish by some summarizing conclusions (VII.).

## II. THE ORIGINS OF THE ABUSE CONCEPT

The origins of the “abuse” concept in Article 102 TFEU [initially: Article 86 EEC; later: Article 82 EC] are not as clear as one might expect. David Gerber’s well known study of the intellectual framework for EU competition law, which is still the main reference in the English literature, has highlighted the particularly important impact of German ordoliberal thinking on the competition law provisions of the Rome Treaty (then Articles 85 and 86 EEC) which bore little resemblance to anything to be found in other European (i.e. national) competition laws at the time.<sup>2</sup> This seems to imply that the notion of “abuse” in particular has its roots in German ordoliberalism. Pinar Akman who is also widely quoted in the English speaking world, has in her more recent study on the concept of “abuse” challenged this proposition and has, on the basis of a very detailed historical account of the negotiations that lead to the Rome Treaty, argued just to the contrary, namely that ordoliberal thinking has not had any impact on the wording of Article 102 TFEU.<sup>3</sup>

It may sound paradoxical, but both authors got it wrong. Gerber is wrong, because his account of ordoliberal thinking is extremely narrowly based exclusively on its initial version developed already in the 1930ies and 1940ies by the so-called Freiburg School of ordoliberalism which was formed by scholars of economics (in particular Walter Eucken) and of law (in particular Franz Böhm) who were located at the university of Freiburg/Germany. As strong intellectual opponents of the Nazi-regime, they felt very early on the need to

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<sup>2</sup> D. Gerber, *Law and Competition in Twentieth Century Europe*, 1998, at 264.

<sup>3</sup> P. Akman, *The concept of abuse in EU Competition law*, 2012, at 49-105; see to the same effect, although for different reasons, F. Maier-Rigaud, *On the normative foundations of competition law – efficiency, political freedom and the freedom to compete*, Fifth ASCOLA Workshop 2010 (2012), 132-168, at 139-150.

develop the institutional design for a new economic order for post-war Germany, based on free markets and the rule of law. Originally, this early version of ordoliberalism was quite inimical towards controlling dominant undertakings' conduct, but would rather prevent the creation of dominant positions, divest existing monopolies and, only where this was exceptionally impossible, subject them to state regulation that would prevent specific exploitative or exclusionary practices.<sup>4</sup> However, the ordoliberal school was far from monolithic and it was not at all static. After World War II, especially in the 1950ies, its adherents included already a much larger group of intellectuals some of whom introduced neoliberal ideas (such as Friedrich von Hayek) whereas others (such as Alfred Müller-Armack) developed the famous concept of a "social market economy" which then became the general model for Germany.<sup>5</sup> Consequently, there were differences among ordoliberals on crucial issues;<sup>6</sup> and, even more importantly, over time ordoliberal thinking underwent considerable adjustments and refinements which must be taken into account when it comes to an assessment of its impact on the drafting of Article 86 of the Rome Treaty [now: Article 102 TFEU] in the 1950ies. In sum, as will be demonstrated in more detail later, contrary to David Gerber, it was not the original Freiburg Schools' learning but rather an already somewhat refined version which led to the incorporation of the "abuse" concept into the Rome Treaty.

Pinar Akman is also wrong in denying any influence of ordoliberal thinking upon the drafting of Article 102 TFEU as well as in concluding that therefore the Commission and the CJEU, by nevertheless applying ordoliberal concepts, have disregarded the legal history of the provision and misconstrued the meaning of "abuse". Apart from the fact that, in light of the CJEU's functional and teleological interpretation of the TFEU, the drafting history of the Rome Treaty is not really relevant for the interpretation of Article 102 TFEU, Akman's conclusion is on the one hand based on an equally narrow definition of ordoliberalism as Gerber's limited notion of the Freiburg School, and on the other hand she has based her argument on an extremely selective reading of the *travaux préparatoires* of the Rome Treaty. According to Akman,<sup>7</sup> the true ordoliberal approach to the "monopoly problem" is characterized mainly by the proposition that monopolies (including, for that matter, dominant market positions) are inherently harmful, because they are incompatible with the standard of "complete" (i.e. perfect) competition. Monopolistic power should therefore be prevented from being established in the first place by adequate policies on the macro level. Existing but avoidable monopoly positions should be abolished as far as possible. Only

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<sup>4</sup> See W. Eucken, *Die Wettbewerbsordnung und ihre Verwirklichung*, 2 ORDO – Jahrbuch für die Ordnung der Wirtschaft und Gesellschaft, 1-99 (1949) = *The Competitive Order and its Implementation*, abridged version translated by C. Ahlborn and C. Grave, reprinted in 2(2) Competition Policy International 219, at 239-241 (2006).; the same ideas were later set out in W. Eucken, *Grundsätze der Wirtschaftspolitik* [Foundations of Economic Policy], at 291-299 (1952, reprint 2004).

<sup>5</sup> For a recognition of this fact see D. Gerber, *supra* n. 2, at 236.

<sup>6</sup> See for a discussion of the roots of the Freiburg School including its relation to other neoliberal currents in Germany H.G. Grosseckttler, *On Designing an Economic Order. The Contribution of the Freiburg School*, in: D.A. Walker (ed.), *Perspectives on the History of Economic Thought*, Vol. II, 38-84 (1989).

<sup>7</sup> See P. Akman, *supra* n. 3, at 59.

unavoidable (natural) monopolies (mainly infrastructure monopolies) would require supervision by a state agency so as to make them behave “as if” complete competition prevailed, i.e. they should be prevented from pursuing particularly harmful exclusionary practices such as boycotts, predatory pricing or fidelity rebates as well as exploitative practices such as unfair prices. This characterization of the ordoliberal school presented by Akman (who relies mainly on Gerber’s study<sup>8</sup>) is indeed correct to the limited extent that it is roughly a proper account of the position which the leading economist of the Freiburg group Walter Eucken had developed in the 1940ies.<sup>9</sup> But it does reflect neither a proper account of the much more nuanced ordoliberal approach that has developed after Eucken’s pivotal publications nor does it therefore put us in a position to determine whether or not the “abuse” concept that became part of Article 86 of the Rome Treaty [now Article 102 TFEU] is rooted in ordoliberal thinking. Akman, in order to prove her hypothesis that ordoliberalism had no impact upon the drafting of the Rome Treaty, simply reduces ordoliberalism to its still early undercomplex version that was already superseded in important respects when the negotiations about the Rome Treaty began. It is, in addition, worth noticing, that even according to Akman’s own account of early ordoliberalism already Eucken’s approach contained the kernel of an “abuse” concept as far as the control of “unavoidable” monopolies was concerned. Eucken intended to allude to natural monopolies in the field of infrastructure, an idea which foreshadows in a way already the sectoral regulations of network industries that we have today in order to implement an ex ante control of “abuses”. Article 86 of the Rome Treaty [now Article 102 TFEU] went, however, far beyond Eucken’s concept of controlling such “unavoidable” monopolies. So, did ordoliberal thinking have an impact on the drafting of that provision or not?

Akman supports her denial of such impact by another argument. She also strongly denies that the German ordoliberal approach played a significant role in the process of drafting the Rome Treaty, because, according to her, this approach had neither been successful in Germany itself, nor had it allegedly been the basis for the German delegation’s proposals during the period of negotiations about the wording of Article 86 of the Rome Treaty [now Article 102 TFEU]. The first argument is indeed correct: The initial draft for a German Act Against Restraints of Competition (the “Josten-Draft” of 1949),<sup>10</sup> which indeed largely followed the ideas of Eucken and Böhm, would have authorized the supervisory authority to prevent or eliminate monopolies by way of merger control and divestiture of dominant undertakings as well as by imposing upon them an obligation to behave „as if“ they were exposed to effective competition. This famous “as if”-standard of conduct figured quite prominently in Eucken’s seminal publication on economic policy<sup>11</sup> and referred, according to his own words, mainly to exclusionary practices (Behinderungsmissbräuche) which are at the core of today’s “abuse” concept. But the “Josten-Draft” of an Act against restraints of

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<sup>8</sup> Cf. D. Gerber, *supra* n. 2, at 252-53.

<sup>9</sup> See W. Eucken, *supra* n. 4.

<sup>10</sup> See D. Gerber, *supra* n. 2, at 273.

<sup>11</sup> W. Eucken, *Grundsätze der Wirtschaftspolitik* [Foundations of Economic Policy], *supra* n. 4, at 295, 299.

competition met with strong resistance from German industry and was withdrawn. The version of the Act that did in fact become law in 1957 no longer relied on merger control or divestiture of dominant undertakings; rather the Act authorized the cartel authority to intervene in case an undertaking would “abuse” its dominant position in the market by imposing unfair prices, unfair trading conditions or tying arrangements. So, there was some limited notion of “abuse” in the German Act of 1957 which was, however, mainly targeted at exploitative rather than exclusionary practices. Also, the original Act was devoid of direct applicability in favour of consumers, it merely authorized the competition agency to take action.

The skepticism in Germany towards the introduction of a general prohibition of “abuse” of a dominant position in the Act of 1957 was partly due to the negative historical experience regarding the implementation of the prohibition of an “exploitation of a position of economic power” which had been at the core of the German Cartel Ordinance of 1923.<sup>12</sup> This ordinance had turned out to be a total failure, because the control of the conduct of firms with “economic power” merely allowed the Minister of Economic Affairs to intervene at his discretion whenever he considered the prices charged or the trading conditions applied harmful for the economy as a whole or would jeopardize public welfare, a power which the Minister never used.<sup>13</sup> But the German Act of 1957 also clearly failed to prevent or to dismantle dominant positions which the legislator did not consider harmful *per se*. In this regard, the ideas of the first generation of ordoliberalists like Eucken were indeed not fully successful when competition legislation gained momentum in Post-War Germany. In 1965, however, a general prohibition of “abuse” of a dominant position was introduced into the Act by way of an amendment; it was still not directly applicable, though, before 1999 when the German prohibition was aligned with Article 82 of the EC-Treaty [now Article 102 TFEU]. Is all of this proof of Akman’s argument that ordoliberal ideas did not at all inform the drafting of Article 86 of The Rome Treaty?

When it came to the negotiations for the drafting of the Rome Treaty, it turned out that the German delegation had a different agenda than their domestic legislature. As early as 1954, even before the 1955 conference of Messina where the Ministers of Foreign Affairs of the six prospective Member States of the European Economic Community re-launched the idea of comprehensive European integration, the German delegation stated in a Memorandum concerning the ban of private practices in restraint of competition that dominant positions should not be regarded as damaging *per se*; rather in order to consider market dominance as

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<sup>12</sup> See § 10 Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen [Ordinance against the abuse of economic power positions], 2 November 1923, Reichsgesetzblatt [Official Journal] 1923 I, 1067. Instead of invalidating contracts resulting from such exploitation of economic power, the Ordinance merely provided for a right of revocation that could only be granted, upon a request from the Minister of Economic Affairs, by the competent court.

<sup>13</sup> See H. Kronstein and G. Leighton, *Cartel Control: A Record of Failure*, 56 Yale Law Journal 297 (1946).

restrictive of competition the showing of an “abuse” should be required.<sup>14</sup> Since then, the abuse concept never really disappeared from the negotiation table. In 1955, a *document de travail* of the intergovernmental commission for the Common Market established by the Messina conference stated very clearly:

“A coté de l’élimination des discriminations, il faudra aussi prévoir, dans le marché commun, la disparition progressive des mesures restrictives résultant de l’abus de position monopolistique ou d’entente entre entreprises.”<sup>15</sup>

The famous Spaak Report of 1956<sup>16</sup> which had been commissioned by the Ministers of Foreign Affairs and which developed the main concepts that should later form part of the Rome Treaty proposed, without going into details, the formulation of provisions that would prevent dominant positions *and* (sic!) abusive practices from undermining the implementation of the Common Market.<sup>17</sup> Hans von der Groeben (a German), even according to David Gerber “a key figure with strong ties to ordoliberalism”<sup>18</sup> and one of the two principal drafters of the Spaak Report as well as president of the Common Market Group, made a more specific proposal for the drafting of competition rules including a provision according to which the “abuse” of the market position by an undertaking “that is not or at least not substantially exposed to competition” should generally be considered incompatible with the Common Market.<sup>19</sup> Also, Alfred Müller-Armack, a high ranking official of the German government who as a delegate played a dominant role in the negotiations and who was also affiliated with the ordoliberal school (even though he invented the notion of a “social market economy” that became the dominant economic and political program in Germany) reported in an internal memorandum that the German delegation had proposed to apply the concept of “abuse” generally to monopolies, including state monopolies, and oligopolies alike and offered the submission of draft provisions to that effect.<sup>20</sup> Accordingly,

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<sup>14</sup> See Document 42: *Memorandum der deutschen Delegation über die Ausschaltung wettbewerbsbeschränkender privater Praktiken* [Memorandum of the German delegation concerning the elimination of private practices in restraint of competition], Paris 10 February 1954, reproduced in: R. Schulze and Th. Hoeren (eds.), *Dokumente zum Europäischen Recht* [Documents concerning European Law], Band [Volume] 3: Kartellrecht (bis 1957) [Competition Law (until 1957)], 101-103, at 103 (2000).

<sup>15</sup> See Document 46: *Commission du Marché Commun des investissements et des problèmes sociaux: document de travail*, Bruxelles 3 octobre 1955, reproduced in: R. Schulze and Th. Hoeren (eds.), *supra* note 14, 138-143, at 141.

<sup>16</sup> Intergovernmental Committee [chaired by Paul-Henri Spaak] commissioned by the Conference of Messina, *Report of the heads of delegations to the ministers of foreign affairs*, Brussels 21 April 1956.

<sup>17</sup> *Id.*, Title II (Chapter 1 b) - Monopolies, at 59-60.

<sup>18</sup> D. Gerber, *supra* n. 2, at 263.

<sup>19</sup> Document 49: Regierungskonferenz für den Gemeinsamen Markt und Euratom [Conference of governments concerning the Common Market and Euratom], Brüssel [Brussels], 4. Juli 1956: *Vorschläge von Herrn von der Groeben zum Entwurf für die Abfassung von Artikeln betreffend den Gemeinsamen Markt* [Proposals from Mr. von der Groeben concerning the drafting of articles pertaining to the Common Market] (Dok. MAE 131/56), in: R. Schulze and Th. Hoeren (eds.), *supra* note 14, 148-49, para. (1) 2.

<sup>20</sup> Document 53: *Vermerk über die Sitzung der Arbeitsgruppe „Gemeinsamer Markt“* [Note concerning the meeting of the working group „Common Market“] in Brüssel [Brussels] vom 3.9.-5.9.1956 (Bonn, den 7. September 1956), in: R. Schulze and Th. Hoeren (eds.), *supra* note 14, 162-164, para. 3(c); see also Document 55: *Darlegungen des Sprechers der deutschen Delegation zu den Entwürfen der Artikel 40 bis 43 im Ausschuss*

a draft of the competition rules dated 7 September, 1956, contained an Article 42b which went far beyond the Spaak Report and came already pretty close to the final version of Article 86 of the Rome Treaty [today article 102 TFEU]. This was even more true with regard to the final draft submitted by H. Thiesing on 10 September, 1957.<sup>21</sup> The major point on which German ordoliberalists did not prevail with regard to monopolies (or dominant positions) was the control of mergers.

Which lesson do we have to learn from all of this? First of all, it becomes crystal clear that ordoliberalism cannot be limited to the ideas of its first generation proponents. As one author has quite rightly observed,

"although ordoliberalism is often discussed as if it were a static and homogeneous school of thought, in reality it has been more of a family of ideas, with important strands that have evolved over the past 75 years. It is a curious fact of European competition law history that what is often perceived today to represent ordoliberalism is a set of ideas that seem frozen in the period of 1933 to 1950 or 1957".<sup>22</sup>

In the meantime ordoliberalism spans over at least four generations. Especially among the second generation ordoliberalists who were those who have influenced the drafting of the Rome Treaty there were several conceptual strands which had led to the reconsideration of some of the initial notions of the Freiburg School without, however, giving up its fundamental ideological principles. The most important deviation from Eucken's general skepticism towards market power was the acceptance of the principle that dominant positions (including monopolies) are not harmful *per se*, especially where they have emerged from competition on the merits, i.e. due to their success on the market. This implied at the same time a withdrawal from the notion of "complete" (perfect) competition as the standard for the identification of restraints of competition as well as from the "as if"-standard for the control of dominant undertakings' market conduct. Such reconsiderations of basic concepts prove that ordoliberalism is not an approach that was somehow frozen into the orthodoxy of a narrowly defined Freiburg School. The contrary is true: without giving up their core convictions, ordoliberalists have always been open to adjust their concepts to practical experience and to theoretical progress triggered by new economic insights. Akman's identification of ordoliberalism as a position that regards monopolies as harmful *per se* and therefore pleads for their prohibition instead of controlling the "abuse" of their market power, is therefore without foundation. But also Gerber's limitation of German ordoliberalism to the Freiburg School unfortunately prevents a proper understanding of

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*Gemeinsamer Markt* [Comments by the speaker of the German delegation regarding the draft articles 40-43 in the „Common Market“ committee] Bonn, den 8. September 1956, in: R. Schulze and Th. Hoeren (eds.), *supra* note 14, 167-68, para. 5.

<sup>21</sup> Document 56: *Entwurf zu den Artikeln 42, 42a-d* [Draft of Articles 42, 42a-d] vorgelegt von [submitted by] H. Thiesing, 10. September 1957, in: R. Schulze and Th. Hoeren (eds.), *supra* n. 14, 168 et seq.

<sup>22</sup> Mel Marquis, *Introduction, Summary, Remarks*, in: C.-D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (2008) at p. xxxi, n. 16.

ordoliberal ideas and their impact upon the Rome Treaty. In order to put things back into the right perspective, it is therefore indispensable to first present a more complete picture of German ordoliberalism as it has developed from the original ideas of the first generation ordoliberals about the control of monopolies until its contemporary version which still informs the interpretation of Article 102 TFEU.

### **III. THE ORDOLIBERAL APPROACH TO THE MONOPOLY PROBLEM**

The first generation ordoliberals, i.e. the members of the Freiburg School such as Walter Eucken (the economist) and Franz Böhm (the lawyer), developed their innovative approach to what they called the “economic problem”, i.e. the problem of allocating scarce resources, in opposition to how Nazi-Germany and the Soviet Union had organized their economies. To begin with, Eucken conceived the "economic problem" as a problem of economic planning, i.e. of allocative decision making by relevant actors. Economic systems were then distinguished according to how the decisions of these actors are coordinated. From a morphological perspective, Eucken identified by way of abstraction two pure forms economic organization: the centrally directed economy (Zentralverwaltungswirtschaft) on the one hand, and the decentralized exchange economy (Verkehrswirtschaft) on the other. The first relies on central planning (presumably by the state as was the case in Nazi-Germany and the Soviet Union), the latter relies on decentralized planning (by individual market participants). Planning implies choice making. Ordoliberals clearly favoured competitive markets as the preferable way of coordinating consumers' and producers' choices, because their liberal convictions lead them to consider markets as the most promising combination of individual freedom to make choices and the resulting prosperity of society at large (today we would say: efficiency in terms of allocation of resources according to consumers' preferences).

Implicit in this approach was a concept of competition that had already been a centerpiece of Adam Smith's notion of a "system of natural liberty", i.e. competition as rivalry. In Adam Smith's own words:

"All [governmental] systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men."

By emphasizing individual economic freedom as the source of competition, ordoliberals followed and still continue to follow the liberal tradition which in its classical form was established by Adam Smith. As long as individuals are free to pursue their own interest, producers' motivation to make profits will quite naturally lead them to compete; consequently consumers will be able to choose so that resources are allocated according to their preferences (this is what we call allocative efficiency). This approach distinguishes ordoliberalism from modern welfare economics. Even Nobel Prize winner Ronald Coase

shared the view that Adam Smith's great strength was that he "thought of competition ... as rivalry, as a process, rather than as a condition defined by a high elasticity of demand, as would be true for most modern economists".<sup>23</sup> And Coase did not conceal his belief that ultimately the Smithian view of competition will prevail.<sup>24</sup>

In a very important respect the Freiburg School of ordoliberalism did, however, not agree with classical laissez-faire liberalism and this is equally true for the generations of ordoliberals that followed. They did not and still don't share the optimistic expectation that - in Adam Smith's words - a "harmonious system of natural liberty" would establish itself if only all government intervention were taken away. Rather experience had taught them that mere *laissez-faire* would lead to untamed cartelization and concentration of market power, in other words to the self-destruction of competitive markets as means of serving consumers' preferences and achieving allocative efficiency. The remedy that the Freiburg School suggested was an institutional approach to competition which has become the hallmark of ordoliberalism. Especially Franz Böhm (the lawyer) emphasized that competition is not merely rooted in individual economic freedom, but in individuals' use of their property rights guaranteed by a system of private law, rights which are limited, however, by rules which would determine the borderline between (lawful) competitive and (unlawful) anti-competitive market conduct. Ordoliberals therefore insist that competitive markets must be based on the rule of law, more specifically on competition rules which the state must enforce by administrative and adjudicative means.<sup>25</sup> David Gerber was quite right, therefore, in describing the convictions on which the original Freiburg thinkers based their ordoliberal concepts as follows:

"The Freiburg school thinkers agreed with earlier conceptions of liberalism in considering a competitive economic system to be necessary for a prosperous, free, and equitable society. They were convinced, however, that such a society could develop only where the market was imbedded in a 'constitutional' framework. This framework was necessary to protect the process of competition from distortion, to assure the benefits of the market were equitably distributed throughout society and to minimize governmental intervention in the economy."<sup>26</sup>

David Gerber has, however, at the same time, caused an unfortunate misunderstanding in the English speaking world by putting state measures for the enforcement of competition rules on the same footing as direct state intervention in economic transactions. He has simply confused the idea of "ordo" with "order (command)". This led him to conclude that "the ordoliberal scheme inevitably creates a highly regulated economy".<sup>27</sup> This misunderstanding is clearly due to Gerber's identification of ordoliberalism with the notion

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<sup>23</sup> R. Coase, *The Wealth of Nations*, 15 *Economic Inquiry* 309, 318 (1977).

<sup>24</sup> See for a critical discussion of Coase's position R. Posner, *Ronald Coase and Methodology*, in: *id.*, *Overcoming Law* (1995) 406, 419.

<sup>25</sup> See for a comprehensive account of the Freiburg school: Viktor Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*, Freiburg Discussion Papers on Constitutional Economics 04/11.

<sup>26</sup> D. Gerber, *supra* n. 2, at 232.

<sup>27</sup> *Id.*, at 247.

of an "as if" regulation of monopolies<sup>28</sup> that had been advocated in the beginning by some but was soon given up.<sup>29</sup> Gerber's misunderstanding is also due to his total disregard of the fundamental distinction between, on the one hand, prescriptive state intervention or interference which imposes upon undertakings a specific conduct aimed at specific results, and, on the other hand, administrative or judicial decisions for the enforcement of general rules which impose upon undertakings a duty not to behave in a way that is prohibited. This confusion is shared by many authors who rely exclusively on Gerber's exposition. Franz Böhm has emphasized time and again that competition rules must be regarded as "rules of the game". Enforcement of prohibitions based on such rules is fundamentally different from prescriptive state intervention. This distinction, which has most emphatically been stressed by Friedrich von Hayek<sup>30</sup> is fundamental for a proper understanding of the ordoliberal approach.

The third basic feature of ordoliberalism, apart from individual freedom and legally protected individual rights, is its systemic approach to competition, i.e. the concept of "ordo" as "order" in the sense of systemic arrangement. Strictly speaking, the idea that the economy may be regarded as a system was already inherent in Adam Smith's notion of a "system of natural liberty". Eucken's morphological approach to the comparative analysis of economic mechanisms for the coordination of individual economic planning also resulted in the concept of "systems" which would differ according to the centralization or decentralization of economic planning. For ordoliberals, a competitive market is a system of decentralized economic planning based on individual economic freedom. It is important to understand, however, that this individual freedom is conditioned upon the workability of the whole system of interaction, more precisely: on the freedom of all market participants to voluntarily engage in mutual transactions. Consumers' freedom of choice is therefore dependent upon producers freedom to compete and vice versa.

From an ordoliberal point of view, it is the role of competition law, therefore, to protect competition *as a system* within which individuals are free to make their choices on the market. In order for consumers to be able to make choices, it is indispensable that there exists a sufficient variety of competing producers (suppliers). This brings us to the relevance of the "market structure" which reflects the number of producers (suppliers) and their market shares. Consumers' freedom to choose between alternative products or services offered on the market is dependent upon the degree of decentralization of production. The higher the degree of concentration, the lower is the number of alternatives available to

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<sup>28</sup> See *id.*, at 252 *et seq.*

<sup>29</sup> See for a more detailed analysis H. Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in: C.-D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2007 – A Reformed Approach to Article 82 EC* (2008) 119-164, at 134.

<sup>30</sup> See F. von Hayek, *Law, Legislation and Liberty*, Vol. 2: *The Mirage of Social Justice* (1976), 128: "A rule of just conduct serves the reconciliation of the different purposes of many individuals. A command serves the achievement of particular results. Unlike a rule of just conduct, it does not merely limit the range of choice of the individuals (or require them to satisfy expectations they have deliberately created) but commands them to act in a particular manner not required of other persons"; *id.*, *The Constitution of Liberty* (1960), 224.

consumers and the more limited is consumers' freedom of choice. It follows that a restraint of competition is characterized by a limitation of consumers' choice which depends on the rivalry among a sufficient number of producers. Hence from an ordoliberal point of view, a restraint of competition may be found wherever (1) the number of freely competing producers is artificially reduced in ways that do not result from the normal process of competition itself, and (2) where this reduces the scope of alternatives among which consumers may freely choose.

It is important to appreciate at this point again that ordoliberals have since long abandoned the idea that "perfect (complete) competition" should serve as the model for a competitive market structure. The model was early on recognized as what it is: no more than a model that explains interrelationships between prices, costs and output. It may allow predictive propositions, but these are totally inadequate to be converted into normative propositions that would justify competition policy proposals. Due to the influence of Friedrich von Hayek who is also associated with the ordoliberal school, competition is regarded as a dynamic process of discovery which produces all the information necessary to determine consumers' wants, their demand for specific goods and services and their willingness to pay as well as all the information necessary for producers to determine what to produce at which costs. The theory of "perfect competition" is instead assuming the availability of all the information that competition is supposed to produce in the first place. According to von Hayek, therefore,

"if the state of affairs assumed by the theory of perfect competition ever existed, it would not only deprive of their scope all the activities which the verb 'to compete' describes but would make them virtually impossible."<sup>31</sup>

It follows that it is common ground among contemporary ordoliberals that market power in terms of the ability to raise prices without losing too many customers is a pervasive phenomenon in real markets due - among other factors - to product differentiation and differences in production costs even for homogeneous goods. In other words: some degree of market power is almost a prerequisite for competition as rivalry among producers (sellers) who are then struggling for the enhancement of their share of the market.

The constituent elements of ordoliberalism may hence be summarized as follows:

- Competition results from individual freedom of producers to choose what they want to offer and of consumers to choose what they want to buy.
- Competition is understood as a dynamic system (process) of interaction between choice making individuals who by making their choices reveal their preferences and produce the kind of information that other individuals need to make their choices.
- It is the fundamental role of the law to provide individuals with legal rights the unrestricted use of which forms the basis of competitive rivalry among producers and of consumers' freedom of choice among alternative sources of supply.

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<sup>31</sup> F. von Hayek, *The Meaning of Competition*, reproduced in: *id.*, *Individualism and Economic Order* (1963), 92 *et seq.*

These basic elements are generally shared by ordoliberals of all generations even though many of them have added one way or another further refinements. Many adherents to the ordoliberal approach developed their own nuanced views on its central paradigms. *Von Hayek's* concept of competition as a dynamic process of discovery was, for instance, complemented by the *Schumpeterian* notion of rivalry as a process of "creative destruction",<sup>32</sup> i.e. a process of constant emergence and erosion of market power, where one or some innovative firms strive to outcompete others who are then challenged in turn to overtake the lead by more effective innovation and so on (in Germany it became usual to speak of "vorstossender Wettbewerb" [pioneering competition]). Others developed the *Hayekian* approach to competition further into the notion of a cybernetic, self-regulating and evolutionary system based on voluntary transactions whose concrete effects can neither be anticipated nor in any way measured.<sup>33</sup> Another strand of ordoliberal thought has integrated the fundamental insights of the institutional economics movement, especially the relevance of transaction costs and incomplete information of market actors for the assessment of their competitive behaviour on markets.<sup>34</sup> Ordoliberalism would be no more than a footnote in the history of competition law had it not been able to constantly reconsider its premises and notions especially in light of the judicial experience that evolved over time.

How then does contemporary ordoliberalism deal with the monopoly problem? First of all, there is consensus among ordoliberals that where market power or even monopoly is the result of success on the market there is no justification to punish it. It is recognized that market power, even where it gives rise to a "dominant position" in the market, cannot be held illegal *per se*, if it is acquired by totally lawful means.<sup>35</sup> This is recognized as an unavoidable antinomy inherent in the concept of the freedom to compete which is also granted to dominant undertakings.<sup>36</sup> Market dominance should, however, neither be allowed to result from external growth (by way of mergers or acquisitions) nor be abused in

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<sup>32</sup> See Joseph A. Schumpeter *The Theory of Economic Development* (1934, reprinted 1961).

<sup>33</sup> See, e.g., Erich Hoppmann *Über Funktionsprinzipien und Funktionsbedingungen des Marktsystems* [On Principles and Conditions for the Functioning of the Marktsystem] in: Wegehenkel (ed.) *Marktwirtschaft und Umwelt* [Market Economy and Environment] (1981), 219.

<sup>34</sup> See V. Vanberg, "Ordnungstheorie" as *Constitutional Economics – The German Conception of a "Social Market Economy"*, 39 *ORDO-Jahrbuch für die Ordnung der Wirtschaft und Gesellschaft* 17 (1988); R. Richter and E.G. Furubotn *Institutions and Economic Theory: The Contribution of the New Institutional Economics* (1997); see for an analysis of the parallels and divergences between ordoliberal thought and the "New Institutional" school: S. Broyer, *German Contemporary Analyses of Economic Order: Standard Ordnungstheorie. Ordoliberalism and Ordnungsökonomik in Perspective*, in: A. Larousse and J.D. Weisz (eds.), *Institutional Economics in France and Germany – German Ordoliberalism versus the French Regulation School* (2001), 93 *et seq.*

<sup>35</sup> Judge Learned Hand's famous formula that "the successful competitor, having been urged to compete, must not be turned upon if he wins" (*US v. Aluminium Co. of America*, 148 F. 2d 416, 2<sup>nd</sup> Cir. 1945) is common ground among contemporary ordoliberals.

<sup>36</sup> For an in depth ordoliberal analysis of the problem of private economic power and its control by means of competition see Franz Böhm *Democracy and Economic Power* in: *Kartelle und Monopole im modernen Recht* [Cartels and Monopolies in Modern Law], Internationale Kartellrechtskonferenz 1960 [International Antitrust Law Conference 1960] (1961) 25.

ways that have a negative impact upon the market structure and, consequently, on the options available to consumers' choice (thereby damaging "workable" competition). In order to protect the process of competition as rivalry, unilateral conduct of already dominant firms must be prevented to lead to further concentration in the relevant market by way of merger or by way of exclusionary practices which would drive competitors out of the market by improper ("abusive") means at the expense of consumers' choice.

#### **IV. THE ORDOLIBERAL APPROACH TO ARTICLE 102 TFEU**

It must be admitted that the ordoliberals of the Freiburg School did not have a fully developed concept of abuse yet. Even at the time the Rome Treaty was negotiated, no such concept could have been offered by ordoliberals. Nevertheless, as has already been mentioned, Walter Eucken did in fact have some ideas about "exclusionary" practices such as boycotts, predatory pricing or fidelity rebates as well as "exploitative" practices such as unfair prices which, according to him, should be controlled in cases of "unavoidable" monopolies (i.e. natural monopolies such as in the field of infrastructures). A comprehensive ordoliberal concept of abuse was able to develop, however, only following the incorporation of Article 86 [now Article 102 TFEU] in the Rome Treaty. Once it had become part of a directly applicable prohibition that was designed to control unilateral conduct of dominant undertakings, it became indispensable to specify more clearly the meaning of abuse so as to allow the enforcement of the prohibition by the Commission and the CJEU.<sup>37</sup>

The starting point was a dispute between René Joliet who later became judge at the ECJ and Ernst-Joachim Mestmäcker who is the leading representative of the second generation of ordoliberals and who in those days served as special adviser to DG IV [now DG Competition]. Even though both authors had published studies comparing sec. 2 Sherman Act and Article 86 EEC,<sup>38</sup> they drew totally opposite conclusions. Joliet argued that conduct in order to be qualified as an abuse under Article 86 EEC must be different from conduct that was qualified as "monopolization" under sec. 2 Sherman Act, because the Rome Treaty did not prohibit market power as such, but merely its exploitation to the detriment of the consumer:

"The abuse of a dominant position under Article 86 of the Rome Treaty should be understood as the effective exploitation of monopoly power to the detriment of the consumers. None of the examples cited in Article 86 refers to the tactics whereby an enterprise seizes control over the market or perpetuates its domination. As it only prohibits the abusive exploitation of power, Article 86 does not permit the penalization of aggressive or disloyal methods within the meaning of United States

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<sup>37</sup> See for a very detailed in depth analysis of the development of the interpretation of Article 86 EEC [later Article 82 EC, now: Article 102 TFEU] H. Schweitzer, *supra* n. 29, 119-164.

<sup>38</sup> R. Joliet, *Monopolization and Abuse of Dominant Position. A Comparative Study of the American and European Approaches to the Control of Economic Power* (1970); E.-J. Mestmäcker, *Concentration and Competition in the EEC*, Part I, *Journal of World Trade Law* 1972, 615-647; Part II, *Journal of World Trade Law* 1973, 36-63.

antitrust law. Each of these conceptions of abuse corresponds to a different method of control of economic power: the maintaining of competition or the regulatory control of monopoly power.”<sup>39</sup>

"Monopolization" was in those days considered to clearly include, without being limited to, exclusionary practices.<sup>40</sup> Hence, the interpretation of sec. 2 Sherman Act was in those days based on a structural approach towards monopoly power. Joliet regarded Article 86 EEC, however, as being based on a purely behavioral approach that allowed no structural remedies but only the supervision of the market conduct of dominant firms.

For Mestmäcker the starting point was the fact that the Rome Treaty had placed the abuse concept in a unique and novel context. Article 86 was, according to him, one of the competition rules whose purpose it was, to establish a "system ensuring that competition in the internal market is not distorted" as specified in Article 3(f) of the Rome Treaty [later Article 3(1)(g) EC-Treaty]. The same holds still true with regard to Article 102 TFEU read in conjunction with Protocol 27 on "the internal market and competition", according to which the "internal market" includes "a system ensuring that competition is not distorted". Since that system of competition was regarded as a means of achieving the fundamental goals of the Rome Treaty as listed in its Article 2, in particular the goal of "raising the living standard" (i.e. the general welfare), efficiency, consumer welfare as well as economic progress were considered to result from market integration and competition. This link of competition to integration is the specific European perspective that determined and still determines the interpretation of Article 102 TFEU.

It cannot escape our attention that the wording of Article 3(f) of the Rome Treaty was particularly receptive toward the ordoliberalists' systemic approach to competition. If competition is seen as a dynamic system of interaction of producers and consumers making choices between different lines of production and different sources of supply respectively, then it follows that abuse must be understood to refer to a restriction of market participants' freedom to make such choices which in turn is determined by the market structure. The more a market is concentrated, the smaller the room for consumers to choose. Given that market dominance is not anti-competitive *per se*, the acquisition as well as the expansion of a dominant position by way of legitimate internal growth is not illegal. However, the acquisition or expansion of a dominant market position by means other than competition on the merits (i.e. by mergers or exclusionary practices) must be considered an illegitimate increase of market concentration. Hence, "abuse" in Article 102 TFEU refers to an improper

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<sup>39</sup> R. Joliet, *Monopolisation et abus de position dominante, Essai comparatif sur l'article 2 du Sherman Act et l'article 86 du Traité de Rome*, Revue trimestrielle du droit européen, 1969, 645, 688 (the English translation of quoted from from E.-J. Mestmäcker, supra n. 38, Part I, at 640).

<sup>40</sup> See *US v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 342 (D. Mass. 1953) where Judge Wyzanski distinguished three different categories of "monopolization": (1) acquisition of the power to exclude, (2) use of market power to engage in exclusionary practices, (3) acquisition of an overwhelming market share without exclusionary conduct. See as an example for this latter proposition the famous case *US v. Aluminium Co. of America*, 148 F. 2d 416 (2d Cir. 1945). Much later the Chicago school of economics would deny the viability of exclusionary practices altogether.

restriction of the residual competition that remains in an already concentrated market where one or some firms hold individually or collectively a dominant position.

As Mestmäcker emphasized, this structural concept of “abuse” does not at all conflict with the protection of consumers that was Joliet’s concern. From an ordoliberal perspective, “competition as a process is advantageous to consumers”.<sup>41</sup> Article 102 TFEU therefore protects the residual range of consumers' choice. This approach is supported by Article 101 (3) TFEU which grants an efficiency exemption from the prohibition of cartels only if there is no substantial elimination of competition. This means that, in order to profit from the efficiency exemption, a cartel must leave sufficient competition so as to make sure that consumers may benefit from the efficiencies due to the residual pressure of competition on the market. Similarly, a dominant firm should be prevented from eliminating residual competition either by way of merger or by pursuing exclusionary practices which reduce choice.<sup>42</sup> An abuse therefore consists in particular of market conduct whereby the dominant firm suppresses actual or potential competition, especially by eliminating competitors by means other than competition on the merits, by hampering market access of potential entrants or by expanding its dominant position into neighbouring or downstream markets. The bottom line of Mestmäcker's approach<sup>43</sup> was the principle that a dominant firm must not engage in conduct that would not be possible under competitive conditions (put differently: conduct that is only possible due to market dominance). How then did this ordoliberal concept of abuse influence the interpretation of Article 86 EEC [now Article 102 TFEU] by the Commission and the CJEU?

To begin with, it must be stated that Article 102 TFEU contains a non-exhaustive list of examples of abusive conduct that is not limited to exclusionary practices, but includes exploitative practices as well (such as the imposition of excessive prices or unfair trading conditions). This was due to pressure from the French delegation during the negotiations of the Rome Treaty. The concern of the German delegation was clearly focused on exclusionary practices. Heike Schweitzer, in her exhaustive account of the history of Article 102 TFEU,<sup>44</sup> calls this “an important fact shedding light on the intent of the drafters [of Article 86 EEC], given the German influence”. German ordoliberals accepted the inclusion of exploitative abuses only because the wording of Article 86 EEC limited such abuses to exceptionally excessive practices and therefore avoided the risk of anti-inflationary price controls that had been pervasive in some Member states before. Rather, Article 86 EEC put exploitative abuses within the context of competition rules and may be regarded, therefore, even as a

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<sup>41</sup> E.-J. Mestmäcker, *supra* n. 38, Part I, at 641.

<sup>42</sup> The same idea was recently most clearly expressed in a comment by AAI President Diana Moss on the Heinz-Kraft merger in the US (quoted from the Washington Post of March 25, 2015): “All these food-space mergers give (buyers) the illusion of choice. They're thinking, 'Oh gosh, look at all these brands'. But what the consumer doesn't see is the smaller and smaller number of manufacturers maintaining those brands. It doesn't mean they compete with each other - they don't - and that gives them significant power to raise prices and reduce choice.” (source: <http://>

<sup>43</sup> See for a more detailed account of Mestmäcker's approach H. Schweitzer, *supra* n. 29, at 139-140.

<sup>44</sup> *Id.*, at 136 *et seq.*

"deregulatory" move.<sup>45</sup> As it turned out later, Article 86 EEC [later Article 82 EC, now Article 102 TFEU] has rarely been used by the Commission or the CJEU to "micro-manage" dominant firms pricing strategies.

The main thrust of the ordoliberal approach on the interpretation of abuse came to be felt with regard to exclusionary abuses. After the entering into force of the Rome Treaty in 1958 it took another 15 years before the first case, the *Continental Can* case<sup>46</sup> concerning a practice of a dominant firm that could be regarded as restricting the residual competition in the relevant market, was decided by the Commission and finally by the ECJ in 1973. It happened that Mestmäcker in his capacity as special adviser to DG IV was entrusted with preparing the Commission's decision. Upon appeal, the decision was upheld by the ECJ. The Court, quite along the lines of Mestmäcker's ordoliberal approach to the protection of residual competition for the sake of consumers' choice, started its reasoning by emphasizing the context within which Article 86 EEC [now Article 102 TFEU] had to be interpreted and from which the Court derived the function of the prohibition of abuse to contribute to the establishing of a "system of undistorted competition" according to Article 3(f) EEC [now Article 3(3) TFEU in conjunction with Protocol 27 on "the internal market and competition"]. Recognizing that Article 86 EEC [now Article 102 TFEU] covered not only exploitative but also exclusionary practices, the Court stated the purpose of the provision in the following terms:

"The provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty."<sup>47</sup>

Hence, in order to determine the exclusionary nature of a specific practice, the Court followed the notion of residual competition which must be protected against strategies that would significantly strengthen the dominant undertaking's market position at the expense of consumers' choice. One author was fully justified in those days to state that "the purpose of the competition rules is to preserve the freedom of choice of those who transact business" and "the abuse therefore would materialize when the dominant position is used to restrain or eliminate the freedom of decision of either competitors or of the consumers".<sup>48</sup> Little later, the ECJ refined in *Hoffmann-La Roche* the concept of abuse in the following terms:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which through recourse to methods different from those which condition normal competition in product or services on the basis of the transaction of commercial operators, has the effect of hindering the

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<sup>45</sup> *Id.*, at 136.

<sup>46</sup> ECJ Case C-6/72 *Europemballage and Continental Can v Commission*, [1973] ECR 215.

<sup>47</sup> ECJ, *ibid.*, para. 26.

<sup>48</sup> A. Deringer, *The Competition Law of the European Economic Community: A commentary on the EEC rules of competition (article 85-90)*, Commerce Clearing House, 1968, para. 533.

maintenance of the degree of competition still existing in the market or the growth of that competition.”<sup>49</sup>

The Court also coined the widely misunderstood principle that a dominant firm has a "special responsibility not to allow its conduct to impair undistorted competition in the common market".<sup>50</sup> This principle does not imply that dominant undertakings are responsible for the protection of their smaller rivals. The Court itself has explained later that "special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings",<sup>51</sup> a position that reflects exactly the ordoliberal idea that a dominant firm must not engage in conduct that would not be possible under competitive conditions (put differently: conduct that is only possible due to market dominance).<sup>52</sup> This idea is also reflected by the recent judgment of the CFI in the *Intel* case concerning exclusivity rebates, where the Court emphasized that it is the special responsibility of an undertaking in a dominant position "not to allow its conduct to impair genuine undistorted competition in the common market"<sup>53</sup> which would be the case, however, if such exclusivity rebates were applied in a dominated market where, "precisely because of the dominant position of one of its economic operators, competition is already restricted".<sup>54</sup>

Despite the Commission's somewhat misleading "more economic approach" rhetoric in its recent guidelines,<sup>55</sup> these jurisprudential holdings are still good law.<sup>56</sup> The emphasis on the protection of the competitive market structure for the sake of the protection of market participants' freedom of action (freedom of choice) as the basis for the competitive process has recently become particularly clear in the case *TeliaSonera Sverige* where the ECJ held:

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<sup>49</sup> ECJ Case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461, para. 91.

<sup>50</sup> ECJ Case C-322/81, *NV Nederlandse Banden-Industrie v Commission* [1983] ECR 3461, para. 57.

<sup>51</sup> See CFI joined cases T-191/98 and others, *Atlantic Container Lines AB and others v Commission*, [2003] ECR II-3275, para 1460.

<sup>52</sup> See E.-J. Mestmäcker and H. Schweitzer, *Europäisches Wettbewerbsrecht* [European Competition Law] (3<sup>rd</sup> ed. 2014) at 405, para. 9, where the authors state that the development of competition on a dominated market will be distorted by strategies that deviate from normal competition on the merits, that being the case if under conditions of effective competition such strategies would not be rational or appropriate.

<sup>53</sup> CFI Case T-286/09 *Intel v Commission* (not yet published) para. 90; appeal pending: ECJ Case C-413/14, OC 2014 C 395, 25.

<sup>54</sup> *Id.* para. 89.

<sup>55</sup> See Commission, *supra* n. 1; for a critical assessment of the Commission's *Guidance on Article 82 EC enforcement priorities* see E.-J. Mestmäcker *The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008* in: Lorenzo Federico Pace (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (2011), 25, 39 *et seq.*

<sup>56</sup> See ECJ Case C-95/04 *British Airways v. Commission* [2007] ECR, I-2331, 2411, para. 106; CFI Case T-340/03 *France Télécom v. Commission* [2007] ECR, II-117, 193, para. 266; CFI Case T-201/04 *Microsoft v. Commission* [2007] ECR, II-3601, 3824, para. 664; see also the recent judgment of the ECJ in Case C-549/10 *Tomra Systems ASA et al. v. Commission* [2012] ECR, I-0000, para. 59 *et seq.*, where the Court analyzed a rebate scheme in light of Article 102 TFEU: The Court (as well as the Commission itself!) relied on the exclusionary effect of the scheme (i.e. its negative impact on the market structure!) rather than on the equally efficient competitor-test which forms an essential part of the "more economic approach" as outlined in the Commission's *Guidance* regarding Article 102 TFEU (*supra* n. 1).

“In order to determine whether the dominant undertaking has abused its position [...], it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition.”<sup>57</sup>

All in all, there can be no doubt left that ordoliberal thinking has strongly influenced the interpretation of Article 102 TFEU from the beginning until these days and there is no sign in the ECJ’ jurisprudence that it will change its approach.

## V. APPLICATION OF THE ORDOLIBERAL CONCEPTS TO SPECIFIC TYPES OF ABUSES

The following explanations will briefly discuss consequences of the ordoliberal approach when it comes to the interpretation of specific categories of abuse such as exploitative abuses or exclusionary abuses like, e.g., predatory pricing or refusal to deal?<sup>58</sup>

### 1. EXPLOITATIVE ABUSES

The fact that Article 102 TFEU includes exploitative abuses such as the imposition of unfair prices or trading conditions has been attributed by some authors to the influence of ordoliberal concepts on the drafting of that provision,<sup>59</sup> especially to the original “as if” approach that had been advocated in the beginning by Eucken,<sup>60</sup> disregarding the fact that this approach has been criticized early on and since long been abandoned by mainstream ordoliberals. Nevertheless, due to David Gerber’s account,<sup>61</sup> it is still supposed by some authors that the “as if” approach is a core element of ordoliberal thinking.<sup>62</sup> Since this approach would result in the control of dominant undertakings’ conduct so as to ensure that they behave “as if” they operated under competitive conditions, it follows that the prohibition of exploitative abuses would imply regulatory intervention in such undertakings price and marketing decisions. Hence the claim that ordoliberals are responsible for a strong

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<sup>57</sup> ECJ Case C-52/09, *TeliaSonera Sverige*, [2011] ECR, I-527, para. 28. See also earlier cases where an exclusionary abuse of market dominance was found to infringe upon Article 82 EC [now Article 102 TFEU], because the negative impact upon the market structure was considered to restrict consumers’ freedom of choice: ECJ Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR, 461, para. 90 (exclusive purchasing agreement or loyalty rebate eliminates customers’ choice among different sources of supply)); ECJ Case C-202/07 *France Télécom v. Commission* [2009] ECR 2009, I-2369, para. 112 (predatory prices harm consumers by limiting their options due to the elimination of competitors of the dominant firm); ECJ Case C-280/08 *Deutsche Telekom v. Commission* [2010] ECR, I-9555, para. 182 (margin squeezing by a dominant firm that leads to the elimination of competitors harms consumers by limiting their choices); Commission, Decision COMP/C-3/37.990 of 13 May 2009 *Intel*, para. 1598 ff. (conditional rebates leading to a limitation of consumers’ choices), upheld upon appeal by the CFI, *supra* n. 53, at para. 77 (exclusivity rebates said to be “designed to remove or restrict the purchasers’ freedom to choose his sources of supply and to deny other producers access to the market”).

<sup>58</sup> For the following text *cf.* in more detail H. Schweitzer, *supra* n. 29, 143 *et seq.*

<sup>59</sup> See M. Gal, *Monopoly pricing as an antitrust offence in the U.S. and the EC: Two systems of belief about monopoly?* 49 *Antitrust Bulletin* 34, 363 *et seq.* (2004).

<sup>60</sup> W. Eucken, *supra* n. 11.

<sup>61</sup> D. Gerber, *supra* n. 2.

<sup>62</sup> See, e.g., R. O’Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed. 2013), at 839.

regulatory interpretation of Article 102 TFEU<sup>63</sup> and for an excessive concern for fairness rather than efficiency.<sup>64</sup> Contrary to these views which are based on a fundamental misunderstanding of the ordoliberal approach as well as on a totally distorted account of the impact of ordoliberalism on the development of the “abuse” concept in EU competition law, it was rather René Joliet (clearly *not* an ordoliberal) who had argued in favour of an interpretation of Article 86 EEC [now Article 102 TFEU] that would have limited the scope of the prohibition to exploitative abuses only and hence would have allowed regulating dominant firms conduct. For Joliet, the reprehensible conduct of a dominant firm lay mainly in abusive market exploitation through unreasonably high prices or monopolistic restriction of output. He inferred from the examples listed in Article 86 EEC [Article 102 TFEU] that the main preoccupation of the Treaty was not the maintenance of a competitive system. According to him, all the examples relate to cases of practices and policies through which a firm exploits its market dominant power. Consequently, according to Joliet, the major objective of Article 102 TFEU was to ensure that dominant firms do not use their power to the detriment of utilizers and consumers.<sup>65</sup> The enforcement agency could go as far as to set prices at which dominant firms can sell or to fix the quantities which they must produce substituting the dominant firm’s economic calculus by its own.<sup>66</sup> Instead of protecting the system of undistorted competition, this approach would amount to a kind of public utility regulation.

This truly regulatory approach to Article 86 EEC [now Article 102 TFEU] was prevented from becoming law due to the influence of ordoliberals such as Mestmäcker. He argued that the interpretation and application of Article 102 TFEU must be guided by its function to establish a “system of undistorted competition” and to promote the integration of markets. Article 101(3) TFEU reflects this goal, according to Mestmäcker, by prohibiting the elimination of effective competition even in light of potential efficiencies of a cartel. In the same vein, Article 102 TFEU must also be interpreted to prohibit the elimination of residual competition which is still effective on the dominated market or a related market. Article 102 TFEU became therefore almost exclusively targeted at exclusionary abuses whereas exploitative abuses have practically fallen into “benign neglect”.<sup>67</sup> In less than a handful cases has the Commission condemned excessive prices and the CJEU, while establishing a very high threshold for the determination of excessively high prices,<sup>68</sup> has positively found an exploitative abuse in only one single case.<sup>69</sup> Consequently, neither may the extremely

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<sup>63</sup> See for example E. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 Notre Dame Law Review 981, at 992-994 (1986).

<sup>64</sup> *Id.* at 985; cf. also R. O’Donoghue and J. Padialla, *supra* n. 63, at 839.

<sup>65</sup> R. Joliet, *Monopolization and Abuse*, *supra* n. 38, at 11 and 131; see also *id.*, *supra* n. 39, at 688.

<sup>66</sup> *Id.*, *supra* n. 39, 690: “...le système de l’article 86 justifie le recours à un contrôle direct des prix et de la production ...”; “l’autorité administrative sera inmanquablement conduit à substituer son propre calcul économique à celui de l’entreprise”.

<sup>67</sup> H. Schweitzer, *supra* n. 29, at 145.

<sup>68</sup> See the leading case ECJ Case C-27/76 *United Brands v Commission*, [1978] ECR 207, para. 250.

<sup>69</sup> ECJ Case C-116/84 *British Leyland v Commission* [1986] ECR 3263. See for a more detailed analysis of the case law H. Schweitzer, *supra* n. 29, 145 et seq.; see for an in depth analysis Th. Ackermann, *Excessive pricing and*

reluctant application of Article 102 TFEU to exploitative abuses serve as proof of an interventionist approach of EU competition law when it comes to the control of dominant undertakings, nor is it justified to characterize the ordoliberal concept of abuse as regulatory and interventionist in the first place, because it allegedly favours “as if” regulation which it does not. On the contrary: Pinar Akman's allegation that ordoliberal thinking has misguided the interpretation of Article 102 TFEU towards exclusionary abuses and that the Commission and the Court should return to applying the provision to exploitative abuses only<sup>70</sup> would imply a very unfortunate reset and redirection of the whole system of Article 102 TFEU toward a truly interventionist approach of the kind advocated very early on by Joliet.

It should be noted that a regulatory approach to monopoly control does in fact exist in the EU outside the framework of Article 102 TFEU with regard to certain infrastructural network industries such as telecommunications, energie (electricity and gas), railway transportation etc. where the *ex post* control of abuses on the basis of Article 102 TFEU is complemented by sector specific *ex ante* (preventive) control enforced by independent network agencies. This is in principle what Eucken had in mind when he in the early days of the Freiburg School argued in favour of controlling the conduct of “unavoidable” monopolies (i.e. natural monopolies such as network industries).<sup>71</sup> Ackermann, in his paper given at the Fifth ASCOLA Workshop 2010 in Bonn/Germany has demonstrated in detail that competition law (i.e. Article 102 TFEU) and sector specific regulations are alternative instruments for controlling monopolies which must not be mixed up but which clearly complement each other. It is worth mentioning in this context that those few cases where the Commission or the Court found an exploitative abuse concerned monopolies whose monopoly profits could not be expected to be competed away in a reasonable period of time. Article 102 TFEU can therefore be said to be applied to exploitative abuses only where there is little hope that markets would self-correct,<sup>72</sup> i.e., in Eucken’s words, where the monopoly is “unavoidable” so that regulation is exceptionally justified on the basis of Article 102 TFEU.

## 2. EXCLUSIONARY ABUSES

The specific flavour of the ordoliberal approach to exclusionary abuses may be illustrated by two examples: predatory pricing and refusal to deal with regard to essential facilities. Heike Schweitzer has presented an in depth study comparing the US approach and the approach of the CJEU which is still based on ordoliberal thinking.<sup>73</sup> What follows is based on her study.

### *Predatory pricing*

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*the goals of competition law*, in: D. Zimmer (ed.), *The goals of competition law - Fifth ASCOLA Workshop 2010*, (2012) 349, at 354 *et seq.*

<sup>70</sup> P. Akman, *The Role of Exploitation in Abuse under Art. 82 EC*, in: C. Barnard and O. Odudu (eds.), 11 *Cambridge Yearbook of European Legal Studies* 165-88 (2008-9).

<sup>71</sup> See for an analysis of the comparative advantages of regulation and competition law as far as control of monopoly pricing is concerned: Th. Ackermann, *supra* n. 70, 368 *et seq.*

<sup>72</sup> See *id.*, at 357.

<sup>73</sup> H. Schweitzer, *supra* note 29, 149 *et seq.*, 155 *et seq.*

Whereas US law concerning predatory pricing is based on the welfare economic concept of consumer welfare and therefore requires in addition to below-cost pricing the showing of an objective likelihood of recoupment (i.e. consumer harm), CJEU jurisprudence is not concerned with the effects of below-cost pricing on consumers' welfare but on the process of competition and hence on the rivals of the dominant firm. Fully in line with the ordoliberal concept of competition, Article 102 TFEU is interpreted so as to "ensure that the exercise of market power does not impair competitors' possibilities to succeed or prevail on the market on the basis of superior business performance".<sup>74</sup> This reflects the ordoliberal conviction that competition results from the exercise of individual rights within a system of interaction the workability of which rests on the protection of all market actors against exclusion that does not result from competition on the merits but rather from the unilateral exercise of a dominant firm's market power. As Heike Schweitzer has put it, "competition law will ensure that the fate of each competitor will depend on skill, business acumen and luck, and not on the exclusionary exercise of market power by a dominant firm".<sup>75</sup> Hence no showing of consumer harm or of the likelihood of recoupment is necessary; what matters is the negative effect on competition. This approach is far from protecting inefficient competitors who would be driven out of the market by legitimate competition on the merits anyway.

#### *Refusal to deal / Essential facility*

Another example for the adoption of an ordoliberal approach to the notion of "abuse" may be found in the jurisprudence related to refusals to deal with an essential facility. The ECJ has recognized the basic principle that even dominant firms or monopolists enjoy the right to prevent actual or potential competitors from having access to facilities developed, produced and owned by themselves. Nobody is in principle obliged to assist his competitors to enter the market or to succeed on the market. Rather, in order to compete, competitors must therefore engage in innovation. Where, however, the monopolist owns a resource that is an indispensable input for producers on the downstream market, because the resource cannot be duplicated, a refusal to deal may constitute an "abuse", if otherwise competition on the downstream market or access to that market would be made absolutely impossible. Relevant cases typically relate to infrastructure like ports, telecommunication networks, pipelines etc. Again: even in this context, the purpose of Article 102 TFEU is not to protect competitors, but to protect competition in favor of consumers' choice.<sup>76</sup>

## **VI. THE PROPER ROLE OF EFFICIENCY CONSIDERATIONS**

Ordoliberalism has often been said to disregard efficiency concerns. Pinar Akman has even argued that, since EU competition law has had efficiency as its aim from the very beginning, ordoliberalism cannot have had an influence upon its formation. This is wrong. There is a

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<sup>74</sup> Th. Eilmansberger, *How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anticompetitive abuses*, 42 *Common Market Law Review* 129, at 133 (2005).

<sup>75</sup> H. Schweitzer, *supra* note 29, at 155; *cf.* Commission Decision 97/624/EC, [1997] OJ L 258/1 – *Irish Sugar plc*, para. 34.

<sup>76</sup> See for a more detailed analysis H. Schweitzer, *supra* note 29, 155 *et seq.*

misunderstanding here of the role that efficiency plays in the context of an ordoliberal approach to competition as opposed to the “consumer welfare” approach. Ordoliberals have always appreciated and highlighted the positive welfare effects of competition in terms of productive, allocative and dynamic efficiencies. What they refuse, however, is to measure the allocative and dynamic efficiency effects of individual business strategies. The determination and materialization of these effects depends on consumers’ choice in the market. In other words: allocative and dynamic efficiencies can only be the result of effective competition. These results cannot be specified *ex ante*, because that would require access to the full amount of information which competition is supposed to discover in the first place. Competition rules cannot, therefore, pretend to assess dominant firms’ conduct according to their allocative or dynamic efficiencies but merely according to their impact upon competition and consumers’ choice. The efficiency defense that is available according to Article 101(3) TFEU as well as, according to the jurisprudence of the CJEU, within the framework of Article 102 TFEU, is limited to productive efficiencies upon the condition, however, that sufficient residual competition is left. This allows the determination of allocative and dynamic efficiencies to be deferred to the competitive process which allows consumers to make their choices. So, in the end, any business conduct that appears efficient on the micro-level of the individual firm(s) must pass the efficiency test on the macro-level of the system of competition where consumers decide what they want. Article 102 TFEU therefore does not prohibit inefficient conduct, but conduct that restricts competition by exclusionary strategies.

Modern welfare economists tend to disregard the link between market participants’ freedom of choice and allocative efficiency as a result of competition as rivalry; they rather believe that quantitative analysis of producers conduct allows us to directly determine what is efficient or not. This optimism is shared neither by ordoliberals nor by the CJEU. They feel rather reassured by Richard Posner who once said that “[e]fficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further”.<sup>77</sup> If allocative efficiency means satisfaction of consumers’ preferences then we have to recognize that consumers’ preferences must be revealed by market transactions based on consumers’ choice. There is no way to directly measure allocative efficiency, let alone dynamic efficiency. What is measurable though is productive efficiency, but here we should be reminded of what Robert Bork once said:

“Economists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured.”<sup>78</sup>

The bottom line is that we simply cannot translate all qualitative criteria into quantitative criteria. To determine whether a dominant firm has abused its market power to the detriment of competition and consumer choice, will – in spite of the increasing relevance of

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<sup>77</sup> R. Posner, *Antitrust Law*, 2<sup>nd</sup> ed. 2001, at 29.

<sup>78</sup> R. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 1978, at 127.

econometric studies for the application of competition rules – remain a normative issue that requires not only an assessment of facts but judgment.

## VII. SUMMARY CONCLUSIONS

In concluding, I take the liberty to begin with the following quotation from Mel Marquis' introduction to the European Competition Law Annual 2007:

"The term "ordoliberalism" is imprecise and problematic, for at least two reasons. First, the concepts associated with it cannot be adequately conveyed in a few lines, and paper-thin generalizations abound. Unfortunately, the (quite necessary) quest for a more economically intelligent competition policy in Europe has been accomplished by a tendency in some of the literature to use the terms "ordoliberal" and "ordoliberalism" as epithets (e.g. "The judgment in such-and such a case is a throwback to *ordoliberalism*"). It is not difficult to caricature concepts that are poorly understood. Second, although ordoliberalism is often discussed as if it were a static and homogeneous school of thought, in reality it has been more of a family of ideas, with important strands that have evolved over the past 75 years. It is a curious fact of European competition law history that what is often perceived today to represent ordoliberalism is a set of ideas that seem frozen in the period of 1993 to 1950 or 1957."

This paper has attempted to explain in some more detail what the core elements of ordoliberal thinking are, how it has developed over the last 75 years and how it has influenced the drafting; the interpretation and the application of the "abuse" concept in Article 102 TFEU. Some of the most important misunderstandings and distortions of the ordoliberal approach and its impact upon EU competition law have been clarified.

To begin with: Some authors'<sup>79</sup> denial of ordoliberals' influence on the drafting of the Rome Treaty's competition rules is unfounded. A careful reading of the *travaux préparatoires* (preparatory work) clearly demonstrates that the incorporation of the "abuse" concept in the provision pertaining to the control of undertakings holding a dominant position in the market is due to proposals recurrently submitted by the German negotiating team which was composed of ordoliberals.

There is also no good reason to downplay the role of ordoliberalism when it comes to the interpretation and application of Article 102 TFEU by the Commission and the CJEU. Some authors feel that the role of ordoliberalism in competition law cases may have been exaggerated.<sup>80</sup> The early controversy between Joliet and Mestmäcker testifies to the crucial role that ordoliberal thinking has played in orienting the notion of "abuse" towards competition rather than interventionist regulation.

An equally unfortunate mischaracterization of ordoliberalism consists in David Gerber's identification of ordoliberalism with its initial version represented by the Freiburg school.<sup>81</sup> Other English speaking authors have reproduced this mistake time and again by reference to

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<sup>79</sup> See the argument developed by P. Akman, *supra* n. 3, 74-95; see also F. Maier-Rigaud, *supra* n. 3, 139-150.

<sup>80</sup> See R. Whish and D. Bailey, *Competition Law* (7<sup>th</sup> ed. 2012) at 22 (relying exclusively on P. Akman).

<sup>81</sup> See D. Gerber, *supra* n. 2, at 232-253.

Gerber's account.<sup>82</sup> The mistake lies, however, in the total disregard of the dynamics of ordoliberalism and its development since the 1930ies over at least four generations of lawyers and economists who adhere to this approach. The influence of ordoliberal thinking on the interpretation of "abuse" of a dominant position cannot possibly be appropriately appreciated, if the refinements and the increasing sophistication that younger generations of ordoliberals who followed the members of the initial Freiburg school added to its learning, are simply disregarded.

It should, in particular, not be overlooked that ordoliberals have early on abandoned the "as if" approach, i.e. the requirement that dominant firms behave "as if" they were subject to competition.<sup>83</sup> It may have been this doctrine, however, that led some authors to infer that ordoliberalism "inevitably creates a highly regulated economy".<sup>84</sup> The contrary is true. Ordoliberals have always insisted that competition laws are "rules of the game" that do not positively prescribe specific market conduct but merely prohibit conduct that has a negative impact on rivals or consumers freedom to autonomously determine their conduct. This is the opposite of regulatory intervention.

It has proven equally wrong therefore to hold ordoliberalism responsible for a strong regulatory interpretation of Article 102 TFEU<sup>85</sup> and for an excessive concern for fairness rather than efficiency.<sup>86</sup> The analysis of the historical debate between Joliet and Mestmäcker should have made abundantly clear that this view is without foundation. The Jurisprudence of the Commission and the CJEU rather prove the contrary: The proposal for a strictly regulatory interpretation of Article 102 TFEU originated from René Joliet who had advocated that only exploitative strategies were covered by the notion of "abuse" which would indeed require direct intervention by the competition authority into dominant firms pricing and output decisions, whereas it was the ordoliberal approach of Ernst-Joachim Mestmäcker who argued that the interpretation of Article 102 TFEU must be guided by the Treaty's purpose to establish a system of undistorted competition which, in parallel to Article 101(3) TFEU, would not allow the elimination of effective competition and would therefore mainly cover exclusionary practices. Since this has become the dominant view of the Commission and the CJEU, regulation of dominant firms' exploitative conduct has been limited to exceptional cases or deferred to sector specific regulation by way of secondary legislation. To turn the wheel back as Pinar Akman has suggested,<sup>87</sup> is an untenable position.

The often heard allegation that the ordoliberal approach to the control of exclusionary abuses protects competitors rather than competition<sup>88</sup> is no more than an "empty slogan".<sup>89</sup>

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<sup>82</sup> Cf. P. Akman, *supra* n. 3, 55-63; cf. also R. Whish and D. Bailey, *supra* n. 81, at 22.

<sup>83</sup> Cf. however D. Gerber, *supra* n. 2, at 252-53; cf. also R. O'Donoghue and J. Padilla, *supra* n. 83.

<sup>84</sup> See D. Gerber, *supra* n. 2, at 247.

<sup>85</sup> See E. Fox, *supra* n. 64.

<sup>86</sup> *Id.* at 985; M. Gal, *supra* n. 59, at 364.

<sup>87</sup> P. Akman, *Searching for the Long-Lost Soul of Article 82 EC*, 29 Oxford Journal of Legal Studies 267 (2009).

<sup>88</sup> See, e.g., R. Whish and D. Bailey, *supra* n. 81, at 22.

<sup>89</sup> H. Schweitzer, *supra* n. 29, at 142 (quoting W. Wurmnest).

As Heike Schweitzer has properly said, the challenge under Article 102 TFEU is “to distinguish those acts with exclusionary effects that result from legitimate competition on the merits from exclusionary acts which cannot be justified as normal acts of competition but which, to the contrary, exploit the special power that a dominant firm possesses so as to entrench the firm’s position in the marketplace”.<sup>90</sup> Based on this distinction, Article 102 TFEU assumes an individual right of each competitor not to be excluded by illegal acts at the expense of consumers’ choice, irrespective of whether the exclusion results in verifiable inefficiencies or in a verifiable decrease of consumer welfare.

Finally, the ordoliberal approach is often said to be formalistic and based on bad economics. It is true that ordoliberal reasoning has led to *per se* prohibitions of certain types of abuses such as, e.g., exclusivity rebates. As Wouter Wils has correctly stated with regard to the *Intel* judgment of the CFI, however, “abuse” of a dominant position is a legal category and that it is not possible to conceive a workable interpretation of Article 102 TFEU without some use of categories which are sufficiently clear, foreseeable and administrable.<sup>91</sup> Such categories must, of course, be based on sound economics, but it can hardly be said that the categories used by the CJEU are not reflecting careful analysis of the economic effects of exclusionary practices upon the process of competition. It is by the same token unjustified to blame the dominant interpretation of Article 102 TFEU for not being “effects-based”. What counts are the effects upon competition and consumer choice, not on some kind of consumer welfare. Once such effects are established, they may reasonably be assumed in similar cases as well. This is how a legal rule emerges from generalized experience.

In sum, the ordoliberal approach which has had a dominant influence on the drafting, interpretation and application of the “abuse” control of dominant undertakings is neither obsessed with interventionist regulation nor with fairness instead of competition and it does neither protect competitors instead of competition nor is it formalistic instead of following “good” economics. Ordoliberalism simply stands for the protection of a “system of undistorted competition” that is based on individuals using their legally protected rights in order to freely reveal their preferences in a continuous process of choice making, a process that according to our experience is the most efficient way of organizing our economy.

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<sup>90</sup> *Ibid.*

<sup>91</sup> W. Wils, *The judgment of the EU General Court in Intel and the so-called ‘more economic approach’ to abuse of dominance*, 37 *World Competition*, 405-434 (2014).