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Ordoliberalism: What We Know and What We Think We Know

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This article draws on direct archival evidence from the Committee responsible for drafting the *Gesetz gegen Wettbewerbsbeschränkungen* 1957 (GWB) to establish what the priorities and beliefs of the Ordoliberals (broadly construed) were during the mid- to late-1950s. This is done primarily by analysing the views expressed by Franz Böhm, Finance Minister Ludwig Erhard and Alfred Müller-Armack. This work is important as it challenges the current understanding of Ordoliberalism. It reveals that aspects of the current understanding of Ordoliberalism are either flawed or do not take into account the changes that occurred between the submission of the Josten Draft (1949) and the drafting of the GWB (enacted 1957). This evidence also challenges the argument that the influence of Ordoliberalism on EU competition law has been exaggerated.

INTRODUCTION

It is no surprise that the aims and objectives of EU competition law are hotly debated.[1] This is because the aims and objectives of an area of law guide its daily application and when new challenges arise it impacts how the law reacts to those

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1 The leading study on the subject, Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: a Comprehensive Empirical Investigation' [2022] *Legal Studies* 1. Consider also Rex Ahdar, 'Consumers, redistribution of income and the purpose of competition law' (2002) 23 ECLR 341; Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Oxford: Hart Publishing, 2012); Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart Publishing, 1997); Oles Andriychuk, 'Rediscovering the spirit of competition: on the normative value of the competitive process' (2010) 6 *European Competition Journal* 575; Adi Ayal, *Fairness in Antitrust* (Oxford: Hart Publishing, 2016); Roger van den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (London: Sweet & Maxwell, 2nd ed, 2006); Ariel Ezrachi 'EU Competition Law Goals and the Digital Economy' Oxford Legal Studies Research Paper No 17/2018 at www.ssrn.com/abstract=3191766 [https://perma.cc/3MJT-X3WX]; Allan Fels and Geoff Edwards, 'Working paper III – competition policy objectives' in Claus-Dieter Ehlermann and Laraine Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Oxford: Hart Publishing, 1998); Damien Geradin and others, *EU Competition Law and Economics* (Oxford: OUP, 2012); David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: OUP, 1998) first published 1998; Louis Kaplow, 'On the choice of welfare standards in competition law' in Daniel Zimmer (ed), *The Goals of Competition Law* (Cheltenham: Edward Elgar, 2012); Ioannis Lianos 'The Poverty of Competition Law: the Long Story' CLES Research Paper Series No 2/2018 at www.ucl.ac.uk/cles/sites/cles/files/cles_2-2018.pdf [https://perma.cc/9GAG-MFQG]; Frederic Marty, 'Is the Consumer Welfare

challenges. In the case of the EU competition law, this is complicated by the fact that the Commission has been trying to reform/replace the theoretical framework upon which the law is based, with another, the so called 'more economic approach', for a number of decades.[2] The approach has for a number of years been embraced by the Commission but only tolerated rather than embraced by the courts. But with ground-breaking judgments such as *Post Danmark A/S* v *Konkurrenceråde*t[3] and *Konkurrensverket* v *TeliaSonera Sverige*[4] and in particular *Intel Corp* v *Commission*,[5] the foundation of EU competition law appears to be close to shifting[6] from the original Ordoliberal approach based on economic freedom to the Chicago/post-Chicago approach based on what is called 'consumer welfare'. However, before committing to replacing one approach with another it is necessary to compare the merits of the two approaches. This merely leads to another problem however; to compare two schools of thought both must be properly understood. It will be argued here that at present Ordoliberalism is misunderstood in English language discourse. That is not to say it is wholly misunderstood, but that it is sufficiently misunderstood to require greater investigation before rejecting the approach in favour of another.

The main challenge for the English-speaking student of Ordoliberalism is language. The dearth of interest in the subject, until relatively recently, meant that 'all roads lead back to Gerber', that is to say that the vast majority of the literature on the subject relies heavily on the seminal work of David Gerber.[7] There are other sources,[8] but it is without doubt Gerber's work upon which

Obsolete? A European Union Competition Law Perspective' GREDEG Working Paper No 2020-13 at https://ideas.repec.org/p/gre/wpaper/2020-13.html [https://perma.cc/HWW5-7GYF]; Giorgio Monti, *EC Competition Law* (Cambridge: CUP, 2007); Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge: CUP, 2004); Damien Neven and others, *Trawling for Minnows: European Competition Policy and Agreements Between Firms* (London: Centre for Economic Policy Research, 1998); Okeoghene Odudu, 'The Wider Concerns of Competition Law' (2010) 30 OJLS 559; Laura Parret, 'Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy' (2010) 6 *European Competition Journal* 339; Barry Roger and Angus Macculloch, *Competition Law and Policy in the EU and UK* (London: Routledge, 6th ed, 2021); Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing, 2009); Dina Waked, 'Antitrust as public interest law: redistribution, equity, and social justice' (2020) 65 *The Antitrust Bulletin* 87.

2 For an excellent analysis of this consider: Anne C. Witt, *The More Economic Approach to EU Antitrust Law* (Oxford, Hart 2019).

3 Case C-209/10 *Post Danmark A/S* v *Konkurrenceråde*t ECLI:EU:C:2012:172.

4 Case C-52/09 *Konkurrensverket* v *TeliaSonera Sverige* ECLI:EU:C:2011:83.

5 Case C-413/14P *Intel Corp* v *Commission* ECLI:EU:C:2017:632.

6 Anne C. Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?' (2019) 64 *The Antitrust Bulletin* 172.

7 Gerber, n 1 above.

8 Wernhard Möschel, 'Competition Policy from an ORDO point of view' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (London: Trade Policy Research Centre, Palgrave Macmillan, 1989); Ernst-Joachim 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* (Cheltenham: Edward Elgar Publishing, 2011) 25; Peter Behrens, 'The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' in Fabiana Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (Cheltenham: Edward Elgar Publishing, 2018); Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberlism and its Impact upon EU Competition Law' (2014) Europa-

most English language scholarship relies. Recently there has been a renewed interest in the subject largely due to the attribution of the German Federal government's reluctance to engage in inflationary borrowing and spending during the Euro-crisis to the Ordoliberal influence.[9] Consequently, this more recent scholarship is generally more focused on the political and monetary views expounded in Ordoliberalism rather than its competition policy.[10] The relative scarcity of information on a topic so foundational to EU competition law has allowed confusion to persist, with some even questioning the extent to which EU competition law was influenced by Ordoliberalism in the first place leading to greater uncertainty again.[11]

To contribute to the present knowledge on Ordoliberalism and help overcome the problems described above, this paper analyses archival evidence taken from the *Bundestag Archiv*, Berlin, specifically the records of the Committee[12] tasked with drafting the *Gesetz gegen Wettbewerbsbeschränkungen* 1957 (GWB). This Committee contained a substantial number of Christian Democratic Union/Christian Social Union (CDU/CSU) MPs, a number of Social Democratic Party (SPD) MPs and representatives from the Free Democratic Party (FDP) with minor representation of other smaller parties.[13] What is pertinent here however is the presence and intellectual leadership of Professor Franz Böhm who was a founding member of the Freiburg School and one of the few members of the school to live long enough to influence the movement as it spread through Germany and developed into what is now called Ordoliberalism. In addition, there was also direct input from the Finance Minister Ludwig Erhard and Professor Müller-Armack, both of whom are known to have been heavily influenced by and affiliated with Ordoliberalism.

To present the results of this analysis, the paper will be structured in the following way. First, a concise explanation will be given of who the Ordoliberals were, how they came together and an explanation given of

Kolleg Hamburg, Discussion Paper No 1/14; Matthew Cole, 'Does the EU Commission really hate the US? Understanding the Google decision through competition theory' (2019) 44 *European Law Review* 468; Ignacio Herrera Anchustegui, 'Competition Law through an Ordoliberal Lens' (2015) 2 *Oslo Law Review* 139; Matthew Cole, 'Ordoliberalism and its influence on EU tying law' (2015) 36 ECLR 255.

9 Thomas Biebricher and Frieder Vogelmann (eds), *The Birth of Austerity; German Ordoliberalism and Contemprorary Neoliberalism* (London: Rowman & Littlefield, 2017) 6-8: 'under certain conditions and in certain contexts, *Ordnungspolitik* will amount to a politics of austerity, not in all but in many respects – and the European Union and the Sovereign Debt Crisis arguably is one of such contexts'; Wolfgang Münchau, 'The wacky economics of Germany's parallel universe' *Financial Times* 16 November 2014. Although see, arguing against this position, Philip Manow, 'How Monetary Rules and Wage Discretion get into Conflict in the Eurozone (And What – If Anything – Ordoliberalism has to do with it' in Josef Hien and Christian Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Oxford: Bloomsbury Publishing, 2017).

10 This is in no way to detract from the useful work that is contained in both these volumes that are both welcome additions: Biebricher and Vogelmann (eds), *ibid*; and Hien and Joerges (eds), *ibid*.

11 Pinar Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29 OJLS 267. Consider also Angela Wigger, 'Debunking the Ordoliberal Myth in Post-War Europe' in Hien and Joerges (eds), n 9 above, although the author would respectfully disagree with Wigger's arguments, this relates not to our understanding of Ordoliberalism but relates to our understanding of cartels and in particular *rationalisierungskartells* in the GWB and consequently will not be dealt with here.

12 Ausschuß für Wirtschaft.

13 The Deutsche Party (DP) and GB.

some of the different strands of thought that exist within what is broadly called Ordoliberalism. Second, the mistakes that are common in the present understanding of Ordoliberalism will be set out. These include a static understanding of the Ordoliberal position on dominance and monopolies; a belief that Ordoliberals preferred form-based approaches; the idea that an 'as-if' approach was a core Ordoliberal tenet by the time of these deliberations; and the belief that Ordoliberals often protect competitors over competition.

After this there will be an analysis of what is correct about the current understanding of Ordoliberalism. Namely, the Ordoliberal desire for strong government, in the sense of one that is not easily swayed by special interests; a focus on the protection of economic freedom; a desire to protect the ability of firms to compete 'on the merits'; and finally, that there was no 'pure' Ordoliberal influence on the GWB. Rather, while there was a significant Ordoliberal influence, the GWB was still the outcome of a democratic process that involved a number of different parties and a number of different perspectives.

Continuing the theme of influences, the next section will consider some of the external influences on the GWB, looking specifically at the influence of US antitrust law and then considering the influence of other jurisdictions. Finally, in the last section some of the more surprising opinions found in the records will be discussed, raising the question, were the Ordoliberals ahead of their time?

This paper does not claim to represent the Ordoliberal standpoint comprehensively, this would be impossible for a journal article and in any event, as with any school of thought, there is inevitably a breadth of views. Rather, this paper is intended to use contemporaneous, direct archival evidence to make a substantial contribution to the understanding of Ordoliberalism, particularly outside of Germany.

WHO WERE THE ORDOLIBERALS?

The historical context of the development of the Freiburg School and Ordoliberalism is relatively well established.[14] Nonetheless, it is useful to contextualise the following discussion by considering the main protagonists and their impact on the development of Ordoliberalism. Ordoliberalism is often used as an umbrella term to cover a few closely related strands of thought: the Freiburg School, Ordoliberalism[15] and the Social market economy.[16] Walter Eucken (an economist), Franz Böhm and Hans Großmann-Doerth (lawyers) were the co-founders of the Freiburg School. Working together in Freiburg

14 This has already been considered in other sources. Consider for a succinct summary Biebricher and Vogelmann (eds), n 9 above 2-5; From a political perspective: Kenneth Dyson, 'Ordo-Liberalism in Comparative and Historical Perspective' in *Conservative Liberalism, Ordo-liberalism, and the State: Discipling Democracy and the Market* (Oxford, Oxford Academic, 2021); Anchustegui, n 8 above; Cole, n 8 above, 255-258; Gerber, n 1 above, ch 7.

15 Sometimes called second wave Ordoliberals, see Anchustegui, *ibid*, 144.

16 Consider, for a breakdown of the differences between the various strands of Ordoliberalism, Razeen Sally, 'Ordoliberalism and the social market: Classical political economy from Germany' (1996) 1 *New Political Economy* 233.

during the Nazi period (although their work was antithetical to Nazism)[17] these three were initially united by their concerns regarding the failings of law and economics and the need for an economic constitution.[18] However, this turned into something greater, with a vision being set out for how Germany should be revived after the end of the Second World War.[19] Unfortunately, of the three founding members, Großmann-Doerth perished during the War and Eucken died in 1950 whilst working on *Grundsatze der Wirtschaftspolitik* (Principles of Economic Policy). This meant that only Böhm lived to see the implementation of their ideas. These ideas travelled beyond Freiburg and were embraced by Willhelm Röpke and Alexander Rüstow and others such as Leonhard Miksch; this broader group took a more sociological approach than the founding three. Their position, both as eminent lawyers and economists, combined with their opposition to both Nazism and Communism placed them in a providential position when the War ended, and the Allied Forces wanted to set up a new government that was not tainted by those involved with the Nazi regime. Their ideas were transformed into government policy, not only through their own appointments, but due to their influence on prominent politicians of the period, such as Ludwig Erhard and Alfred Müller-Armack. This gave rise to the 'Social market economy', a concept that was inspired by, although not wholly the same as 'pure' Ordoliberalism.[20] What is important to note in the present context, is that while the influence of Ordoliberalism on German politics is not contested, its influence on the EU, particularly in the context of competition law, is contested.[21] Therefore it is of great importance to understand what the status of Ordoliberal thought was *at the time of the negotiations* of the Treaty of Rome, when the Treaty provisions on competition were established, this is the same period as the Committee deliberations on the GWB.

A MISTAKEN UNDERSTANDING OF ORDOLIBERALISM

The Ordoliberal stance on monopolies and dominance

The question 'What is the Ordoliberal stance on monopolies?' may at first seem prosaic. However, it has become highly important because of the implications for the whole of EU competition law. The seminal author on the subject is David Gerber. Gerber wrote both an article on the subject[22] and then later a larger work called *Law and Competition in Twentieth-Century Europe: Protecting Prometheus*.[23] Both these sources gave some of the first insights, from an English speaking point of view, into the world of Ordoliberalism or the Freiburg

17 Cole, n 8 above, 255-258.
18 Franz Böhm, Walter Eucken and Hans Großmann-Doerth, 'The Ordo Manifesto of 1936' (David Hunniford and others trs) in Biebricher and Vogelmann (eds), n 9 above.
19 Walter Eucken, *Grundsätze der Wirtschaftspolitik* (Tübingen: Mohr, 1990).
20 Consider for a breakdown of the differences between the various strands of Ordoliberalism; Sally, n 16 above.
21 Wigger, n 11 above, 172; Akman, n 11 above, 294.
22 David Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe' (1994) 42 AJCL 25.
23 Gerber, n 1 above.

School.[24] It is also important to note that Gerber stated that the Freiburg School was a dominant theoretical influence on EU competition law, through the German delegation to the European Economic Community's treaty negotiations. He states: '[The] Ordoliberal influence has been particularly important in relation to competition law … The structure of the two main competition law provisions of the Rome Treaty (Articles 85 and 86) also closely tracked ordoliberal thought and bore little resemblance to anything to be found in other European competition laws at the time.'[25]

This was largely accepted wisdom until new information was made available in the form of the *travaux préparatoires* of the Treaty of Rome.[26] These documents were investigated by the second most influential author on the subject, Professor Pinar Akman. Akman's work has had a profound effect, questioning the extent to which Ordoliberalism has really influenced EU competition law. Akman's work sets out primary aspects of the Ordoliberal tradition then, through careful comparison with the Articles of the Treaty of Rome and examining the *travaux préparatoires* of the competition rules of the Treaty, argues that the Ordoliberal influence on EU competition law has been overstated and that Article 102 TFEU (as it is now) was not envisaged as a classical Ordoliberal norm. Akman argues that this has implications for understanding what the aims of EU competition law are. In particular, if the law is not Ordoliberal then the aim of the Treaty drafters was not protecting competition but achieving efficiency.[27] The import of such a claim can hardly be overstated.[28]

Akman argues that 'the most important reasons' for Article 102 not being 'envisaged as a classical ordoliberal norm' are the pervasive concerns for efficiency and the lack of a prohibition of a dominant position in itself.[29] She states that 'Indeed, these two points demonstrate the crucial differences between Article [102 TFEU] and Ordoliberalism'.[30] Akman's argument hangs then on the premise that Ordoliberals and Ordoliberalism requires the prohibition of a dominant position. However, the actual situation appears to be more complex. The Freiburg School had sought to prohibit dominant positions around the 1940s, with Böhm declaring that the functioning of the free market should be protected by the 'Prevention, combatting and reversal of the process of concentration of power with the help of all available legal, administrative means

24 Two terms that themselves are often used interchangeably, erroneously.
25 Gerber, n 1 above, 264, although later Gerber uses slightly more cautious language.
26 At the time Gerber was writing he stated that 'Official records of the Messina conference and of the drafting of the Rome Treaty have not been made public', Gerber, n 1 above, 343.
27 Akman, n 11 above, 294.
28 One merely has to consider the impact that Robert Bork's claim that the aim of US antitrust was 'consumer welfare' or more accurately 'total welfare' to understand the impact such a claim can have on the direction of a competition regime, see for example Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, NY: Simon & Schuster, 1978) 50-51 and Steven C. Salop, 'Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard' (2010) 22 *Loyola Consumer Law Review* 336, 336.
29 Akman, n 11 above, 301. In support see Sir Peter Roth, 'The continual evolution of competition law' (2019) 7 *Journal of Antitrust Enforcement* 6, 10.
30 Akman, *ibid*, 275.

…'[31] and that an appropriate cartel policy was the 'pitiless de-concentration of the private economy; deprivatisation of any remaining market power'.[32] However, this position had softened by the time the GWB (and Article 102) was being written. To prove that the Ordoliberal position had changed by the mid- to late- 1950s the original records of the Committee that drafted the GWB 1957 (the Committee) can be relied upon. The GWB was and is the primary legislative instrument of German competition law. It was drafted and re-drafted, as is common in the German legislative process, by a committee of experts before being submitted to the German Bundestag and Bundesrat for approval. The reason why this Committee is of such great use here, is because the biggest contributor to the deliberations is none other than Professor Franz Böhm himself, a founding member of the Freiburg School and consequently a pivotal influence on Ordoliberal thinking (along with Walter Eucken). Further it was under the guidance of one of the most influential Ordoliberal ministers, Ludwig Erhard. If it is true that Ordoliberals believed at the time of the drafting of the GWB that 'monopolies should be prohibited because their very existence distort[s] the competitive order',[33] then one would expect the Committee to have spent much time discussing prohibiting dominant positions or the idea would have been raised and supported by Böhm at the very least. In fact, the meeting records note in three separate places that all members of the Committee were united in the belief that dominant positions should *not* be prohibited. This can be found in document 97 where section 17 of the GWB 1957 is discussed in relation to dominant undertakings:

> Section 17 Dominant companies
>
> On the contrary, the Federal Government would take the view in its deliberations that such dominant undertakings were initially neutral in terms of competition and that it was only the abuse of their dominant position that entitled the cartel authority to intervene.
> …
> In the general debate, the following is essentially pointed out with regard to the special situation of dominant companies:
>
> (a) … However, a development towards an optimal company size, which is often due to technical reasons and at the end of which there can be a domination of partial markets, cannot be prohibited by law. It was therefore logical to place only the behaviour of such companies in the market under abuse control. (Böhm) …
> (b) The competitive neutrality of dominant companies as assumed by the government is recognised and it is added that from the consumer's point of view dominant companies differ from cartels in that they do not, like the latter, direct their efforts towards increasing profits. On the contrary, as a result of economies of scale through operational expansion, they are enabled to drive a price strat-

31 Franz Böhm, 'Decartelisation and De-concentration' (Michelle Everson tr) in Biebricher and Vogelmann (eds), n 9 above, 130.
32 Böhm, *ibid*, 131.
33 Akman, n 11 above, 274.

egy. The danger of the dominant companies is not so much that they take advantage of their customers, but that they try to prevent the emergence of competition and exclude outsiders through their market strategy.(Böhm) …

(c) … The newer economic theory therefore no longer assumes without further information that monopolies and oligopolies are exclusively anti-competitive. Rather, it is recognised that monopolies are carriers of economic expansion and that oligopolies are in competition with each other. A substantial part of the competitive economy rested in these enterprises, and other areas of the economy were opened up by them. For this reason, a nuanced view of this problem is recommended (Prof. Müller Armack).[34]

The fact that a founding member of the Freiburg School, along with fellow Ordoliberal MPs and even those who are not Ordoliberal all agreed that dominance in itself is not necessarily anti-competitive and that monopolies can even produce pro-competitive effects through economies of scale is completely contradictory to the current understanding of Ordoliberalism. Some might counter-argue, given the records are minutes of the meeting, that Böhm was in disagreement with these points but was ignored. This is unlikely. In other parts of the records individual members' disagreement is often noted, the absence of such here is consistent with the agreement of the members of the Committee. Alternatively, some may counter-argue that one member of the Committee is trying to put words into the mouth of the rest of the panel, but if this was the case, it would be bizarre that the record attributes the most relevant points to Professor Böhm himself. In light of this it appears that this is the genuine view of Böhm at the time.

That a member of the Freiburg School and a founding member at that, would personally put forward the idea that monopolies can provide pro-competitive

34 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 97 Dominant Undertakings. All translations of the GWB documents are the work of the authors. Original German: 'Section 17 marktbeherrschende Unternehmen: Die Bundesregierung ginge in ihren überlegungen vielmehr davon aus, daß solche marktbeherrschenden Unternehmen zunächst wettbewerbsneutral seien, und daß erst der Mißbrauch der marktbeherrschenden Stellung die Kartellbehörde zu Eingriffen berechtige. In der allgemeinen Aussprache wird zu der besonderen Situation der marktbeherrschenden Unternehmen im wesentlichen auf folgendes hingewiesen: a) … Jedoch könne eine Entwicklung zur optimalen Betriebsgröße, die oft technisch bedingt sei und an deren Ende eine Beherrschung von Teilmarkten stehen könne, nicht durch Gesetz untersagt weden. Es sei daher folgerichtig, lediglich das Verhalten solcher Unternehmen im Markt under Mißbrauchsaufsicht zu stellen. …b) Die von der Regierung unterstellte Wettbewerbsneutralität marktbeherrschender Unternehmen wird anerkannt und hinzugefügt, daß Standpunkt des Verbrauchers sich marktbeherrschende Unternehmen von Kartellen dadurch unterscheiden, daß sie nicht wie letztere ihr Streben auf Gewinnerhöhung richten. Im Gegenteil werden sie infolge der Kostendegression durch Betriebsexpansion in die Lage versetzt, eine Preisstrategie zu treiben. Die Gefahr der marktbeherrschenden Unternehmen lige weniger in der Übervorteilung der Abnehmer, als darin, daß sie bestrebt seien, durch ihre Marktstrtegie das Aufkommen von Konkurrenz zu unterbinden und Außenseiter auszuschließen. …c) … Die neuere volkswirtschaftliche Theorie unterstelle daher nicht mehr ohne weiteres, daß Monopole und Oligopole ausschließlich wettbewerbsfeindlich seien. Es werde vielmehr anerkannt, daß Monopole Träger der wirtschaftlichen Expansion seien, und daß Oligopole miteinander im Wettbewerb ständen. Ein wesentlicher Teil der Wettbewerbswirtschaft ruhe in diesen Unternehmen, andere Bereiche der Wirtschaft würden durch sie erschlossen. Aus diesem Grunde empfehle sich eine differenzierte Betrachtung dieses Problems (Prof. Müller Armack).'

effects and that it is unwise to assume a particular ideal sized company, provides clear evidence that it did not require the prohibition of dominant positions at the time of the drafting of the GWB and what is now Article 102 TFEU. Rather, as summarised by Professor Müller Armack, a much more nuanced view of the problem of dominant undertakings was taken.

This view is further corroborated in other places. The *Bundesministerium für Wirtschaft* (BMW or BMWi) Minister Ludwig Erhard, also known for his Ordoliberal standpoint, later says: 'It should not be overlooked that both a monopoly and an oligopoly can come into being and gain power through free performance in competition. It [the GWB] was not intended to take away the market power of the companies concerned, but only to prevent abuse of this power.'[35]

Also, when considering the merger regulations, it is explicitly stated that the purpose of the merger regulations is not to break down existing mergers:

> 2. The draft only provides for unbundling in the case of mergers without permission, so that it is incorrect to assume that these provisions provide for a new right of unbundling. Rather, the draft followed the basic idea of the law, according to which monopoly power is neutral in itself. It was only in order to prevent new dominant undertakings from arising as a result of the merger … that the cartel authority had to examine whether competition would be endangered by this merger.[36]

Since the belief that Ordoliberalism had a limited influence on EU competition law is based largely on the understanding that Ordoliberals require the prohibition of dominant firms, this too, should be re-evaluated.

It is true that some Ordoliberals had argued in favour of abolishing monopoly positions[37] on occasion. But it is argued that this needs to be put in the historical context of the period running up to the 1930s when those in authority in Germany had actively encouraged cartelisation and consolidation in German industry leading to highly concentrated markets.[38] It could be that they were speaking of monopolies that had been created by merger and government mandate rather than competitive success, in much the same way as the US is now considering unwinding mergers between technology companies such as Facebook and WhatsApp, despite not being against dominant companies in and of themselves.

35 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 132. Original German: 'Es dürfe nicht übersehen werden, daß sowohl ein Monopol als ein Oligopol durch die freie Leistung im Wettbewerb entstehe und Macht erlangen könne. Es sei nicht daran gedacht, den betreffenden Unternehmen ihre Marktmacht zu nehmen, sondern nur einen Mißbrauch dieser Macht zu verhüten.'

36 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 99. Original German: '2. Lediglich für den Fall des Zusammenschlusses ohne Erlaubnis sehe der Entwurf eine Entflechtung vor, so daß es unzutreffend sei, anzunehmen, diese Vorschriften sähen ein neues Entflechtungsrecht vor. Vielmehr folge der Entwurf auch hier dem Grundgedanken des Gesetzes, wonach Monopolmacht an sich neutral sei. Lediglich um zu verhüten, daß durch den Zusammenschluß … neue marktbeherrschende Unternehmen entständen, habe die Kartellbehörde zu prüfen, ob durch diesen Zusammenschluß der Wettbewerb gefährdet werde.'

37 Akman, n 11 above, footnote 36.

38 Consider Daniel Crane, 'Fascism and Monopoly' (2020) 118 *Michigan Law Review* 1315, 1333-1337.

The Ordoliberal stance on 'form-based' approaches to anti-competitive conduct

A regular critique of EU competition law has been that it is too form-based.[39] A form-based approach is where a particular form of behaviour is prohibited rather than a particular outcome or effect. For example, a rule that says undertakings cannot engage in exclusive dealing contracts prohibits a particular form of behaviour, in contrast an 'effects-based approach advocates an analysis of the potential or even actual effects on competition in the market context … before finding an infringement'.[40] While some see the form-based/effects-based analysis as inappropriate,[41] this purported tendency toward form-based prohibitions is often claimed to hail from the law's Ordoliberal roots.[42] But is this a fair representation? After all, looking at things from the opposite side,

39 Patrick Rey and James S. Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38 *World Competition* 3, 4, 18; Damien Geradin, 'Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffmann-La Roche' (2005) 11 *Journal of Competition Law & Economics* 579, 580, 599; Lars Kjolbye, Jorge Padilla and Robbert Snelders, 'The Intel Controversy: An Introduction' (2015) 1 CLPD 28, 28; Matthew G. Rose and Douglas Lahnborg, 'The Chips Are Down: Intel's Victory in the European Court of Justice Has Implications on How Anticompetitive Conduct Is Analysed in EU Antitrust Cases' Orrick Antitrust Watch, 6 September 2017 at https://blogs.orrick.com/antitrust/2017/09/06/the-chips-are-down-intels-victory-in-the-european-court-of-justice-has-implications-on-how-anticompetitive-conduct-is-analysed-in-eu-antitrust-cases/ [https://perma.cc/693P-9VXN]; *Intel Corp* v *Commission* n 5 above, Opinion of AG Wahl, at [84]-[88]; EAGCP, 'An Economic Approach to Article 82' July 2005 at https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf [https://perma.cc/9AWE-LDQN]; Arjen W.H. Meij and Tristan Baumé, 'Object and Effects-Based Approaches in Identifying Abuses of a Dominant Position under Article 82 EC' in Heikki Kanninen, Nina Korjus and Allan Rosas (eds), *EU Competition Law in Context, Essays in Honour of Virpi Tiili* (Oxford: Hart Publishing, 2009) 97; Valentine Korah, 'European Night Services, the First Judgment on a Joint Venture Adopted a Realistic Approach to Effects on Competition' (2007) 6 *Competition Law Journal* 331, 343.

40 Manuel Kellerbauer, 'The Commission's new enforcement priorities in applying article 82 EC to dominant companies' exclusionary conduct: a shift towards a more economic approach?' (2010) 31 ECLR 175, 176-177.

41 See Matthew Cole, 'Economic Freedom or the Consumer Welfare Standard?' (forthcoming); Stavros S. Makris, 'Applying normative theories in EU competition law: exploring article 102 TFEU' (2014) 3 *UCL Journal of Law and Jurisprudence* 30, 43-44.

42 For a discussion of Ordoliberalism and its influence on EU competition law consider: Gerber, n 1 above; Kiran Klaus Patel and Heike Schweitzer (ed), *The Historical Foundations of EU Competition Law* (Oxford: OUP, 2013); Matthew Cole, *Tying law in the European Union: theory and application* (PhD Thesis, on file with the author) ch 1; Ernst-Joachim Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' in Pace (ed), n 8 above, 25; Behrens, 'The Consumer Choice Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law' n 8 above, 8; Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007* (Oxford: Hart Publishing, 2008); Möschel, n 8 above, 142; Lisa Lovdahl Gormsen, 'Where are we coming from and where are we going to?' (2006) 2 *Competition Law Review* 5, 9-14. Also consider against Akman, n 11 above; Pinar Akman and Hussein Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) 48 JCMS 111; Lisa Gormsen, 'The Parallels between the Harvard Structural School and Article 82 EC and the divergences between the Chicago school and post-Chicago Schools and Article 82 EC' (2008) 4 *European Competition Journal* 221; Pinar Akman, 'The role of "freedom" in EU competition law' (2014) 34 *Legal Studies* 2.

there has been a tendency to underemphasise the importance attached by the Chicago School to rules, presumptions and structured tests.[43] Is there also an overemphasis of the importance placed by Ordoliberals on formal rules? The records suggest so. Where formal rules do exist they are often a compromise between protecting competition on the one hand and the practical desire to have a functioning, practically administrable legal order on the other.

This can be seen most clearly in discussions surrounding market dominance. The Committee shows a real reticence to adopt market share as the determining factor in establishing dominance, instead preferring to focus on the specific market situation of the company, whether they face substantial competition and their individual behaviour. This can be seen in the following discussion. 'The question then arose as to how the concept of dominance should be defined. It is not advisable to start from the size of an undertaking's market share alone, which is not always decisive for dominance, but rather appears to be an important indication that the undertaking in question has no or no substantial competition against it.'[44] And also: 'In the course of the further discussion it then emerges that the facts of market dominance are to be judged differently depending on the type of production, the stage of production as well as the location and finally depending on the economic situation …'.[45]

By way of comparison consider the Guidelines on the application of Article 82 (now 102).[46] The Guidelines are considered to be indicative of a move towards a 'more economic approach'[47] where formal rules are less important. The Guidelines state that 'In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative'.[48] They further state in relation to market share that: 'Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings

43 Ryan Stones, 'The Chicago School and the Formal Rule of Law' (2018) 14 *Journal of Competition Law & Economics* 527.

44 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 97. Original German: 'Es habe sich sodann die Frage gestellt, wie der Begriff der Marktbeherrschung zu definieren sei. Es sei nicht ratsam, von der Größe des Marktanteils eines Unternehmens allein auszugehen, der nicht immer für die Marktbeherrschung entscheidend sei, vielmehr erscheine als wesentliches Indiz die Tatsche, daß dem in Frage stehenden Unternehmen kein oder kein wesentlicher Wettbewerb gegen überstehe.'

45 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 82. Original German: 'Im Verlauf der weiteren Diskussion ergibt sich sodann, daß der Tatbestand der Marktbeherrschung je nach Art der Produktion, der Produktionsstufe sowie des Standorts und schließlich je nach Konjunkturlage unterschiedlich zu beurteilen sie …'.

46 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2.

47 The consensus within the literature appears to be that the Guidelines moved towards an effects-based analysis, but this was undermined by their ambiguous legal nature and inability to substantially depart from established case law. Consider: Ertuğrul Can Canbolat, '2009 guidance on the Commission's enforcement priorities on article 102: greater precision to the parameters?' (2016) 37 ECLR 151, 151; Liza Lovdahl Gormsen, 'Why the European Commission's enforcement priorities on article 82 EC should be withdrawn' (2010) 31 ECLR 45, 47; Pinar Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) 73 MLR 605, 611-613.

48 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings n 46 above, para 10.

active on the market. However, the Commission will interpret market shares in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated …'.[49]

So both the Committee and the Guidelines consider market share inappropriate as a determinative criterion for dominance but at the same time consider it to be a useful starting point. If the Guidelines represent good sound economics and a move away from a form-based approach, they have much in common with the Committee's discussion: market share is not sufficient alone and what is determinative is whether there is sufficient competition to constrain the undertaking.

The same can be seen in the discussion regarding abuse itself:

> The discussion concentrates on the criteria to be laid down in the law for identifying a dominant company and on the offence of abuse of market position. The casuistic enumeration of elements in the government bill is just as unsatisfactory as the general clause recommended by the Bundesrat….
> There is general agreement that only on the basis of the behaviour of a dominant company can the facts of abuse be established.
> …so that it appears impossible to lay down a catalogue of abusive practices in the law as envisaged by the government bill. The Committee first asks for the BWM to compile certain practices (e.g. tying, adhesion contracts, production restrictions) of dominant undertakings in order to review the present legislative formulations on the basis of this compilation. It is feared, however, by many sides, - if the law does not specify the elements of the facts, that there is a danger of a dirigiste influence through a general right of scrutiny of the antitrust authority.[50]

It can be seen that whether the question relates to the determination of dominance or the determination of abuse, in both cases the Committee seems united in the understanding that it is difficult to set out rules or lists that apply in every market and situation. However where such lists or prohibited behaviours were set out this was not due to an Ordoliberal preference for focusing on the form of abuse or the form of a particular behaviour, but rather out of a concern from a number of parties that a free hand to investigate abuse without a clear legal framework would lead to dirigiste control of the market place. In other

49 *ibid*, para 13.

50 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 82. Original German: 'Die Diskussion konzentriert sich auf die im Gesetz festzulegenden Kriterien zur Kennzeichnung eines marktbeherrschenden Unternehmens sowie auf den Tatbestand des Mißbrauchs der Marktstellung. Die kasuistische Aufzählung von Tatbestandsmerkmalen in der Regierungsvorlage befriedigt ebensowenig wie die vom Bundesrat empfohlene Generalklausel … Es besteht allgemein Übereinstimmung, daß erst auf Grund des Verhaltens eines marktbeherrschenden Unternehmen der Tatbestand des Mißbrauchs Festgestellt werden kann. … so daß es unmöglich erscheint, im Gesetz einen Katalog mißbrächlicher Verhaltensweisen, wie es die Regierungsvorlage forsieht, festzulegen. Der Ausschuß bittet zunächst um eine Zunsammenstellung bestimmter Verhaltensweisen (z.B. Koppelgeschäft, Knebelverträge, Produktionsbeschränkungen) marktbeherrschender Unernehmen durch das BWM, um an Hand dieser Zusammenstellung die vorliegenden Gesetzesforulierungen zu überprüfen. Es wird jedoch von meheren Seiten befürchtet, -falls man auf eine Festlegung von Tatbestandsmerkmalen im Gesetz verzichtet-, daß durch ein allgemeines Prüfungsrecht der Kartellbehörde die Gefahr einer dirigistischen Einflußnahme bestehe.'

words, formulaic requirements were only desired where necessary for the fair, impartial and predictable administration of the law.

The Ordoliberal influence on EU competition law has often been criticised as being the reason why EU Competition law overly focused on the form rather than the economic effect of any particular behaviour. However, there appears to be little to suggest that was how Ordoliberals operated. This is seen again in another record where it states that an MP argues that purchasing co-operatives should be excluded from the purview of the law as they may help smaller competitors to be able to compete against larger ones and thus balance competition. The response from Professor Böhm is clear: 'In the discussion it is first clarified that for the assessment of the overall problem – protection against strong competitors – not the legal form but the material content of the contract is of importance. According to Prof. Böhm (CDU/CSU), such contracts are not affected by S1 if they do not influence the market.'[51]

So when an MP seeks to exclude a particular form of behaviour from the ambit of the legislation, it is Böhm who states that this is unnecessary because the form of the contract is not important but rather its '*materielle Inhalt*' that matters, that is to say its substance or in context the actual impact of the contract. The target of the law is a particular effect and consequently there is no need for a particular exclusion for cooperative purchasing contacts.

These examples show that Ordoliberals, do not seek to allow or prohibit a particular form of agreement but rather their concern is with the effect the agreement has on the market. To put it another way they are focused not on form but on anti-competitive effects. It is, of course, to be expected that the economics used in such discussions may not be as developed as it is today, after all, these discussions were taking place over 60 years ago and economics has developed during that time, but to consider that Ordoliberalism is 'form-based' appears false, the Ordoliberals in this Committee were concerned with the effect of a behaviour. Where form-based rules were adopted these are, as with other schools of thought, necessary for practical reasons rather than being the preferred solution.

Competition and the 'as if' standard

One of the controversies surrounding the Freiburg School and Ordoliberalism more generally is the importance of the 'as-if' requirement.[52] The seminal work of Gerber said that the Ordoliberals believed that dominant firms should

51 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 86. Original German: 'In der Diskussion wird zunächst klargestellt, daß für die Beurteilung des Gesamtproblems - Schutz gegen starke Konkurrenten - nicht die Rechtsform, sondern der materielle Inhalt des Vertrages von Bedeutung sei. Nach Auffassung von Prof. Böhm (CDU/CSU) werden deartige Verträge von S1 nicht betroffen, wenn durch diese Verträge eine Beeinflussung des Marktes nicht erfolgt.'

52 Gerber, n 22 above, 52; Gerber, n 1 above, ch 7; Gormsen, 'Where are we coming from and where are we going to?' n 42 above, 10; Ian Rose and Cynthia Ngwe, 'The Ordoliberal Tradition in the European Union, its Influence on Article 82 EC and the IBA's Comments on the Article 82 EC Discussion Paper' (2007) 3 *Competition Law International* 8, 8; Akman, n 11 above, 276; Anne C. Witt, 'The Commission's Guidance Paper on Abusive Exclusionary Conduct – More Radical than it Appears?' (2010) 35 ELR 214, 220-221; Robert O'Donoghue and Jorge Padilla, *The Law*

be required to behave 'as-if' subject to competition.[53] Since then, this has been challenged with other scholars suggesting that the 'as-if' requirement was espoused by some members of the movement,[54] such as Eucken in the narrow context of natural monopolies[55] and Miksch more generally,[56] but ultimately rejected by most and heavily criticised by many, particularly those who were themselves Ordoliberal.[57] The discussion that takes place within the records appears to confirm that by the time of the GWB Committee there was no desire on behalf of the Ordoliberals to incorporate into the law an 'as-if' standard. Rather, when discussing how to characterise a dominant position, after much discussion a somewhat exasperated[58] Professor Böhm seems to summarise his frustration with the discussion by noting that what is important is to maintain competition rather than regulate the behaviour of dominant companies:

> Professor Böhm emphasises that in order to make the emergence of dominant companies more difficult, first and foremost economic policy measures are necessary. … He believes that strong measures to prevent exclusive dealing, as well as all economic policy measures that encourage the emergence of competition, are the most effective ways to deal with dominant companies. Measures based on S17 are, in his view, of lesser weight in promoting competition.[59]

It seems that he was of the opinion that while monitoring dominant firms and preventing them abusing their position was of some use, there is no replacement for competition itself. This he saw as being maintained by various economic policies and preventing exclusivity clauses, which were dealt with

and Economics of Article 82 EC (Oxford: Hart, 2006) 9; Hans Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8 *Journal of Competition Law & Economics* 717, 765.

53 Gerber, n 1 above.

54 Behrens, 'The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' n 8 above, 17-18.

55 Walter Eucken, *Grundsätze der Wirtschaftspolitik* [Foundations of Economic Policy] (Tübingen: Mohr Siebeck 1952, reprint 2004) 295, 299.

56 Leonhard Miksch, *Wettbewerb als Aufgabe. Grundsätze einer Wettbewerbsordnung* (Stuttgart: Kohlhammer, 1937); Leonhard Miksch, '*Die Wirtschaftspolitik des Als-Ob*' (1949) 105 *Zeitschrift für die gesamte staatswissenschaft* 310.

57 Ernst-Joachim Mestmäcker, '*Verpflichtet § 22 die Kartellbehörde, marktbeherrschenden Unternehmen ein Verhalten aufzuerlegen, als ob Wettbewerb bestünde?*' [Does §22 Oblige the Cartel Office to Instruct Dominant Undertakings to Behave as if Competition Would Exist?]' [1968] *Der Betrieb* 1800; Ernst-Joachim Mestmäcker, '*Die Beurteilung von Unternehmenszusammenschlüssen nach Art. 86 EWG*' in Ernst von Caemmerer, Hans J. Schlochauer and Ernst Steindorff (eds), *Probleme des europäischen Rechts, Festschrift für Walter Hallstein* (Frankfurt am Main: Vittorio Klostermann, 1966) 322, 335. For further discussion see Schweitzer, n 42 above, 134; Behrens, 'The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' n 8 above, 17-19.

58 Böhm speaks at the end of the meeting, which started at 15:00 and is just about to end at 18:40 and generated an unusually long 10 pages of minutes.

59 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 132. Original German: 'Professor Böhm unterstreicht, um das Aufkommen von marktbeherrschenden Unternehmen zu erschweren, in erster Linie Maßnahmen der Wirtschaftspolitik erforderlich seien. … Er glaubt, daß durch scharfe Maßnahmen zur Verhütung von Ausschließlichkeitsverträgen, sowie durch alle Maßnahmen der Wirtschaftspolitik, die das Aufkommen von Konkurrenz ermutigten, am wirkungsvollsten gegen marktbeherrschende Unternehmen vorgegangen werden könne. Maßnahmen, die sich auf S17 stützten, seien seiner Ansicht nach zur Förderung des Wettbewerbs von geringerem Gewicht.'

under a separate section. What is notable by its absence, is any discussion of requiring dominant firms to behave 'as-if' subject to competition. If anything, the thrust of the comment, is the opposite: there is no replacement for competition itself. This suggests a change had taken place since the publication of the Josten Draft eight years earlier, which required dominant companies to behave 'as if' subject to competition.[60] So, it appears that the Ordoliberals dropped the 'as-if' standard at some point between the Josten Draft and the GWB.

Ordoliberals do not seek to protect competitors

It is alleged by some that Ordoliberalism seeks to protect competitors, not competition.[61] Is this true? Much of the discussion that revolves around the GWB legislation is whether or not to allow 'crisis' cartels. The arguments provided are that when there is a cyclical crisis, a price cartel or quota cartel is actually beneficial because it allows competitors to agree a price that covers their overheads. This allows companies to stay in business, which is seen by some to be good economic policy and a particular MP argues that such cartels are particularly beneficial for SMEs because they are the companies that are most at risk since large corporations are 'immortal'[62] anyway. Such arguments would be dismissed as economic nonsense today, but there is still something particularly useful to observe here. This argument is in essence the idea that competitors (in the sense of market structure) should be protected rather than competition. It is an argument for maintaining the maximum number of firms within a market. It also accepts that (potentially significantly) higher prices should be borne by consumers in order to protect smaller firms and the market structure. These arguments however are *not* the arguments of the Ordoliberals and are wholly rejected by Erhard, who is, of course, Ordoliberal himself. In his opinion, forming cartels to combat cyclical crises is economic nonsense. During such a crisis, demand does not match supply anymore. The appropriate reaction is a lowering of prices. Accordingly, a cartel would make the situation

60 Josten Draft Section 22: 'Inhaber wirtschftlicher Macht sollen sic him Geschäftsverkehr so verhalten, wie sies ich verhalten würden, wenn sie einem wirksamen Wettbewerb ausgesetzt wären.' Meaning approximately 'Holders of economic power should behave in business transactions as they would if they were exposed to effective competition.' This is all the more interesting when it is considered that Professor Böhm also helped write the Josten Draft. Consider also Böhm, n 31 above, 130.

61 This critique can be found widely, however consider for example Francesco Ducci and Michael Trebilcock, 'The Revival of Fairness Discourse in Competition Policy' (2019) 64 *Antitrust Bulletin* 79, 94; Akman, n 11 above, 295; Tom C. Hodge, 'Compatible or Conflicting: The Promotion of High Level of Employment and the Consumer Welfare Standard under Article 101' (2012) 3 *William & Mary Business Law Review* 59, 95; Anca Daniela Chirita, 'The EC Commission's Guidance Paper on the Application of Article 82 EC: An Efficient Means of Compliance for Germany' (2009) 5 *European Competition Journal* 677, 681. Noting the criticism, although not necessarily endorsing it, Liza Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 *European Competition Journal* 329, 338; Josef Drexl, 'Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Case' (2010) 76 *Antitrust Law Journal* 677, 683.

62 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 122.

worse by preventing this. Furthermore, since there always is some sort of crisis in some part of the economy, allowing these cartels is a slippery slope. There is no mention and seemingly no intention of trying to protect the 'structure of the market' in the sense of retaining as many companies as possible, neither is there a desire to protect SMEs or any other companies on principle but rather if companies leave the market that is part of the natural course of competition and the market is not to be interfered with.

There is one final report that also appears to deal with the issue of protecting competition and protecting competitors. The MPs consider whether to add the word 'substantial' or 'harmful effects' to the law to provide a *de minimis* standard. The response is this: 'The Federal Minister of Economics, Prof. Erhard, has fundamental objections to both proposals, since the economic approach (macroeconomic) is fundamentally different from that of individual enterprises. The proposed wording would therefore cause the cartel authority, which only has to decide from a macroeconomic point of view, extraordinary difficulties in interpreting the term "substantial" or "harmful"'.[63]

Here, Professor Erhard rejects proposals to use the word 'harmful' and 'substantial' because the cartel authority is to take an economic approach (*volkswirtschaftliche Betrachtungsweise*) rather than the view of individual enterprises. What exactly is meant by an economic approach is not completely clear, but it appears that Erhard's concern is for what we would today call 'harm to competition' rather than harm to competitors. However, it is very important to understand at this point that what is understood as protecting competition in some jurisdictions (most notably the US within the Chicago tradition) is markedly different to what the Ordoliberals consider protecting competition. The Ordoliberal conception of protecting competition is much more aligned with protecting economic freedom, as will be discussed below.

What can be seen as a whole then, is that the opinions expressed by Ordoliberals in these records challenge the current understanding of Ordoliberalism within the English-speaking world.

WHAT WE DO GET RIGHT ABOUT ORDOLIBERALISM

The previous section has provided new evidence that challenges what Ordoliberalism is thought to be in the English-speaking world. In this section the focus is on what the records confirm about the current understanding of Ordoliberalism.

63 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 86. Original German: 'Bundesministeer für Wirtschaft, Prof. Erhard, hat gegen beide Anträge grundsätzliche Bedenken, da sich die volkswirtschaftliche Betrachtungsweise von derjenigen des Einzelbetriebes grundlegend unterscheide. Die vorgeschlagene Gormulierung würder daher die Kartellbehörde, die nur unter gesamtwirtschaftlichen Gesichtspunkten zu entscheiden habe in außerordentliche Schwierigkeiten bei der Auslegung des Begriffs "wesentlich" oder "schädlich" bringen.'

The protection of economic freedom

One theme that the current understanding of Ordoliberalism appears to get right relates to the importance of economic freedom.[64] The phrase of consequence is *wirtschaftlichen Bewegungsfreiheit*, meaning economic freedom or economic freedom of action. This is not just a concern for Professor Böhm either (although he appears particularly concerned about exclusivity contracts and their effect on freedom and competition) but it is also a concern of the Government at the time and even some of the members of the (centre-left) SPD party.

> S13: Contracts with exclusivity clauses.
>
> … The Federal Government had based the prerequisite for intervention by the cartel authority on the impairment of the economic freedom of action of the contracting parties in the individual case. The Bundesrat, on the other hand, had assumed as a precondition for the intervention of the cartel authority that competition in general on the market was impaired by the exclusive dealing agreement. The Federal Government did not share this view. It remained of the opinion that the abuse had to be based on the individual impairment. …
> Professor Böhm objected to the legal structure of S13… Both elements of the offence, i.e. the individual restriction as well as the general restriction of competition on the market, were conceivable in the case of exclusive contracts, so that the discussion on the replacement of the word 'or' by 'and' was superfluous.[65]

Böhm then was arguing that either a restriction of economic freedom or the restriction of competition more generally should be sufficient to break the law.[66]

It can be seen then, that in the eyes of Böhm both the protection of competition and the protection of economic freedom are part of the remit of competition law. Some in the Committee go further and declare them to be one and the same thing. This connection between freedom of action and competition appears in the government's discussion a few times.[67] The records do not say whether Professor Böhm shared this opinion of complete equivalence,

64 Gerber, n 1 above, 240; Möschel, n 8 above, 146.

65 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 129. Original German: 'S13: Verträge mit Ausschließlichkeitsklauseln. … Die Bundesregierung habe als Voraussetzung für ein Eingreifen der Kartellbehörde auf die Beeinträchtigung der wirtschaftlichen Bewegungsfreiheit der Vertragsbeteiligten im Einzelfall abgestellt. Der Bundesrat dagegen habe als Voraussetzung für das Eingreifen der Kartellbehörde angenommen, daß der Wettbewerb allgemein auf dem Markt durch den Ausschließlichkeitsvertrag beeinträchtigt werde. Dieser Auffassung habe sich die Bundesregierung nicht angeschlossen. Sie bliebe weiter der Auffassung, daß der Mißbrauch auf die individuelle Beeinträchtigung abgestellt werden müsse. … Gegen den juristischen Aufbau des S13 wendet sich Abg. Professor Böhm. … Beide Tatbestandsmerkmale, d. h. die individuelle Beschränkung sowie die allgemeine Wettbewerbsbeschränkungen auf dem Markt, seien im Fall von Ausschließlichkeitsverträgen denkbar, so daß die Diskussion über die Ersetzung des Wortes 'oder' durch 'und' hinfällig sei.'

66 Another MP (Dr Deist) takes this further even arguing that a restriction of competition and a restriction of economic freedom are essentially the same thing and that therefore to establish one is to establish the other.

67 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record numbers 94, 5, 6 and 7.

but it does show his clear concern for the restriction of both economic freedom and for competition in the market generally.

Ordoliberals care about competition on the merits

Ordoliberals are strongly associated with a special responsibility for undertakings that are dominant on the market.[68] They are also strongly associated with the idea of protecting competition on the merits.[69] What it interesting when considering the discussion on sections 23 and 25 is that while the government draft prohibited anticompetitive conduct by cartels and dominant firms, Professor Böhm actually focused less on the dominant position and wanted the law to cover any exploitation of an economic position of power that violated the principles of competition on the merits. It seems then for Professor Böhm, focusing too much on a dominant position may allow firms that have economic power in ways that diverge from dominance to engage in anticompetitive behaviour: '1) Professor Böhm … In particular, he objects to the fact that the provisions of SS23 and 25 are limited to cartels and dominant companies. On the contrary, he wanted the law to cover any exploitation of an economic position of power, whether held by some or by others, which violated the principles of competition on the merits.'[70]

For Professor Böhm, dominance was not the only form of market power and so he wanted to give the law greater flexibility to investigate the market to determine whether the behaviour was competition on the merits or a restraint of competition. This is particularly salient in the current competition law environment where there have been concerns that lengthy disputes over dominance

68 Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 *Competition Policy International* 197, 208; Matthew Cole, 'Does the EU Commission really hate the US? Understanding the Google decision through competition theory' n 1 above, 472; Antonio Bavasso, 'The Role of Intent Under Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses in Regent's Park"' (2005) 26 ECLR 616, 617; Amato, n 1 above, 65; Witt, n 52 above, 224-225; Gerber, n 1 above, 367-368; Kathryn McMahon, 'Interoperability: "Indispensability" and "Special Responsibility" in High Technology Markets' (2007) 9 *Tulane Journal of Technology & Intellectual Property* 123, 161-166; David Howarth and Kathryn McMahon, '"Windows has performed an illegal operation": the Court of First Instance's judgment in Microsoft v Commission' (2008) 29 ECLR 117, 131.

69 Akman, n 11 above, 276; Philip Lowe, speech given 23 October 2003 at the Fordham Antitrust Conference in Washington, 'Thirteenth Annual Conference on International Antitrust and Policy', 5 combined with Philip Lowe, speech given 27 March 2007 at the 13th International Conference on Competition and 14th European Competition Day, 'Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?', 2; Gormsen, n 61 above; Behrens, 'The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' n 8 above, 11; Massimiliano Vatiero, 'The Ordoliberal Notion of Market Power: An Institutionalist Reassessment' (2010) 6 *European Competition Journal* 689, 695; Christian Ahlborn and Jorge Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in Ehlermann and Marquis (eds), n 42 above, 72.

70 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 102. Original German: 1. 'Professor Böhm … Er beanstandet insbesondere, daß die Vorschriften der SS23 und 25 sich lediglich auf Kartelle und marktbeherrschende Unternehmen beschränken. Er wünscht vielmehr, daß das Gesetz jegliche Ausnutzung einer einigen oder fremden wirtschaftlichen Machtstellung, die gegen die Grundsätze des Leistungswettbewerb verstoße, erfasse.'

and market definition have neutered the law's ability to deal with some competition problems effectively, which has led to the most recent amendment to the GWB that allows gatekeepers to be subject to restrictions without requiring dominance to be established.

Ordoliberalism and strong/impartial government

Another point that is correctly understood is that Ordoliberals like 'strong government'.[71] There is of course a difficulty with this phrase because it sounds like an appeal for authoritarian government, but there would be little 'liberal' about the Ordoliberals if this were true. What is meant by strong government is one that is independent and strong enough to resist pressure from special interest groups. This can be seen from the following:

> Prof. Böhm (CDU/CSU) expressed fundamental reservations against the insertion of a general clause. … The law should provide protection against restrictions of competition as well as against state intervention. However, if a state authority is authorised to grant exceptions, it will always depend on the value judgement of this state authority in which way competition should or should not exist in an economy. However, dispensing with a general clause ensures that private competition remains the organising principle in the market. Prof. Böhm admits that it is not possible for the legislator to cauistically list all those cases that justify an exception to the prohibition principle. He recognises that at a later date a case might arise that would require an exception. However, he believes that the legitimate way to grant this exception is through legislation. In his view, this would ensure that neither an office nor a government would be put under pressure from interested parties (vested interests).[72]

In this instance Böhm was voted down by the rest of the committee, but nonetheless this passage highlights the Ordoliberal concern for what today would be called 'regulatory capture'. There was a deep mistrust of discretion being given to governments or offices, which is why as far as possible Böhm wanted the rules to be clearly set out in legislation with as little scope for discretion as possible. This concern is born out of the experience of the Ordolib-

71 Gerber, n 1 above, 249-250.

72 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 92. Original German: 'Gegen die Einfügung einer Generalklausel äußert Prof. Böhm (CDU/CSU) grundsätzliche Bedenken. … Das Gesetz solle in gleicher Weise einen Schutz gegen Wettbewerbsbeschränkungen als auch gegen Interventionen des Staates bieten. Wenn man nun aber eine staatliche Stelle ermächtige, Ausnahmen zu erteilen, werde es immer vom Werturteil dieser staatlichen Stelle abhängen, in welcher Weise in einer Wirtschaft Wettbewerb bestehensolle oder nicht. Ein Verzicht auf eine Generalklausel aber gewährleiste, daß der private Wettbewerb das Ordnungsprinzip im Markt bleibe. Prof. Böhm gibt zu, daß es dem Gesetzgeber nicht möglich sei, kauistisch alle diejenigen Fälle, die eine Ausnahme von dem Verbotsprinzip rechtfertigten, aufzuzählen. Er erkennt durchaus an, daß zu einem späteren Zeitpunkt u.U. ein Fall eintreten könnte, der eine Ausnahme erforderlich mache. Er glaubt jedoch, daß der legitime Weg für die Erteilung dieser Ausnahme der Gesetzesweg sei. Auf diese Weise werde nach seiner Auffassung sichergestellt, daß weder ein Amt noch eine Regierung unter den Druck von Interessenten gestellt werden.'

erals during the Weimar Republic and its failure to resist corporate lobbying.[73] This can be seen when one MP (Dr Hoffmann, FDP) argued that the Federal Minister of Economics should have the sole right to decide on matters where discretion was important.

> Prof. Böhm (CDU/CSU), on the other hand, would like the Federal Minister of Economics to be able to intervene only to a minimum. He fears that the Federal Minister could be put under commercial pressure and that in this way the cartel authority would not take objective decisions. He refers to his experience with the Cartel Regulation. The Reich Minister of Economics [Weimar] had only twice made use of his right to intervene under the Cartel Regulation. He said, however, that both cases proved that the Minister had acted under pressure.
> Prof. Böhm (CDU/CSU) wanted to limit the Federal Minister of Economics' ability to intervene to the issuing of general guidelines, which were to be published. The right to intervene in individual cases should be avoided as far as possible, in order to prevent short-term difficulties from being decided via the cartel authority against the principles of the market economy.[74]

Later, Böhm again shows his awareness of government lobbying and a concern that the law should be fairly applied to all areas of the economy unless objectively justified:

> Cartel Bill S73 and following (areas of exception)
>
> …
>
> Prof. Böhm raised fundamental objections to the privileges envisaged for agriculture, banks and insurance companies, transport, etc.. In his opinion, an exception could only be granted if objective reasons made this necessary. Otherwise, the principle of equality would be violated by this regulation. Industry and commerce could then justifiably object that it was not justified that a stricter law should apply to them than to the other sectors of the economy.[75]

73 Confirming, Gerber, n 1 above, 250.

74 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 103. Original German: 'Abg. Prof. Böhm (CDU/CSU) wünscht dagegen, das Maß der Einwirkungsmöglichkeit des Bundesministers für Wirtschaft auf ein Mindestmaß zu beschränken. Er befürchtet, daß der Bundesminister unter einen wirtschaftlichen Druck gesetzt werden könnte, und daßauf diese Weise die Kartellbehörde keine objektiven Entscheideungen fällen werde. Er weist auf seine Erfahrungen mit der Kartellverordnung hin. Der Reichswirtschaftminister habe von dem ihm nach der Kartellverordnung zustehenden Eingriffsrecht nur zweimal Gebrauch gemacht. Beide Fälle bewiesen jedoch, daß der Minister unter Druck gehandelt habe. Abg. Prof. Böhm (CDU/CSU) wünscht die Einwirkungsmöglichkeit des Bundesministers für Wirtschaft auf den Erlaß von allgemeinen Richtlinien, die zu veröffentlichen seien, zu beschränken. Ein Eingriffsrecht im Einzelfalle solle nach Möglichkeit unterbleiben, um zu vermeiden, daß augenblickliche Schwierigkeiten auf dem Umweg über die Kartellbehörde gegen marktwirtschaftliche Prinzipien entschieden würden.'

75 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 111. Original German: 'Kartellgesetzentwürfer S73 ff (Außnahmebereiche) … Abg. Prof. Böhm trägt grundsätzlich Bedenken gegen die für die Landwirtschaft, Banken und Versicherungen, Verkehr u. a. vorgesehenen Privilegien vor. Eine Ausnahme dürfe nach seiner Auffassung - nur gewährt werden, wenn sachliche Gründe dies erforderlich machten. Anderenfalls würde durch diese Regelung

These quotes show a persistent concern that discretion given to ministers and exclusions given to whole sectors would end up causing their own distortions or unfairness within the economy. So, in this matter the current understanding is accurate; Ordoliberals are keenly aware of and fiercely resistant to any opportunity for corporate lobbying or pressure that can undermine competition law and therefore seek to set exceptions in legislation or general guidance where possible rather than leaving discretion to officials or ministers. However, since the term 'strong government' is slightly ambiguous, perhaps it is clearer to say that they prefer to minimise governmental discretion in matters of competition law.

There was no 'pure' Ordoliberal influence

There is no doubt that the Ordoliberals had a substantial influence on the GWB 1957. From the thought leadership of Professor Böhm who is cited again and again in the records, to the input and oversight of MPs and Ministers who were also well known for their connection to Ordoliberalism such as Müller-Armack and Ludwig Erhard,[76] there is a substantial influence on the GWB from Ordoliberals. What should also be noted however is that this is not a 'pure' influence. That is to say, Professor Böhm, for example, was not above the other members of the committee. He was not able to dictate what the law should prohibit and allow. He was a member, a very vocal member of the committee, but he was nonetheless a member with one vote just like all the others. Consequently, there are occasions[77] when he proposes particular ideas or solutions and is outvoted, showing the influence of the other members of the committee on the law.

THE INTERNATIONAL INFLUENCES ON THE GWB

The American question

Given the influence of the United States and its requirement that Germany introduce competition law,[78] there is the question of how much US antitrust law influenced the GWB.[79] The records suggest that US antitrust law played a very limited role in influencing German competition law. That is not to say

der Gleichheitssatz verletzt. Industrie und Handel könnten dann mit Recht einwenden, es sei nicht gerechtfertigt, daß für sie ein strengeres Recht gelten solle als für die übrigen Bereiche der Wirtschaft.'

76 Ludwig Erhard and Karl Hohnmann (eds), *Gestern-Heute-Morgen in Gedanken aus fünf Jahrzehnten* (Düsseldorf: Econ, 1961/1988) 696.

77 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 104, 89, 92 (not translated, based on notes).

78 Gerber, n 1 above, 270.

79 Consider the question of similarity of public policy and law in Ivo E. Schwartz, 'Antitrust Legislation and Policy in Germany – A Comparative Study' (1956-1957) 105 *University of Pennsylvania Law Review* 617; Gerber, n 1 above, 269.

that reference is not made to US antitrust law during the GWB debates, there are many references, but these refer to the US experience rather than being directly influenced by the law itself. There are several examples:

> The representative of the BWM first explains that, due to the additions to the laws and case-law in the USA, the American principle that monopolies and the attempt to form monopolies is prohibited has not been followed. It had been shown that for 11 years the Supreme Court in the USA had only given a single ruling according to which monopoly companies had been broken down in order to give it artificial competitors. This method had not been very successful …[80]
> The desire for the involvement of rationalisation associations is countered by American practice. There, an agreement on technical production methods and on the uniform application of types and standards is permissible without notification.[81]

In the context of Retail Price Maintenance (RPM) it was said: 'In this context, reference is made to an investigation by the Federal Trade Commission, which also came to the conclusion that RPM was detrimental to consumers. For this reason, the USA is currently considering appropriate legal measures in the individual states.'[82]

In each example there is a familiarity with US law, US practice and the challenges that it does and does not face, but there is no desire to automatically import US law or legal practice that can be detected. This gives support to the argument that while 'the United States played a significant role in the introduction of a modern competition law to the German legal order … German law took its own form and, once it had been adopted it own direction'.[83] There even appears to be resistance to anything that is copied unnecessarily from the United States. For example, when discussing mergers two MPs[84] state that one particular form of merger should not fall under the law, in part, because: 'In their opinion, this formulation, which was too far-reaching, was based on American company law. They request the deletion of this provision.'[85]

80 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 97. Original German: 'Der Vertreter des BWM erläutert zunächst, daß man auf Grund der Ergahrungen mit den Gesetzen under Rechtsprechung in den USA nicht den amerikanischen Grundsetz, wonach Monopole under der Versuch zur Monopolbildung verboten sei, gefolgt sei. Es habe sich gezeigt, daß das oberste Gericht in den USA während 11 Jahren nur ein Urteil gefällt habe, wonach win Monopolunternehmen aufgegliedert worden sei, um ihm künstliche Konkurrenten zu schaffen. Diese methode sei wenig erfolgreich gewesen …'.

81 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 88. Original German: 'Der Wunsch auf die Einschaltung von Rationalisierungverbänden wird die amerikanische Praxis entgegengehalten. Dort sei eine Verständigung über technische Fertigungsmethoden sowie über die einheitliche Anwendung von Typen und Normen ohne Anmeldung zulässig.'

82 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 92. Original German: 'In diesem Zusammenhang wird auf einer Untersuchung der Federal Trade Commission verwiesen, die ebenfalls zu dem Ergebnis gekommen sei, daß die Preisbindung der zweiten Hand sich zum Nachteil der Verbraucher auswirke. In den USA erwäge man deshalb zur Zeit in den einzelnen Staaten entsprechende gesetzliche Maßnehmen.'

83 Schweitzer, n 42 above, 169.

84 MP Hellwig and MP Höcherl.

85 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 99. Original German: 'Nach ihrer Auffassung sei diese zu weitgehende Formulierung auf das amerikanische Gesellschaftsrecht abgestellt. Sie beantragen die Streichung dieser Vorschrift.'

Likewise, there is a deliberate effort to distinguish 'home grown' German proposals from anything that was being carried out on the initiative of the Allied forces. When considering the importance of merger control the government representative clarifies that: 'The provisions of S18 to 22 are not – as is alleged – an emanation of the unbundling policy of the Allies, but a corresponding measure for the fight against collective monopolies, in order to prevent an evasion of the law through capital-based integration.'[86]

So, if anything, there appears to be resistance to accepting any law or proposal just because it happens to be the way it is done in the US or even because it was the way the Allies operated, the Committee appears in agreement that they want a German law that fits and functions within the German legal system.

Internationally informed

It is fair to say that the knowledge of Ordoliberalism in the English-speaking world is relatively limited. This is true to such an extent that it has become a matter of parody,[87] and it may be fair to say that German competition law is also relatively esoteric, even if that is starting to change, in part, due to the ground-breaking work of the Bundeskartellamt on gatekeeper undertakings. For those looking to understand competition law in the EU and Germany this has practical implications. EU competition law is often viewed through the lens of US antitrust rather than German competition law, the latter of which is eminently more suitable. For example, EU competition law is often spoken of in the language of per se approaches and the rule of reason, even though these concepts do not exist in EU competition law, but they flow more naturally for those more familiar with US antitrust even if it produces contorted and awkward results. Arguably even aspects of the demand for a 'more economic approach' is partly due to the mistaken understanding of the economics underlying the original approach, because that approach is based on Ordoliberalism, rather than a familiar English language school of thought.[88]

The records of the GWB Committee could not contrast more strongly to the apparently inward-looking Anglosphere approach. The Committee records have numerous references to other jurisdictions, their law, their approaches and their effectiveness. When a German Co-operative group is consulted, they consider whether cooperatives should come within the ambit of the GWB. They

86 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 99. Original German: 'Die Vorschriften der S18 bis 22 seien nicht - wie angekommen wird - eine Ausstrahlung der Entflechtungspolitik der Alliierten, sondern eine korrespondierende Maßnahme für die Bekämpfung der Kollektiv-Monopole, um eine Ausweichung in eine Kapitalmäßige Verflechtung zu verhindern.'

87 Speaking facetiously Schweitzer jokes: 'a spectre is haunting Europe – but this time it is not Communism, it is Ordoliberalism. A small circle of like-minded men managed to captivate Europe with this misguided theory. The scriptures are written in German and basically unknown, but the Ten Commandments of Ordoliberalism still hold Community competition law in their grip', Ehlermann and Marquis (eds), n 42 above, 17.

88 See Cole, n 41 above.

make reference to Austrian, Swedish, Norwegian and Danish competition law.[89] When considering RPM, the law of the US and Sweden was also considered.[90] The law of Canada was also considered, again, not so much to copy the law but rather allowing its economic impact to inform the discussion as to the appropriate course to take on RPM:

> MP Kurlbaum referred to the Canadian report on their experience with the ban on RPM, which had come to the conclusion that the feared consequence of the ban on vertical RPM, namely price gouging, had not occurred. According to this report, on the basis of three years' experience following the ban, margins and prices in the individual sectors had fallen considerably, competition in the retail trade had intensified and even those producers who called for the reintroduction of vertical price maintenance conceded that, on the basis of the experience of the three years, noticeably lower margins and prices could be provided for in future.[91]

To summarise then, the GWB 1957 appears enviably well informed of other jurisdictions' experiences.

WERE THE ORDOLIBERALS AHEAD OF THEIR TIME?

One advantage of reading the records of the GWB Committee decades later is that the reader has the benefit of hindsight as to how economic thought has developed in the years since the Committee sat. What is surprising reading some of the discussions is that in some respects the Ordoliberals appeared to be ahead of their time. When considering the Section 1 prohibition, a SPD MP proposes a change in terminology as described below: 'The suggestion of MP Klingelhöfer (SPD) to give the term "competition" a positive content by the word "competition on performance" is only taken up by MP Höcherl *(CDU/CSU)*, who suggests speaking of a restriction of competition "to the detriment of the consumer" instead of the wording "harmful competition" proposed by him earlier.'[92]

89 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 86 (additional material).

90 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 92.

91 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 128. Original German: 'Abg. Kurlbaum nimmt auf den kanadischen Bericht über die Erfahrungen mit dem Verbot der Preisbindung der zweiten Hand Bezug, der zu dem Ergebnis gekommen sei, daß die befürchtete Folge des Verbots der vertikalen Preisbindung, nämlich der Preisschleuderei, nicht eingetreten sei. Nach diesem Bericht seien auf Grund der dreijährigen Erfahrungen nach dem Verbot die Handelsspannen und Preise in den einzelnen Bereichen erheblich gesunken, der Wettbewerb im Einzelhandel habe sich verschärft und selbst diejenigen Erzeuger, die eine Wiedereinführung der vertikalen Preisbindung forderten, räumten ein, daß nach den Erfahrungen der drei Jahre bei künftiger Preisefestsetzung merklich niedrigere Handelsspannen und Preise vorgesehen werden könnten.'

92 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 115. Original German: 'Die Anregung von Abg. Klingelhöfer, dem Begriff "Wettbewerb" durch das Wort "Leistungswettbewerb" einen positiven Inhalt zu geben, wird lediglich von Abg. Höcherl aufgenommenm, der anregt, von einer Beschränkungen des Wettbewerbs "zum Nachteil des Ver-

What is surprising here is that in 1957 competition on the merits is being discussed with harm to consumers as an indirect aim of competition law. Bear in mind, that Robert Bork's now famous/infamous work arguing for 'consumer welfare' to be the sole aim of antitrust was written 21 years later and it was 48 years later that 'consumer welfare' as a standard that protects consumer surplus, rather than total surplus, was set out by Steven Salop.[93] In the discussion that follows the Committee rejects 'harm to consumers' as a basis for the prohibition, not because the Committee was ideologically opposed to the idea of protecting consumers, but rather because the term was too vague, a problem that still haunts the 'consumer welfare' standard even today, including in the US where it has been used as the lodestar of antitrust for decades.[94]

It is also notable that the Ordoliberals were very open minded when it came to vertical integration of dominant firms. When discussing what restrictions should be placed on dominant undertakings, there was much dispute as to whether the cartel authority should intervene when there was abuse or whether there should also be examples of abusive behaviour to guide intervention or whether there should be an exhaustive, if general, description of abusive behaviour. In this context the Chairman and Professor Böhm discuss restrictions on vertical integration, where it suggests (although it is not recorded) some members of the committee recommended that dominant firms should not be permitted to integrate vertically. To this they respond:

> Moreover, the members of the CDU parliamentary group and the DP doubted that a dominant company only penetrates upstream and downstream levels in order to extend its monopoly power on the basis of its position of power. The expansion into multi-level companies was essentially due to tax considerations, on the one hand,

brauchers" anstelle der früher von ihm vorgeschlagenen Formulieren "schädlichen Wettbewerb" zu sprechen.'

93 Salop, n 28 above (note that although this paper was published in 2010, SSRN states that the original paper was written in 2005, see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491302 [https://perma.cc/MZU8-KJQ8].

94 Herbert Hovenkamp, 'Distributive Justice and Antitrust Laws' (1982) 51 *George Washington Law Review* 1; Joseph Brodley, 'The Economic Goals of Antitrust: Efficiency, consumer welfare and technological progress, (1987) 62 *NYU Law Review* 1020; William Kovacic, 'The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy' (1990) 36 *Wayne Law Review* 1413; Barak Orbach, 'The Antitrust Consumer Welfare Paradox' (2011) 7 *Journal of Competition Law & Economics* 133; Barak Orbach, 'How Antitrust Lost Its Goal' (2013) 81 *Fordham Law Review* 2253; Dennis Carlton, 'Does Antitrust need to be modernized' (2007) 21 *Journal Economic Perspectives* 155, 156-159; Joseph Farre and Michael Katz, 'The Economics of Welfare Standards in Antitrust' (2006) 2 *Competition Policy International* 3; Ken Heyer, 'Welfare Standards and Merger Analysis: Why Not the Best?' (2006) 2 *Competition Policy International* 29; Gregory Werden, 'Monopsony and the Shearman Act: Consumer Welfare in a New Light' (2007) 74 *Antitrust Law Journal* 707; Bork, n 28 above, 91; Kenneth Heyer, 'The Contributions of Robert Bork to Antitrust Economics' (2014) 57 *The Journal of Law & Economics* (special issue); Salop, *ibid*, 338; John Kirkwood and Robert Lande, 'The fundamental goal of antitrust: protecting consumers, not increasing efficiency' (2008) 84 *Notre Dame Law Review* 191; Robert Lande, 'Chicago's False Foundation: Wealth Transfers (not just efficiency) should guide antitrust' (1989) 58 *Antitrust Law Journal* 631; Russell Pittmann, 'Consumer surplus as the appropriate standard for Antitrust enforcement' (2007) 3 *Competition Policy International* 205; Robert Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The efficiency interpretation challenged' (1982) 34 *Hastings Law Journal* 65.

> and on the other hand, either to exploit technical progress for its own production or to rationalise the production process. Moreover, the creation of a multi-level enterprise substantially increases the risk of the enterprise, so that it is absurd to assume a priori that the expansion of the enterprise constitutes an abuse of market power.[95]

Given this discussion was taking place in February 1957, it can be argued that this approach to vertical integration of dominant firms was ahead of its time and would not appear out of place when compared with the current non-horizontal merger guidelines, which state: 'vertical and conglomerate mergers provide substantial scope for efficiencies. … The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. … Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold.'[96]

Given the supposed hostility of Ordoliberals towards dominant companies, this shows an open minded approach towards the benefits of vertical integration, even when pursued by dominant firms.

CONCLUSION

This paper analyses the records of the Bundestag Committee tasked with drafting the Gesetz gegen Wettbewerbsbeschänkungen 1957. By reference to contemporaneous archival documentation, it has been shown that the current understanding of Ordoliberalism in English language sources is flawed. One of the most important points is that there is evidence that, at the time the Committee was meeting, Ordoliberals did not believe that monopolies and dominant positions should be prohibited. There is also evidence that rather than favouring form-based approaches, the Ordoliberals focused on the economic outcome of the legal instrument even if they had to rely on more form-based rules on occasion for reasons of administrability. Contrary to what has been commonly understood, they appear to have rejected the 'as-if' standard by 1957. The Ordoliberals within the Committee were interested in protecting competition, but not competitors or ensuring there was a particular number of competitors in the market.

95 *Ausschuß für Wirtschaftspolitik* (21), 2. *Wahlperiode, Kurzprotokoll*, Record number 132. Original German: 'Im Übrigen wird von den Mitgliedern der CDU-Fraktion und der DP bezweifelt, daß ein Marktbeherrschendes Unternehmen nur zur Ausdehnung seiner Monopolmacht auf Grund seiner Machtstellung in vor- und nachgeordnete Stufen eindringe. Die Ausdehnung in mehrstufige Unternehmen erfolge im wesentlichen einmal aus steuerlichen Erwägungen, zum anderen, um entweder für die eingene Produktion die technischen Fortschritte auszunutzen oder um das Produktionsverfahren zu rationalisieren. Im übrigen werde durch die Schaffung des mehrstufigen Betriebs, das Risiko des Unternehmens wesentlich vermehrt, so daß es abwegig sei, a priori anzunehmen, daß durch die Ausweitung des Unternehmenszwecks ein Mißbrauch der Marktmacht gegeben sei.'

96 Guidelines on the assessment of non-horizontal mergers OJ [2008] C265/6, para 13-14.

There are however aspects of the current understanding that are fully supported by the archival evidence: Ordoliberals protect competition through protecting economic freedom, the specifics of which is worthy of further discussion, but out of the ambit of this paper. They also looked at abusive behaviour as behaviour that prevented or departed from competition on the merits. They were very wary of competition law being directed, influenced or misapplied due to lobbying and special interest groups and as a result tried to design the law to minimise the discretion of government ministers. Ultimately however, the GWB was not just an Ordoliberal invention, but it was one that was heavily influenced by Ordoliberalism, arguably more than anything else.

Further it has been seen that the US influence on the content (rather than the existence) of German competition law appears minimal, rather US antitrust experience, like the experience of Canada, Sweden, Norway, Austria and Denmark etc, was used to determine the likely effects of different prohibitions and requirements and determine what would work in practice. Finally, it has been suggested, that in some ways it appears that the Ordoliberals and the Committee itself, were ahead of their time.

In light of these findings, prior arguments that EU competition law was not based on Ordoliberalism appear to be built upon a mistaken understanding of what the school of thought advocated during this period and in this context. This research suggests that Ordoliberalism itself warrants more investigation and greater understanding due to its significant position both in German law and in likelihood the competition law of the EU.