

## Section III

# **The Ordering Functions of Law in the Ordoliberal Tradition**



# *Debunking the Myth of the Ordoliberal Influence on Post-war European Integration*

ANGELA WIGGER

## ABSTRACT

*References to ordoliberal influence in the context of German and European Community/Union economic regulations, and competition rules in particular, are frequently made by scholars and politicians alike. Moreover, ordoliberalism is often conflated with the German postwar social market economy, and hence portrayed as distinctively different from neoliberalism. This chapter argues that the role of ordoliberals and ordoliberal thinking tends to be exaggerated: ordoliberalism should not be mistaken with the notion of social market economy, nor seen as dissimilar from neoliberalism. Moreover, the chapter demonstrates that the role of ordoliberals in the formulation and subsequent enforcement of competition rules both in Germany and at European Community level has been marginal at best.*

## I. INTRODUCTION

CAPITALIST COMPETITION IS often praised as a stimulus for economic growth and for increasing the overall well-being of humanity. The rationale that competition functions as a welfare enhancer for society at large has a longstanding legacy within the trajectory of European integration. Rules on competition were first included in the 1951 Treaty of Paris, establishing the European Coal and Steel Community (ECSC). In the subsequent 1957 Treaty of Rome, which led to the European Economic Community (EEC), the efficacy of competition was highlighted in the preambles. Accordingly, the establishment of ‘a system ensuring that competition in the internal market is not distorted’ (Article 3(f)) received an almost constitutional status. The centrality of capitalist competition and competition rules since the beginning of the European integration project is often linked to the influence of ordoliberals from the Freiburg School in Germany, a group of economists and lawyers who developed a theory of ‘comprehensive’ competition control in the 1930s. Ordoliberals are also often portrayed as the intellectual founding

fathers of the German post-war social order of *Soziale Marktwirtschaft*, the social market economy.

In the absence of English translations, ordoliberalism has long been discussed exclusively by German-speaking scholars. In the literature on Community competition rules, scholars talked about ‘the Germans’ being ‘obsessed with reproducing the German model and the German virtues of competition policy at European level’.<sup>1</sup> References to ordoliberalism underwent a revival with David Gerber’s (1998) seminal book *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, which assigned a central role to ordoliberal doctrines when explaining why European competition provisions eventually looked so distinct from US antitrust rules—despite the marked presence of US legal experts in the immediate aftermath of the Second World War. The alleged influence of ordoliberal thinking on EU competition rules has been reiterated.<sup>2</sup> Or, as Christian Joerges has correctly observed, ordoliberalism is ‘*en vogue*’.<sup>3</sup> Scholars tend to portray ordoliberalism as a moderate and pragmatic school of thought, particularly when compared to the ‘market fundamentalism often associated with neoliberalism today’.<sup>4</sup> Discussions about ordoliberalism being distinct from neoliberalism particularly flared up with the heyday of Third Way politics in the 1990s, evoking the image of a capitalism with a human face where capitalist competition is ‘fair’ and society harmoniously embedded in the economy. It is also in this vein that ordoliberalism has been equated

<sup>1</sup> See Stephen Wilks and Lee McGowan, ‘Competition Policy in the European Union: Creating a Federal Agency?’, in: Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market*, (Oxford: Clarendon Press, 1996).

<sup>2</sup> See, eg, Oliver Budzinski, ‘Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity’, *Volkswirtschaftliche Beiträge Philipps-Universität Marburg*, 14/2003, idem, ‘Monoculture versus Diversity in Competition Economics’, (2008) *Cambridge Journal of Economics*, pp 295–324; Hannah L. Buxbaum, ‘German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement’, (2006) 23 *Berkeley Journal of International Law*, pp 474–95; Nicola Giocoli, ‘Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy’, (2009) 5 *Journal of Competition Law and Economics*, pp 747–86; Doris Hildebrand, ‘The European School in EC Competition Law’, (2002) 25 *World Competition*, pp 3–23; Jens Hölscher and Johannes Stephan, ‘Competition Policy in Central and Eastern Europe in the Light of EU Accession’, (2004) 42 *Journal of Common Market Studies*, pp 321–45; Bruce Lyons, ‘An Economic Assessment of European Commission Merger Control: 1958–2007’, in: Xavier Vives (ed), *Competition Policy in the EU Fifty Years on from the Treaty of Rome*, (Oxford: Oxford University Press, 2009), pp 1–17; Imelda Maher, ‘Re-imagining the Story of European Competition Law’, (2000) 20 *Oxford Journal of Legal Studies*, pp 155–66; Wernhard Möschel, ‘The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy’, (2001) 157 *Journal of Institutional and Theoretical Economics*, pp 3–13; Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81*, (Oxford: Oxford University Press, 2006); Magnus Ryner, ‘Europe’s Ordoliberal Iron Cage: Critical Political Economy from Germany’, (2015) 1 *New Political Economy*, pp 233–257; and Conor C. Talbot, ‘Ordoliberalism and Balancing Competition Goals in the Development of the European Union’, (2016) 61 *Antitrust Bulletin*, pp 264–89.

<sup>3</sup> See Christian Joerges, ‘What is Left of the European Economic Constitution II?’, (2013) Paper presented at the conference entitled *European Crises from Weimar until Today: History—Economy—Politics—Law*, 11–12 December 2013, Copenhagen Business School; also published as ‘What is Left of the European Constitution II? From Pyrrhic Victory to Cannae Defeat’, in: Poul F. Kjaer and Niklas Olsen, *Critical Theories of Crisis in Europe: From Weimar to the Euro*, (Lanham MD: Rowman & Littlefield, 2016), pp 143–160.

<sup>4</sup> See Taylor C. Boas and Jordan Gans-Morse, ‘Neoliberalism: From New Liberal Philosophy to Anti-liberal Slogan’, (2008) 44 *Studies in Comparative International Development*, pp 137–61.

with the elusive German social market economy.<sup>5</sup> However, studies that bluntly categorise EC/EU competition rules as an artefact of ordoliberal influence often fail to substantiate this claim. Moreover, studies that interpret the German social market economy as an ordoliberal contribution to the creation of a myth—a myth that corroborates an idealised vision of the past and that validates a particular historical understanding of the present. The alleged influence of German ordoliberals after the Second World War (WWII) in the field of German and Community-level institution-building tends to be exaggerated, while the social dimension within ordoliberalism has been misconstrued by ordoliberals and scholarly accounts alike. This chapter seeks to debunk these myths and to offer a more nuanced understanding by tracing the role of ordoliberals first in the context of Germany's social market economy and second in the adoption of competition rules both in Germany and at Community level. Certainly, the ideological positions and theories of the Freiburg scholars may have influenced a range of politicians in Germany, as well as German politicians involved in the trajectory of European integration; however, a diligent translation of ordoliberal templates into regulatory arrangements never happened. In particular, the substantive content of EC/EU competition rules reflects, at best, a very much watered-down version of ordoliberal notions. Ordoliberals envisaged a market with relatively small and equally-matched players, and strongly advocated the containment of economic power. Had ordoliberalism been taken seriously in the aftermath of the WWII, there would be no large corporations in Europe today.

The chapter is organised as follows: Section II discusses and historicises the central premises of ordoliberalism and the utopia of ordered capitalist competition. Section III offers a critique of the ordoliberal notion of capitalist competition being a generic wealth enhancer for society at large, and shows that ordoliberals had a rather primitive understanding of social welfare provision. Section IV debunks the myth of ordoliberalism being distinct from neoliberalism, while Section V debunks the myth of ordoliberal influence on German and Community-level competition rules in the post-war era. The conclusions summarise the main findings and elaborate further on the alleged influence of ordoliberals.

## II. THE ORDOLIBERAL UTOPIA OF AN ORDERED CAPITALIST COMPETITION

The group of economists and lawyers that met at the University of Freiburg in Breisgau in the 1920s and early 1930s, most notably, the economist Walter Eucken (1891–1950) and the lawyers Franz Böhm (1895–1977) and Hans Grossman-Dörth (1894–1944), as well as their assistants, Alexander Rüstow (1885–1963) and Wilhelm Röpke (1899–1966), shared the vocation to establish *Ordnung* (order) after years of political turmoil and hyperinflation during the Weimar Republic, and the successive mass unemployment and pauperisation of large parts of society during

<sup>5</sup> See, eg, Razeen Sally, 'Ordoliberalism and the Social Market: Classical Political Economy from Germany', (1996) 1 *New Political Economy*, pp 233–257, and Brigitte Young, 'Introduction: The Hijacking of German Ordoliberalism', (2015) 2 *European Review of International Studies*, pp 7–15.

the Great Depression.<sup>6</sup> In a political climate of creeping protectionism already in the years prior to the Great Depression, ordoliberals were convinced that free-market principles would lead to a just and harmonious socio-economic order and enhance the economic well-being of society in its entirety. Their ideas evolved at a time when unrestrained liberalism was almost universally rejected. Ordoliberals also criticised the *laissez-faire* liberalism of classical and neoclassical economists in the tradition of Adam Smith (1776), who had assigned almost a metaphysical status to the ‘invisible hand’ of the market. In marked contrast, ordoliberals reserved a strong role for the state in creating order. As Franz Böhm wrote, a market free from state intervention may be free, but is not ordered.<sup>7</sup> To establish order, ordoliberals suggested an economic constitution in parallel to a political constitution. Upon this basis, more fundamental economic institutional choices and substantive market-ordering principles had to be derived. Somewhat paradoxically to the notion of a strong state, the role of the state as a stage-manager also had to be contained. The state had to act according to the rule of law without interfering with decisions about supply and demand, producer and consumer choice, price mechanisms and resource allocation. In the view of Walter Eucken, ‘the nature of state activity should influence the form of the economy, but not amount to state planning and control of the economic process’.<sup>8</sup> The state, instead, had to provide basic institutions, such as a monetarist policy conducted by an independent national bank, private property rights, contractual freedom and free trade, and, most importantly, the state had to guarantee a competitive economic environment.

The state had to be omnipresent in securing capitalist competition. Ordoliberals were convinced that competition did not evolve naturally, but had to be carefully cultivated and policed by the state as the *Hüter der Wettbewerbsordnung*, the guardian of the competitive market order. In no domain other than competition was the state to be equipped with more discretionary powers. The state had to ensure the proviso of *vollständiger Wettbewerb*—complete competition, a hypothetical state of affairs in which no corporate entity has the power to coerce the conduct of others.<sup>9</sup> The ordoliberal ideal of complete competition closely resembles the stylised neoclassical imaginary state of perfect competition in which allegedly powerless capitalists cannot achieve further welfare gains, as if capitalist markets can be stationary. The envisaged ordered competitive structure consisted of equally-matched companies that would engage in economic exchange with each other and with consumers upon a voluntary basis, while driving down prices to marginal production costs.<sup>10</sup> Economic concentration in the form of large corporations was deemed a major distortion to the economic order. According to Walter Eucken, all the relevant

<sup>6</sup> See, also, Angela Wigger, ‘Competition for Competitiveness: The Politics of Transformation of the EU Competition Regime’, Dissertation, 2008, Department of Political Science, Vrije Universiteit, Amsterdam.

<sup>7</sup> See Franz Böhm, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, (Stuttgart: W. Kohlhammer, 1937), p 107.

<sup>8</sup> Walter Eucken, *The Unsuccessful Age or the Pains of Economic Progress*, (London: William Hodge and Company, 1951), p 95.

<sup>9</sup> Walter Eucken, *Wozu Nationalökonomie?*, (Leipzig: Felix Meiner Verlag, 1938), Ch III.

<sup>10</sup> Böhm, n 7 above, p 105.

fields of economic law, ranging from patent to corporate law, shareholder rights and liability schemes, tax and trade policy, needed to be subordinated to the maintenance of minimised economic power.<sup>11</sup> To achieve this, Eucken considered the monopoly office as indispensable as the highest court.<sup>12</sup> The monopoly office had to be equipped with the power to prosecute price-fixing and market-allocating cartels, and, importantly, have the right to de-concentrate excessive private economic power and to split up oligopolies or monopolies into smaller components. Importantly, the monopoly office had to be independent, and hence insulated from partisan interests and political opponents, as well as rent-seeking market players trying to get hold of state power and change the rules to their benefit. According to ordoliberal Franz Böhm, 'a government is constantly faced with a considerable temptation to meet the contradictory demands of pressure groups' which, in the pursuit of their narrow objectives, would ignore the common welfare of society.<sup>13</sup>

The ordoliberal aversion to economic concentration was not unique at that time. The Harvard School in the US also propagated a 'polypolistic' market structure in which firms have small market shares and thus little market power.<sup>14</sup> Louis Brandeis, author of *The Curse of Bigness* (1934),<sup>15</sup> and one of the key Harvard School protagonists, was a fervent advocate of diluted market power, promoting 'a society of small, independent, decentralised businesses' and keeping 'economic power dispersed'.<sup>16</sup> Both the Freiburg and the Harvard School developed their theories in response to a long-lasting phase of monopoly capitalism. In the US, capitalists had formed giant trusts or other collusive ties to supersede competitive pressures arising from the lingering overproduction in a time of rapid industrialisation. Similarly, in Germany, cartels and economic concentrations started to emerge in the capital intensive, large-scale heavy industries of steel, iron, and coal during the Second Industrial Revolution, lasting from 1870 to 1913.<sup>17</sup> In 1905, there were 400 cartels in Germany encompassing 12,000 companies, and five years later, the number of cartels had almost doubled.<sup>18</sup> In the 1920s and 1930s, cartel formation in Germany, but also in other parts of Europe, had its heyday, encompassing virtually every sector of industry. As part of the liberal trade regime at that time, many of these

<sup>11</sup> Walter Eucken, *Grundlagen der Nationalökonomie*, 9, (Berlin: Springer Verlag, [1940] 1989), in: V.J. Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism', Freiburg Discussion Papers on Constitutional Economics 2004/11, p 14.

<sup>12</sup> David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, (Oxford: Oxford University Press, 1998), p 254.

<sup>13</sup> Franz Böhm, *Rule of Law in a Market Economy*, (London: Macmillan, 1989), in: Alan T. Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution*, (London: Palgrave Macmillan, 1989), pp 46–67, at 66.

<sup>14</sup> John M. Clark, 'Toward a Concept of Workable Competition', (1940) 30 *The American Economic Review*, pp 241–56, at 241.

<sup>15</sup> Louis Brandeis, *The Curse of Bigness*, (New York, Viking Press, 1934).

<sup>16</sup> Eleanor M. Fox and Robert Pitofsky, 'United States', in: E.M. Graham and J.D. Richardson (eds), *Global Competition Policy*, (Washington D.C.: Institute for International Economics, 1997), p 236.

<sup>17</sup> Marie-Laure Djelic, 'Does Europe Mean Americanization? The Case of Competition', (2002) 6 *Competition and Change*, pp 233–250.

<sup>18</sup> Harm G. Schröter, 'Cartelization and Decartelization in Europe, 1870–1995: Rise and Decline of an Economic Institution', (1996) 25 *The Journal of European Economic History*, pp 129–153.

cartels exhibited a strong international dimension, transgressing national borders. At the outbreak of the Second World War, about 40% of world trade was controlled by cartels. Thus, ordoliberals sought to break with the centralised economic and political power of the Weimar Republic and later the Nazis, in which cartels and monopolies formed an integral part of the totalitarian state apparatus. The Nazi government had secured the industrial élite with the necessary profits through guaranteed procurement contracts and the re-distribution of allocated Jewish industries and the industries of the annexed territories. Industrial élites, in turn, provided the indispensable production of military equipment, financial and political support. The closed market structures of the Third Reich eliminated outside competition and the industrial élite administered cartels in an authoritarian fashion, marginalising the position of the German *Mittelstand*. After the war, Walter Eucken wrote a declaration entitled *Über die Gesamtrichtung der Wirtschaftspolitik* (1946) in which he strongly recommend *Konzernentflechtung*, the immediate dissolution of large corporations, and the overall break-up of the cartels and syndicates.<sup>19</sup>

Ordoliberals did not, however, hold identical views with regard to the stringency of competition and the interventionist role of the state in correcting uncompetitive conduct. While Hans Grossmann-Dörth fiercely condemned the way in which large corporations and cartels created their own legal rules,<sup>20</sup> Wilhelm Röpke saw room for exceptions, particularly if intercompany collaboration served the rationalisation, specialisation or diffusion of technology and research.<sup>21</sup> Nevertheless, ordoliberals shared the conviction that competitive market structures were a cultural masterpiece. As will be argued in the next section, the persuasion that a competitive market is key to economic freedom, and a variety of other socio-economic goals, including societal cohesion, is utterly naïve and flawed.

### III. DEBUNKING THE MYTH OF THE ORDOLIBERAL COMPETITIVE MARKET ORDER AND THE SOCIAL MARKET ECONOMY

The ordoliberal understanding of competition as a welfare enhancing mechanism and as a motor for societal cohesion completely ignores the contradictory logics of capital accumulation. Ordoliberals did not ask *for whom* welfare would increase as a result of competition, and simply assumed *some* general abstract welfare *some-where* in the system—without distinguishing between capital owners and those that have to sell their labour. Rather than facilitating social cohesion, capitalist competition disunites more than it unites. As a social relation that is essentially antagonising, capitalist competition erects hierarchies in wealth and power, and pits not only capital against capital and capital against labour, but also labour against labour. Ordoliberals somewhat blindly associated the freedom to compete with broader

<sup>19</sup> See, also, Walter Eucken and Paul Hensel, *Grundsätze der Wirtschaftspolitik*, (Tübingen: Mohr und Siebeck, 1952), p 334.

<sup>20</sup> See Hans Grossmann-Dörth, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht*, (Tübingen: Walter Eucken Institut/Mohr Siebeck, 1933).

<sup>21</sup> Wilhelm Röpke, *Economics of a Free Society*, (Grove City PA: Libertarian Press, 1994), p 172.



notions of political freedom and individual self-determination. As Marx wrote in *Grundrisse*:

[i]t is not individuals that are set free by free competition; it is, rather, capital which is set free.<sup>22</sup>

Capitalist competition 'is nothing more than the way in which many capitals force the inherent determinants of capital upon one another and upon themselves'.<sup>23</sup> Through the coercive laws of competition, capitalists are compelled to re-invest accumulated surplus capital to create even more surplus. As not to compete means to perish, capitalists that accumulate more quickly tend to drive those out of business that accumulate at a slower rate, while the elimination of laggards inevitably strengthens the 'winners' and re-enforces their advantages, notably those able to set the (price) standards of competition for others. Ordoliberalism, like all forms of neoliberalism, was premised on a supply side oriented view, perceiving labour merely as a cost factor. The fact that capitalist competition deflates labour has been disregarded. As Marx noted,

[t]he battle of competition is fought by cheapening of commodities. The cheapness of commodities depends, all other circumstances remaining the same, on the productiveness of labour [...].<sup>24</sup>

Thus, to remain profitable and stay in production, capitalists constantly have to enhance the productivity of labour and to cheapen labour as a way to undercut the prices of competitors.<sup>25</sup>

Ordoliberalism also reached beyond economic spheres. Based upon the notion of the *Interdependenz der Ordnungen*, the interdependency of orders, ordoliberals also assigned an important role to churches, schools and the media, as additional ordering institutions next to the state; however, the hierarchy of the different orders was unequivocal: all social spheres had to give way to the pre-eminence of the state-ordered competitive market. Ordoliberals believed that the state-controlled order of complete competition would reduce social inequality automatically, and that supplementary social provisions were not necessary. Thus, despite envisaging a strong role for the state, ordoliberals foresaw no re-distributive role for the state, and paid scant attention to realms *other* than the economy. Nonetheless, ordoliberalism is sometimes mistaken with the political programme of *Soziale Marktwirtschaft*, the social market economy of post-war Germany.<sup>26</sup> Even Foucault relegated

<sup>22</sup> Karl Marx, *Grundrisse*, (London: Penguin Classics, [1939] 1973), p 651.

<sup>23</sup> *ibid*, p 650.

<sup>24</sup> Karl Marx, *Capital*, Vol 1, (Moscow: Progress Publishers, [1887] 1965), p 626.

<sup>25</sup> Angela Wigger and Hubert Buch-Hansen, 'Competition, the Global Crisis and Alternatives to Neoliberal Capitalism. A Critical Engagement with Anarchism', (2013) 35 *A Journal of Politics and Culture*, pp 604–626.

<sup>26</sup> Ralf Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy', in: Philip Mirowski and Dieter Plewhe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought*, (Harvard MA: Harvard University Press, 1989); Viktor J. Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism', Freiburg Discussion Papers on Constitutional Economics, 2004/11; N. Goldschmidt, 'Alfred Müller-Armack and Ludwig Erhard: Social Market Liberalism', Freiburg Discussion Papers on Constitutional Economics, 12; Nils Goldschmidt and Herman

German ordoliberalism to the notion of social market economy in his lecture series on neoliberalism.<sup>27</sup> The term ‘social market economy’ was coined by Alfred Müller-Armack (1901–1978), Professor of Economics and Cultural Sociology at the University of Münster, member of the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP), and later State Secretary in the Ministry of Economic Affairs, to denote a strong role of the state as a guarantor of social justice and the human functioning of the market. Müller-Armack’s conception of social market economy came to form part of the political programme of the conservative Christian Democratic Union (CDU), the political party of the middle class. With the support of the Liberals (FDP), the CDU pushed for a free market with a social welfare tint in the hope of generating similar political support to that of the political left (see *Düsseldorfer Leitsätze*, 15 July 1949). A key figure in this was Ludwig Erhard (1897–1977), Minister of Economics from 1949 to 1963 under Chancellor Konrad Adenauer, and Chancellor himself from 1963 to 1966. The title of his book *Wohlstand für Alle* (1957)—‘Prosperity for All’—became his political slogan. Erhard, however, never considered himself an exponent of the Freiburg School or as the executor of their ideas. According to his logic, welfare and economic growth stemmed from large corporations being able to reap the benefits of economies of scale and scope production, and consequently higher wages.<sup>28</sup> ‘Prosperity for All’ thus had to be realised through Fordist accumulation structures.

Ordoliberals were very active in disseminating their ideas to a broader public and had a clear programmatic vision: they signed the *Ordo Manifesto* of 1936; launched the journal *ORDO*, which became the main outlet for ordoliberal ideas; they wrote books, pamphlets, and newspaper articles, particular in the *Frankfurter Allgemeine Zeitung* until the Nazis banned the newspaper in 1943. Despite their public presence, ordoliberal views were far from hegemonic in post-war Germany. Yet, a range of ordoliberals reproduced and supported the discourse of social market economy, which seemed far more suited to appeasing antagonistic forces with strong anti-capitalist convictions and aligning them with the workings of a capitalist market economy than the notion of an ordered market economy. Alexander Rüstow, for example, was the chair of the *Aktionsgemeinschaft Soziale Marktwirtschaft* in Tübingen, the Action Group for Social Market Economy from 1955 to 1961; and Walter Eucken proclaimed, in 1952, that social security and social justice were the

Rauchenschwandtner, ‘The Philosophy of Social Market Economy: Michel Foucault’s Analysis of Ordoliberalism’, Freiburg Discussion Papers on Constitutional Economics 2007/4; Joachim Zweynert, ‘Shared Mental Models, Catch-up Development and Economic Policy-making: The Case of Germany after World War II and its Significance for Contemporary Russia’, Hamburgisches Welt-Wirtschafts-Archiv (HWWA) Discussion Papers 2004, p. 288; Keith Tribe, ‘Ordoliberalism and the Social Market Economy’, (2007) 49 *The Society for the History of Economic Thought*, pp. 155–160; Oliver M. Hartwich, ‘Neoliberalism: The Genesis of a Political Swearword’, CIS Occasional Paper 114, 2009.

<sup>27</sup> Thomas Lemke, ‘The Birth of Bio-bolitics: Michel Foucault’s Lecture at the Collège De France on Neoliberal Governmentality’, (2001) 30 *Economy and Society*, pp. 190–207; 197; Goldschmidt and Rauchenschwandtner, n. 26 above.

<sup>28</sup> Patrizia Commun, ‘Erhards Bekehrung zum Ordoliberalismus: Die grundlegende Bedeutung des wirtschaftspolitischen Diskurses in Umbruchszeiten’, Freiburg Discussion Papers on Constitutional Economics 2004/4.

greatest concerns of the time.<sup>29</sup> However, prior to that, Eucken had considered the semantic linkage of the ‘social’ and ‘market economy’ to be a hybrid compromise that was contradictory and unstable, ‘as if two conductors with two orchestras play in the same concert hall, until one gives way to the other’.<sup>30</sup> This view was also echoed by Friedrich August von Hayek,<sup>31</sup> one of the most famous proponents of neoliberalism, who considered ‘social market economy’ to be a ‘weasel word’—referring to the characteristic skill of the weasel to ‘empty an egg without leaving a visible sign’. He argued, alongside ordoliberals, that *any* form of state-led social intervention would result in an unproductive economy. Although some ordoliberals—in contrast to von Hayek—had accounted for some minimal standards of social welfare schemes to alleviate acute poverty and misfortunes, the fact remains that ordoliberals had painstakingly little to say about social welfare policies.<sup>32</sup> According to Philip Manow,<sup>33</sup> ordoliberals were even among the most vigorous opponents of the re-construction of the Bismarckian welfare state. Hence, ordoliberals, at best, merely adopted the notion of the social market economy as part of a foundational myth.<sup>34</sup>

#### IV. DEBUNKING THE MYTH OF ORDOLIBERALISM BEING DISTINCT FROM NEOLIBERALISM

Walter Eucken, one of the main ordoliberal protagonists, vehemently refused to be called a neoliberal, and claimed that ordoliberalism was equally far away from the free market economy as it was from the planned economy.<sup>35</sup> Likewise, Alexander Rüstow published an article entitled ‘Between capitalism and communism’ in *ORDO* in 1949, where he positioned ordoliberalism in the middle ground between liberalism and socialism. Ordoliberalism, however, is not distinct from neoliberalism. To the contrary, ordoliberals belong to many early architects of neoliberalism.<sup>36</sup> Neoliberalism did not emanate from a single source, but consists of a plural set of ideas that have unfolded over time through polycentric controversies from within its ideological realm as well as from outside critiques.<sup>37</sup> Neoliberalism, rather than being static, evolved and changed over time, both in terms of theory and in its actual manifestation. Neoliberalism has never become manifest in a pure, prototypical form, as it is unattainable in reality. As Jamie Peck poignantly put it,

<sup>29</sup> Gerber, n 12 above, p 37.

<sup>30</sup> Eucken, n 11 above.

<sup>31</sup> Friedrich August von Hayek, *The Fatal Conceit: The Errors of Socialism*, (Chicago IL: University of Chicago Press, 1988), pp 116–17.

<sup>32</sup> See, also, Christian Joerges, ‘Sozialstaatlichkeit in Europe? A Conflict-of-laws Approach to the Law of the EU and the Proceduralization of Constitutionalisation’, (2009) 10 *German Law Journal*, pp 335–360, and idem, n 3 above.

<sup>33</sup> See, also, Philip Manow, Ch 19 in this volume.

<sup>34</sup> See Josef Hien, Ch 16 in this volume, and Sally, n 5 above.

<sup>35</sup> Gerber, n 12 above, p 236.

<sup>36</sup> See, also, Thomas Biebricher, Ch 6 in this volume.

<sup>37</sup> Dieter Plewhe, ‘Introduction’ in: Philip Mirowski and Dieter Plewhe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective*, (Harvard MA: Harvard University Press, 2006), pp 1–43.

the very impossibility of realising a free market repeatedly energises the neoliberal political project,<sup>38</sup> neoliberalism works as a frontal ideological programme that is unfinished and that always collides antagonistically with the existing institutional regulatory landscapes and other ideologies. In the words of Peck,<sup>39</sup> neoliberalism is an 'ideological parasite' that 'both occupies and draws energy from its various host organisms'.

Neoliberalism was never about *laissez-faire*, but always reserved a very active role for the state in the provision of extensive regulatory regimes that ensure the reproduction of capitalism; and yet, at the same time, the state is continuously blamed for distorting the assumed market equilibrium. In ordoliberalism, we find the self-same tension between the role of the state as the creator of order and its role as the guarantor of economic freedom. As the label 'ordo'-liberalism suggests, establishing order enjoyed clear primacy above economic freedom, which is why ordoliberalism is sometimes considered liberal 'only in the very limited sense'.<sup>40</sup> However, as Karl Polanyi reminds us, a self-regulating liberal capitalist economy without a state is a stark utopia.<sup>41</sup> The continued accumulation of capital relies upon coercive state practices to succumb anti-capitalist oppositional social forces. Ordoliberalism is hence as liberal as any other type of liberalism can be. The type of liberalism promoted by ordoliberalism needs, instead, to be seen as a particular form of authoritarian neoliberalism.<sup>42</sup> The economic constitution envisaged by ordoliberals had to delineate the economic realm, and thus limit political interference into how the economy was governed, ultimately rendering a democratic choice on how to organise the economy impossible. The ordoliberal conception of the state was premised on a technocratic and rule-bound executive state that would preserve a de-politicised economy in which the free play of the capitalist market is the main driver and allocator of wealth in society, and in which the economic realm would be shielded from popular opposition.

Ordoliberals were actively involved in neoliberal circles and formed part of the neoliberal think tank, entitled the *Mont Pèlerin Society*, founded by Friedrich von Hayek in 1947, and named after the Swiss mountain of Mont Pèlerin. The *Mont Pèlerin Society* was devoted to the diffusion and development of Hayekian ideas.<sup>43</sup> Even though von Hayek had also worked at the Freiburg University, he and his disciples never supported the ordoliberal idea of strong state institutions that would correct the workings of the market and curb the concentration of economic power.<sup>44</sup> The *Walter Eucken Institute* founded by Ludwig Erhard in 1954 and sponsored

<sup>38</sup> Jamie Peck, 'Remaking *laissez-faire*', (2008) 32 *Progress in Human Geography*, pp 3–43, at 33.

<sup>39</sup> idem, 'Explaining (with) neoliberalism', (2013) 1 *Territory, Politics, Governance*, pp 132–157, at 144.

<sup>40</sup> See Tribe, n 26 above, pp 155–160, at 158.

<sup>41</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, (Boston MA: Beacon Press, [1944] 1992).

<sup>42</sup> Ian Bruff, 'Neoliberalism and Authoritarianism', in: Simon Springer, Kean Birch and Julie MacLeavy (eds), *The Handbook of Neoliberalism*, (Abingdon: Routledge, 2016), pp 107–17; see, also, Niklas Poulantzas, *State, Power, Socialism*, (London: Verso, [1978] 2014).

<sup>43</sup> Plewhe, n 37 above.

<sup>44</sup> Vanberg, n 26 above.

by the *Commerzbank*, nonetheless came to form part of the *Mont Pèlerin Society's* institutional machinery. Ironically, the *Walter Eucken Institute* is foremost devoted to the work of Friedrich August von Hayek, while Eucken's legacy of books and unpublished works has been left to his family, who founded the *Walter-Eucken-Archive*.<sup>45</sup> Rumour has it that there is not a single monograph by or on Walter Eucken in the Institute, while contributions both by von Hayek or on von Hayek's work are countless.<sup>46</sup> The subordinate position of Walter Eucken is also reflected by the fact that, until recently, the Institute's entry hall only displayed a portrait of von Hayek.<sup>47</sup>

#### V. DEBUNKING THE MYTH OF ORDOLIBERAL INFLUENCE ON GERMAN AND EC/EU COMPETITION RULES

As part of the de-nazification by the US and its allies after the war, a range of eminent ordoliberals successfully ascended from their enclave in Freiburg and assumed leadership positions or became consultants, advising on the economic policy-planning of post-war West Germany. For example, Walter Eucken gave a range of advisory opinions to the Allied Forces on the economic transition in 1946 and 1947; and Franz Böhm became a Member of the *Bundestag* during the period 1951–1961. Under Böhm's auspices, the *Wissenschaftlicher Beirat*, the Academic Advisory Council, was established in 1947 and was entrusted with the task of advising the government on the development of economic policies. Notwithstanding this, ordoliberal ideas were neither codified in the competition rules of post-war Germany, nor, as will be shown below, in the emerging European integration project.<sup>48</sup>

The US Occupation Forces commissioned Böhm to advise on the adoption of competition rules in post-war Germany. Under the leadership of Paul Josten and a team from the Ministry of Economic Affairs, the Josten Draft was worked out in 1949, which foresaw a strong monopoly commission equipped with the right to de-concentrate large conglomerates and prosecute anti-competitive horizontal and vertical agreements under criminal law. The proposal was, however, vehemently boycotted by representatives of the German bureaucracy, the US Occupation Forces, and, importantly, by the industrial élite of the Ruhr and the *Bundesverband der Deutschen Industrie* (BDI), the Federal Association of German Industry. The way in which the Josten Draft problematised economic power concentration was deemed far too radical by industry, while the US authorities saw no evil in large corporations. As a result of fierce controversies, the draft ended up being shelved without

<sup>45</sup> *Süddeutsche Zeitung*, 'Das umstrittene Erbe Walter Euckens', *Süddeutsche Zeitung* 1994, p. 34.

<sup>46</sup> Sybille Tönnies, 'Die Wissenschaft in der Familienpflege. Gegen das Misstrauenmachensich die Nachkommen der Vordenker des Ordoliberalismus um das Erbe verdient', *Tagesanzeiger* (TAZ), 12 September 2000, p. 14.

<sup>47</sup> Walter Oswalt, 'Machtfreie Marktwirtschaft', *Tagesanzeiger* (TAZ), 20 June 1995, p. 10.

<sup>48</sup> See Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective*, (New York: Routledge, 2011).

a further parliamentary debate.<sup>49</sup> Ludwig Erhard, then Minister of Economics and, as outlined above, a staunch supporter of stimulating large Fordist corporations, committed an ad hoc commission to come up with competition rules in 1953. More than 20 draft versions followed until the *Gesetz gegen Wettbewerbsbeschränkungen* was finally adopted in 1957.<sup>50</sup> The German industry and its partisan allies, the FDP and the CDU, successfully pushed for a 'less prohibitive approach to cartels' and for abandoning the idea of a merger control law.<sup>51</sup> Thus, the 1957 German competition rules did not include merger provisions, and allowed for generous exemptions in the area of cartels. The view that 'many German firms had not yet reached their optimal size' prevailed, and cartel formation was believed to evoke rationalisation, standardisation and specialisation. In particular, cartels were considered to be the 'functional equivalents' of the large corporations that could be found in the US.<sup>52</sup> The *Bundeskartellamt*, the cartel authority, in every sense of the word, was an authority that could authorise cartels. Contrary to ordoliberal prescriptions, the *Bundeskartellamt* was not independent, either. The Ministry of Economic Affairs appointed the president and was entitled to give general or individual directions and could overturn decisions upon the basis of Germany's general national economic interest. When, in 1973, merger control rules were adopted and the *Monopolkommission*, the Federal Monopoly Commission, was established to monitor economic concentration, it was only given an advisory task. Thus, the ordoliberal political project had failed dramatically in post-war Germany.

When, in 1951, the Treaty of Paris established the European Coal and Steel Community, US political pressure was pivotal for the inclusion of competition rules. The initial Schuman Declaration contained only a vague provision to rule out cartel practices.<sup>53</sup> In the course of the negotiations among the six governments of France, Germany, the Benelux and Italy, Jean Monnet, head of the French delegation, noted that 'substantive differences' existed, and that 'the provisions on cartels and industrial concentrations' affected 'the very substance of the Schuman Plan'.<sup>54</sup> The French negotiators, supported by the Italian delegation, initially envisaged price regulations in which prices would be fixed by national governments in collaboration with producers' associations.<sup>55</sup> However, the prospect of supranational price controls

<sup>49</sup> Norbert Eickhof and Kathrin Isele, 'Eine Politökonomische Analyse des Einflusses wettbewerbspolitischer Leitbilder auf die Europäische Fusionskontrolle', *Volkswirtschaftliche Diskussionsbeiträge*, Potsdam: Universität Potsdam 2005, p. 93.

<sup>50</sup> Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004*, (Cambridge: Cambridge University Press, 2006), p. 264.

<sup>51</sup> Sebastian Eyre and Martin Lodge, 'National Tunes and a European Melody? Competition Law Reform in the UK and Germany', (2000) 7 *Journal of European Public Policy*, pp. 63–79, at 66.

<sup>52</sup> Marie-Laure Djelic, *Exporting the American Model: The Postwar Transformation of European Business*, (Oxford: Oxford University Press, 1998), p. 232; Gerber note 12 above, p. 302.

<sup>53</sup> Robert Schuman, The Schuman Declaration of 9 May 1950, available at: [https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en).

<sup>54</sup> Jean Monnet, Memorandum to Robert Schuman. Paris, 30 November 1950. Available at: [www.cvce.eu/en/obj/memorandum\\_from\\_jean\\_monnet\\_to\\_robert\\_schuman\\_16\\_september\\_1950-en-259c61d1-8fee-488a-bf0d-6e0958e0d222.html](http://www.cvce.eu/en/obj/memorandum_from_jean_monnet_to_robert_schuman_16_september_1950-en-259c61d1-8fee-488a-bf0d-6e0958e0d222.html).

<sup>55</sup> Tobias Witschke, 'The First Antitrust Law in Europe—Success or Failure? Origins and Application of the Merger Control Policy of the High Authority of the European Coal and Steel Community 1950–1963', Working Paper, European University Institute, Florence, 2001, p. 7.



within the framework of the ECSC raised immediate concerns in the US. When US Secretary of State Dean Acheson was confronted with the draft treaty on 7 May 1950, he called it 'a clever cover for a gigantic European cartel for coal and steel producers'.<sup>56</sup> The US government subsequently threatened that, without the inclusion of competition rules, it could not support 'in good faith that the general idea is a single market characterised by competition'.<sup>57</sup> Against the backdrop of the long-standing cartel tradition in Europe, and particularly in Germany as one of the most cartelised countries, the inclusion of competition rules was regarded as a pivotal first step in the establishment for the same US Fordist-type production and consumer structures in Europe. As US industries were eager to expand across the Atlantic and to gain a foothold in the newly emerging common market, the prospect of high prices for steel worried US industries, particularly in a context of rapidly rising demand for raw materials during the Korean War.<sup>58</sup> Although US officials did not directly participate in the ECSC Treaty negotiations, a range of leading US industrial capitalists and US decision-makers kept themselves briefed about the proceedings during the drafting phase. To counteract the influence of cartel-minded Europe, the US government transferred US High Commissioner for Germany, John McCloy, and two US antitrust experts, Robert Bowie and George Ball, to assist the drafting process in Paris. The overall idea was to (re-) create an open world economy along capitalist logics. The Marshall Plan provided the US government with the necessary leverage in the promotion of competition rules and in buttressing capitalist logics in post-war Europe.<sup>59</sup>

The US government found a loyal ally in Jean Monnet and his staff, who assured it that the Schuman Plan would be the exact opposite of a cartel.<sup>60</sup> The French delegation eventually proposed to prohibit cartels on a per se basis, declaring all cartels categorically illegal, similar to the antitrust provisions of the US Sherman Act.<sup>61</sup> The German representatives, including Ludwig Erhard and Walter Hallstein, the principal negotiator on behalf of Germany, did not consider every cartel to be evil, and also contested the inclusion of supranational merger control rules. The German delegation, which was surrounded by a group of experienced and cartel-minded industrialists, which included Max Boden, CEO of AEG Electrics, as well as Max C. Müller, CEO of the *Vereinigte Stahlwerke*, all feared that the suggested competition rules would lead to a downsizing of the German coal and steel industry.<sup>62</sup> They suggested competition rules based upon the abuse principle, instead—a far more lenient approach according to which cartel practices and the like would be legal in

<sup>56</sup> See Dean Acheson, *Present at the Creation: My Years in the State Department*, 1987 edn, (New York: Norton, 1990), pp 383–4.

<sup>57</sup> Witschke, n 55 above, p 17.

<sup>58</sup> Viktor R. Berghahn, *The Americanisation of West German Industry 1945–1973*, (New York, Berg, 1986), p 136.

<sup>59</sup> Wigger, n 6 above.

<sup>60</sup> Buxbaum, n 2 above, p 4.

<sup>61</sup> Thomas Hoeren, 'Europäisches Kartellrecht zwischen Verbots- und Mißbrauchsprinzip—Überlegungen zur Entstehungsgeschichte des Art. 85 EGV', in: Ulrich Hübner and Werner F. Ebke (eds), *Festschrift für Bernhard Großfeld zum 65. Geburtstag*, (Heidelberg: Recht und Wirtschaft GmbH, 1999), p 414; Jean Monnet, *Memoirs*, (New York: Doubleday & Company, Inc., 1978).

<sup>62</sup> Hoeren, n 61 above, pp 412–3.

principle, and only be prosecuted in cases of abuse.<sup>63</sup> The controversies between the French and Germans about the substantive nature of competition rules threatened the ratification of the entire ECSC Treaty.<sup>64</sup> The Germans eventually lost the battle. The substantive differences with the US antitrust rules turned out to be negligible—with exception that the Treaty's provisions were rewritten 'in a European idiom'.<sup>65</sup>

While the Treaty of Rome, which established the European Economic Community (EEC), was being negotiated, the direct US influence in Western Europe had decreased significantly; but the idea of competition rules was here to stay. The opposition of industry had waned considerably as the ECSC provisions on competition had been hardly enforced. Moreover, the German Adenauer government saw clear benefits in free competition and, hence, in free market access in the common market, and thus emerged as a strong proponent of competition rules. After all, the German export-oriented industry in manufactured goods depended on free market access. Walter Hallstein was again the negotiator on behalf of the German government, and subsequently became the first President of the European Commission, which he headed for nine years. His friend Hans von der Gröben, a lawyer by origin, who became the first Competition Commissioner, played a pivotal role in the detailed formulation of competition rules. He was later also called the 'Jean Monnet of Germany', as he drafted much of the Spaak Report.<sup>66</sup> The concept of competition came to occupy a central position in the EEC Treaty, which exposed almost all economic sectors to the need to compete. The rationale of supranational competition rules was to break down both public and private market barriers, in addition to the abolition of trade-related quotas and tariffs among the six Member States, and to re-configure several national markets into one giant single market.

Whereas the ECSC Treaty was a *traité-loi*, specifying, to a large extent, the regulatory substance, the EC Treaty was a *traité-cadre*, which merely set out a broader legal framework that needed secondary legislation or jurisprudence from the Court in order to have any effect.<sup>67</sup> This meant that EEC competition provisions were formulated in vague and ambiguous terms, including notions such as violating 'Community-interest' or 'if trade between the Member States is affected', all concepts that left ample room for interpretation. Moreover, merger control rules were not included. Whereas Article 66 of the ECSC Treaty on mergers and the prohibition of restrictive business practices was the longest article in the entire Treaty, in the EEC Treaty, mergers were not even mentioned.<sup>68</sup> Instead, Article 82 had been included,

<sup>63</sup> Berghahn, n 58 above, pp 120–1.

<sup>64</sup> *ibid.*, p 120.

<sup>65</sup> Gerber, n 12 above, pp 338–9.

<sup>66</sup> Hans von der Gröben, 'Competition Policy as a Part of Economic Policy in the Common Market'. Address to the European Parliament, Strasbourg, 16 June 1965, (Brussels: Historical Archives of the European Commission); Michael Gehler and Hans von der Gröben, 'Europäische Integration aus historischer Erfahrung. Ein Zeitzeugen spräche mit Michael Gehler/Hans von der Gröben', Zentrum für Europäische Integrations forschung Discussion Paper, Bonn: RheinischeFriedrich-Wilhelms-Universität, 2002, p 8.

<sup>67</sup> See Simon Bulmer, 'Institutions and Policy Change in the European Union: The Case of Merger Control', (1994) 72 *Public Administration*, pp 423–44, at 427.

<sup>68</sup> See Buch-Hansen and Wigger, n 48 above, p 53.



prohibiting ‘any abuse by one or more enterprises of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States’. Article 82 is often referred to as an anti-monopoly law with strong ordoliberal tenets.<sup>69</sup> This, however, is misleading, as holding a dominant market position was not prohibited—only the abuse of such a position. There were, hence, no legal pre-requisites that allowed the Commission to fight monopolies or oligopolies. Combined with the absence of merger-control rules in the Treaty of Rome, this implies that the ordoliberal notion of a competition authority entrusted with the right to de-concentrated the economy also did not materialise at EC level.

The actual enforcement provisions were spelled out in Regulation 17/62, which provided the procedural framework for the application of Articles 81 and 82 (TEU), and the procedural and interpretative framework for their application for the next 40 years (see Council Regulation No. 17/1962). Regulation 17 entrusted the European Commission with the combined role of investigator, prosecutor, judge, jury and executioner in antitrust cases, which allowed it—in addition to a generous exemption regime—to make use of wide-ranging discretionary executive powers both in the interpretation and in the enforcement of the competition rules. The Commission could access all the relevant documentation of the company under investigation, search this documentation unannounced (dawn raids), interrogate employees, and sanction anti-competitive conduct with up to 10% of the company’s annual turnover. Moreover, it allowed the Commission to intervene in the competition control of the Member States, both with regard to private and public companies, and, most notably, Regulation 17 allowed the Commission to formulate its policy without the Council and the European Parliament having a say. To recapitulate, although the Commission may, indeed, have reflected the ordoliberal ideal of an independent competition authority, with regard to the idea of curbing economic concentration and the degree of discretionary powers, ordoliberal logics materialised, at best, in a much watered-down fashion.

The actual enforcement of Community competition rules in the post-war decades deviated considerably from the ordoliberal ideal. Until the late 1970s, the enforcement of competition rules reflected the broader post-war hegemonic order of state-organised capitalism known as ‘embedded liberalism’<sup>70</sup>—a socio-economic order characterised by a broad-based commitment to an open and competitive world economy, accommodated domestically by state-organised capitalism in the form of active state interventions and industrial policies, mixed economies and Keynesian-type domestic welfare states. The increasing openness of national markets to foreign trade was sustained through the elimination of trade barriers by the General Agreement of Trade and Tariffs (GATT) in the late 1950s and early 1960s, and the stepwise liberalisation of capital controls supported by the Bretton Woods system of fixed exchange rates. Competition rule enforcement, alongside industrial policies, formed part of the ‘embedding’ domestic institutional nexus, and exemplified strong

<sup>69</sup> See Maher, n 2 above, p 164.

<sup>70</sup> John G. Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’, (1982) 36 *International Organization*, pp 379–415.

neo-mercantilist and protectionist traits, allowing for significant distortions of competition, whenever justified for general reasons of industrial and social policy.<sup>71</sup> The protectionist stance at Community-level was rooted in the exposure of European industries to US competitive challenges, as US corporations enjoyed a structural advantage over European corporations. The large homogenous home market, supported by a single currency, one language and a rather business-friendly competition unit of regulation, allowed US companies to reap the benefits of economies of scale and scope production, and expand through mergers and compete in global markets. In 1960s, 27 of the 30 largest industrial companies worldwide originated from the US,<sup>72</sup> while the largest US companies located more than half of their total assets abroad and generated most of their profits across the Atlantic.<sup>73</sup> Compared to their US counterparts, European companies were rather small in size, and the European marketplace continued to be highly fragmented along national borders. The dominance and technological superiority of US industrial capital in the market for high-value goods was captured in the bestselling and widely-discussed book, *Le défi américain*, the American Challenge, by the French journalist Jean-Jacques Servan-Schreiber,<sup>74</sup> warning that Europe was about to 'become an annex of the United States'.

The protectionist orientation strengthened throughout the great stagflation crisis of the 1970s, which brought the long wave of the post-war economic growth of Fordism to a halt. Markets in the advanced economies were saturated, and production grew faster than demand, leading to overcapacity in manufacturing sectors, and eventually a major profit squeeze and sharp decreases in output and exports. To alleviate declining aggregate demand, the Commission permitted so-called crisis or emergency cartels in a range of industrial sectors, making use of exemption rulings, while national governments adopted other protectionist measures to cushion their industries from global competition. Once inflation-based Keynesian interventions proved unsuccessful, policy-makers in the Western industrialised world adopted neoliberal policies in the hope of restoring corporate profits. However, with regard to the post-war era of embedded liberalism, ordoliberal logics were neither reflected in the substantive Community competition rules, nor in their enforcement.

## VI. CONCLUSION

The myth that both German and Community-level competition rules were inspired by ordoliberalism is quite entrenched among scholars and competition practitioners alike. As a matter of fact, a range of German officials nurtured in the German

<sup>71</sup> Wigger, n 6 above, and Buch-Hansen and Wigger, n 48 above.

<sup>72</sup> Walter Adams and James W. Brock, 'Mergers and Economic Performance: The Experience Abroad', (1990) 5 *Review of Industrial Organization*, pp 175–88, at 175.

<sup>73</sup> Ngaire Woods, 'International Political Economy in an Age of Globalization', in: John Baylis and Steve Smith (eds), *The Globalization of World Politics: An Introduction to International Relations*, (Oxford: Oxford University Press, 2001), p 284.

<sup>74</sup> Jean-Jacques Servan-Schreiber, *Le défi américain*, (Paris: Livre de Poche, 1968), p 139.

competition law occupied strategic positions in the Commission's DG Competition until far into the 1980s. In particular, the Commission's Cabinets formed enclaves for Germans, as Commissioners in charge could hire and fire advisors and experts according to their own discretion. For example, Ernst Albrecht, was *Chef de Cabinet* under Hans von der Gröben from 1958–1967, and ascended to become Director General from 1967 to 1969. Manfred Caspari, Director General, was in office from 1980 to 1990, and his successors, Claus-Dieter Ehlermann, and Alexander Schaub, held this post from 1990 to 1995, and 1995 to 2002, respectively. Assistant Director General Götz Drauz was appointed in 1999 and remained in office until 2009. However, the vast presence of Germans should not be equalled with the presence of ordoliberals. Notwithstanding this, references to ordoliberalism have been made not only by scholars but also by practitioners over and over again. For example, Competition Commissioner Karel van Miert (1989–1994) once stated 'to have developed an interest in the writings of Ludwig Erhard very early on both privately and professionally'.<sup>75</sup> In 1998, when he was awarded the Ludwig Erhard Prize, he acknowledged that 'ordoliberalism had lost nothing of its relevance' and that 'again and again German politicians and competition specialists have taken a leading role in the shaping and practical development of the European competition rules'.<sup>76</sup> Such references should not, however, be taken at face value. Arguably, there is always a discrepancy between an ideology and its actual implementation, as ideologies or theories are, by definition, incomplete and riddled with contradictions. Moreover, the foundational texts of ordoliberals were far from monolithic or static, while ordoliberal thinking did not survive the course of history unchanged. One could thus argue that ordoliberal self-representations cannot be taken as a yardstick to assess regulatory content and enforcement practices. However, the ordoliberal utopia of a de-concentrated economy was a central pre-requisite of ordoliberalism as a variant of neoliberalism. Despite the presence of ordoliberal debates in the 1940s and 1950s, a de-concentrated economy with equally matched players did not generate the political support required, and hence, never materialised. In fact, to the contrary. Both in Germany and at Community-level, there has been at the outset a permissive approach towards economic concentration to sustain Fordist accumulation structures by means of large corporations that could exploit economies of scale and scope production. Thus, ordoliberalism as a form of neoliberalism was rather insignificant at the time. With the neoliberal turn in the mid-1980s little changed. Since the adoption of the supranational merger rules in 1989, the vast majority of notified mergers were approved.<sup>77</sup> Thus, to date, there is nothing distinctively ordoliberal either in the substantive outlook of competition rules or in their enforcement.

<sup>75</sup> Karel van Miert, The Future of European competition policy. Paper for Ludwig Erhard Prize Award, Bonn, Germany, 17 September 1998, available at: [http://ec.europa.eu/competition/speeches/text/sp1998\\_042\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1998_042_en.html), pp 1–2.

<sup>76</sup> *ibid.*, p 3.

<sup>77</sup> Angela Wigger and Hubert Buch-Hansen, 'Explaining (Missing) Regulatory Paradigm Shifts: EU Competition Regulation in Times of Economic Crisis', (2014) 19 *New Political Economy*, pp 113–37.

