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Peter Behrens*

Abstract

This paper explores the origin and development of the "consumer choice" paradigm as the core concept of German ordoliberal thought which has had a strong impact on EU competition policy and law. Outside Germany, ordoliberal thought is often identified exclusively with the learning of the original "Freiburg School" which represents the formative period of German ordoliberalism after the Second World War. Major developments since then have remained largely unrecognized. This paper sets out the important insights that have markedly changed some of the basic concepts of the "Freiburg School" so as to bring ordoliberalism into line with modern economic learning. The core tenets, however, remain: the crucial role attributed to consumers' choice as the driving force behind producers' rivalry, the dependence of consumers' freedom of choice upon an open market structure, efficiency (consumer welfare) as the result of competition rather than of an individual entrepreneurial market strategy. The core elements of this approach are traced back to classical liberalism and it is shown how they have been enriched and developed beyond the "Freiburg School" toward the contemporary version of ordoliberalism. This approach is still reflected and should continue to be reflected by the jurisprudence of the ECJ, because it avoids the kind of consumer welfare (or consumer harm) fallacy by which the more economic approach risks to be caught.

Key words: EU competition law - antitrust law - ordoliberalism - neoliberalism - *laisser-faire* liberalism - Freiburg School - Chicago School - consumer choice paradigm - consumer welfare paradigm - more economic approach - efficiency - competition as rivalry - competition as a dynamic process of discovery - economic freedom - economic order - economic system - economic planning - centrally directed economy - decentralized exchange economy - social market economy - control of market power - perfect competition - workable competition - system of undistorted competition - public goods - institutional economics - behavioural economics - post-Chicago-economics

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I. INTRODUCTION

From a European perspective, the fact that some American authors such as *Neil Averitt* and *Robert Lande*[1] are suggesting the replacement of the "price and efficiency" paradigms, which still prevail in US antitrust law, for a "consumer choice" approach attracts great attention. This comes at a time when the Commission of the EU is advocating a "more economic approach" based on a "consumer welfare" paradigm which would focus on just that: a price and efficiency analysis. Are US antitrust law and EU competition law moving again in opposite directions, each of them re-defining their goals in terms of the other's outdated paradigms? Not quite. Whether the "consumer choice" approach will push US Antitrust law into a new direction remains to be seen. The "more economic approach" at least has had a less than revolutionary effect on EU competition law although its impact can be felt in the EU Commission's enforcement activities. This is partly due to the fact that the EU Commission's own policy statements indicate a much broader (and less unambiguous) approach than its US counterpart. In one of its memoranda the Commission expressly says:

"Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings."[2]

Here, "efficiency" and "consumer welfare" are defined in much more comprehensive terms than just price and output. The EU-Commission's approach still leaves room for the protection of "effective competition" as such, which – if properly defined – leaves room for "consumer choice" considerations. What is even more important is the fact that the European Court of Justice (ECJ) has expressly refused to read a "consumer harm" standard into EU competition

[1] See AVERITT/LANDE (2007 p. 175; for references to earlier publications by the authors see pp. 180-81, n. 12).
[2] Commission *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings* OJ 2009/C 45/02, para. 22.

rules.[3] The court rather sticks to its longstanding jurisprudence in which it has always emphasized the relevance of the market structure for the effectiveness of competition and of "consumer choice" as a driving force behind producers' rivalry.[4]

The following contribution attempts to demonstrate that the "choice" paradigm has always been and still is deeply rooted in the legal and economic theories of competition and markets represented by the German school of "ordoliberalism" whose impact can still be felt in contemporary EU competition policy and law. A preliminary, not merely terminological remark is necessary, however. It has been argued that the "economic liberty" paradigm (of which "consumers' freedom of choice" is just a reflection) is not part of "ordoliberal", but rather of "neoliberal" thought which is said to have never had any influence on EU competition policy and law at all.[5] A distinction of "ordoliberalism" and "neoliberalism" along these lines is, however, highly artificial and unwarranted in substance.[6] If there is a common denominator of classical "*laisser-faire* liberalism", "neoliberalism" and "ordoliberalism", it relates to the central role of economic liberty, including producers' freedom to compete as well as consumers' freedom of choice. As will be demonstrated, the differences are differences of emphasis with regard to what it takes to institutionalize a competitive market based on individual freedom, in particular on the "consumer choice" paradigm. Classical "*laisser-faire* liberalism" as well as "neoliberalism" and "ordoliberalism" concur as far as the state's duty to provide the institutional underpinnings of a market economy are concerned which consist of the core elements of a system of private law such as the protection of private property, the principle of *pacta sunt servanda*, the principle of responsibility for damages caused to third parties etc. Different from some misconceived views, "the market" is, therefore, the opposite of an unregulated chaos where the law of the powerful prevails instead of the power of the law. So even "*laisser-faire*" does not mean "everything goes". Whereas classical "laisser-faire" liberalism used to be mainly concerned about state intervention in the market, "neoliberalism" and in particular "ordoliberalism" also emphasize the enforcement of the "rules of the game" against restraints of competition established not by the

[3] ECJ joined cases C-501/06 et al. *GlaxoSmithKline v. Commission* ECR 2009, I-9291, 9374, para. 63.
[4] With regard to potentially anti-competitive business strategies of dominant undertakings, see ECJ Case C-52/09 *TeliaSonera Sverige* [2011] ECR, I-527, para. 28.
[5] MAIER- RIGAUD (2012 pp. 132, 139).
[6] See for a rebuttal of the argument SCHWEITZER (2012 p. 169).

state but by the market agents themselves. Their freedom cannot include the freedom to restrict the use of their freedom. It is not without justification therefore that the terms "neoliberalism" and "ordoliberalism" are sometimes used interchangeably[7] despite certain differences that do not matter in the present context. However, since in contemporary political debates the term "neoliberalism" is polemically used in a quite distorted way to designate "free markets without rules" ("untamed turbo-capitalism"),[8] it is practically associated with a "libertarian" approach which some US American authors propagate[9] but which has almost no followers in Europe. Here, even "*laisser-faire* liberalism" used to recognize the important role of the law for the constitution of markets. And that is even more true for "neoliberalism" and "ordoliberalism". Be that as it may, in the present context the term "ordoliberalism" is used for a school of thought which emphasizes the crucial role of private law and competition rules for the proper functioning of competitive markets.

In order to analyze the "consumer choice" paradigm in German ordoliberalism and its impact upon EU competition law, I shall begin with pointing to the most important historical roots of the "consumer choice" paradigm in classical liberalism, especially in the work of *Adam Smith* and later of the Austrian liberal school of economics (II.). I shall then characterize in some detail the formative period of ordoliberalism in Germany represented by the early "Freiburg School" (III.) Since ordoliberal thought never became petrified within the limits of the original "Freiburg School", but rather has undergone major changes since then, I shall explore the development towards its contemporary version(s), a development that is often left unrecognized outside Germany (IV.). Its impact upon the competition policy and law of the EU will briefly be recalled (V.) followed by a discussion of the interrelationship between the "consumer choice" paradigm and the "consumer welfare (efficiency)" concept (VI.). I shall close by some conclusions regarding the adequacy of an economic theory that is designed for competition law purposes (VII.).

[7] See, e.g., WILKE (2003), which is in substance nothing but an introduction to ordoliberalism.
[8] For a critical assessment of the "neoliberal agenda of unrestrained markets" see, e.g., CROUCH (2013).
[9] See, e.g., ARMENTANO (1982).

II. HISTORICAL ROOTS OF THE "CHOICE" PARADIGM

1. THE CONCEPT OF INDIVIDUAL ECONOMIC FREEDOM (*Adam Smith*)

The history of competition policy can be read as the quest for a working definition of competition as a prerequisite for the definition of restraints of competition which competition laws should prohibit in order to protect competition. The concept of "competition" by far antedates any properly defined concept of (private) restraints of competition and their prohibition by "competition law". *Adam Smith*, by providing us in his "Inquiry into the Wealth of Nations"[10] with a scientific price theory that explained the notion of value in a market system based on exchange transactions, was the first to conceptualize competition. He argued that whenever the "market price" deviates from the "natural price" (which in modern terminology is the equilibrium price that equals marginal cost), the price mechanism automatically tends to bring the "market price" into line with the "natural price". This self-regulating mechanism is, according to *Smith*, driven by self-interest on the part of producers as well as consumers. It would work properly only, if each person was left free to follow its own economic incentives and this would lead quite naturally to "*competition"* among sellers and buyers. In order to allow competition to work, the government should refrain from interfering with private economic activities except so far as is necessary to prevent force and fraud, to ensure national defence and domestic peace (police) and – most importantly – to administer justice (we shall come back to this later). This was the birth of the *laisser-faire* approach to competition which characterized classical liberalism. In *Smith's* own words:

> "All [governmental] systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men."[11]

The *laisser-faire* concept of competition therefore started from the proposition that competition is the natural consequence which results from market participants making use of their individual

[10] SMITH (1776).
[11] *Id*. Book IV, Ch. IX, p. 180.

economic freedom unrestrained by the government but protected by the rules of private law. Thus, the core element of economic liberalism was from the very beginning based on a behavioural notion of individual economic freedom, i.e. the freedom to act and to interact with others, hence to compete. *Adam Smith* referred to the overall system of such action and interaction as a "*system of natural liberty*" which required and allowed individuals to act freely with regard to exchange transactions on the market. According to *Smith*, competitive markets would lead self-interested individuals by an "*invisible hand*" to promote the general welfare which was no part of their intention though. In modern terms: competitive markets lead to the enhancement of consumers' welfare, i.e. allocative efficiency. He expressly stated that

"… by directing [the] industry in such a manner as its produce may be of the greatest value, he [i.e. the individual] intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was not part of his intention."[12]

"Individual" clearly refers to individuals in their capacity as consumers, whereas "industry" refers to producers. Therefore, what Smith is saying here, is that consumers' choices among producers' produce are the driving force of competition which leads to the promotion of the general welfare. Hence, *Adam Smith* conceived of competition as rivalry among producers (suppliers) who in their production and supply decisions are directed by consumers' choices. This is the historical birth of the "consumer choice" paradigm!

Smith was of course well aware of producers' tendency to restrict competition among themselves at the expense of consumers. He knew that, whenever people of the same trade meet together, "the conversation ends in a conspiracy against the public or in some contrivance to raise prices".[13] But he also considered it impossible to prevent this from happening. He was of the opinion that the law could not hinder "people of the same trade" (i.e. competitors) from assembling and fixing prices (i.e. conspiring in restraint of trade). *Adam Smith* considered it not necessary to comprehensively analyze the nature of restraints of competition in terms of producers' restrictions of market participants' freedom to act and to interact. His concern was

[12] *Id*. Book IV, Ch. II, p. 400.
[13] *Id*. Book I, Ch. X, Part II, p. 117.

exclusively targeted at governmental interventions.[14] His remedy against anticompetitive practices of producers was in essence the same remedy that he recommended against mercantilist interventions and regulations by the government, namely: free trade.

2. ECONOMC ACTION AS CHOICE (*Ludwig von Mises*)

It took a while until *Adam Smith's* "system of natural liberty" and his notion of competition based on the exercise of market participants' freedom of action was refined and transformed into a theory of human action as a choice making activity. When *Ludwig von Mises*, who was one of the most prominent representatives of the Austrian subjectivist school of economics, published his seminal treatise on economics,[15] he used as its main title "Human Action" thereby indicating that economics must be understood as part of a more comprehensive science devoted to the analysis of human behaviour. (Others would later characterize economics as a social science and would initiate the modern law and economics movement which applies economic analysis to all kinds of human behaviour).[16] In the present context, the most interesting aspect is the fact that *von Mises* characterized all human action in terms of choice. (Others would later develop logical theories of economic choice or analyze the interrelationship between cost and choice).[17] In *von Mises'* own words:

"Until the late nineteenth century political economy remained a science of the 'economic' aspects of human action, a theory of wealth and selfishness. It dealt with human action only to the extent that it is actuated by what was - very unsatisfactorily - described as the profit motive, and it asserted that there is in addition other human action whose treatment is the task of other disciplines. The transformation of thought which the classical economists had initiated was brought to its consummation only by modern subjectivist economics, which converted the theory of market prices into a general theory of human choice.

For a long time men failed to realize that the transition from the classical theory of value to the subjective theory of value was much more than the substitution of a more satisfactory theory of market exchange for a less satisfactory one. The general theory of choice and preference goes far beyond the horizon which

[14] Interestingly enough, however, *Adam Smith*, *ibid.* p. 129, alluded in a side remark to wage fixing cartels: "When masters combine together in order to reduce the wages of their workmen, they commonly enter into a private bond or agreement not to give more than a certain wage under a certain penalty. Where the workmen to enter into a contrary combination of the same kind, not to accept of a certain wage under a certain penalty, the law would punish them very severely; and if dealt impartially, it would treat the masters in the same manner."
[15] MISES (1996).
[16] See, e.g., FREY (1990).
[17] See for an illuminating analysis BUCHANAN (1969).

encompassed the scope of economic problems as circumscribed by the economists from Cantillon, Hume, and Adam Smith down to John Stuart Mill. It is much more than merely a theory of the 'economic side' of human endeavors and of man's striving for commodities and an improvement in his material well-being. It is the science of every kind of human action. Choosing determines all human decisions. In making his choice man chooses not only between various material things and services. All human values are offered for option. All ends and all means, both material and ideal issues, the sublime and the base, the noble and the ignoble, are ranged in a single row and subjected to a decision which picks out one thing and sets aside another. Nothing that men aim at or want to avoid remains outside of this arrangement into a unique scale of gradation and preference. The modern theory of value widens the scientific horizon and enlarges the field of economic studies. Out of the political economy of the classical school emerges the general theory of human action, *praxeology*."[18]

Von Mises' contribution to our theme was the profound insight that what goes on in any economic system, including market economies, is the result of countless conscious, purposive actions, choices, and preferences of individuals, each of whom tries as best as he or she can under the circumstances to attain various wants and ends and to avoid undesired consequences. Markets are characterized as follows:

"The direction of all economic affairs is in the market society a task of the entrepreneurs. Theirs is the control of production. They are at the helm and steer the ship. A superficial observer would believe that they are supreme. But they are not. They are bound to obey unconditionally the captain's orders. *The captain is the consumer*. Neither the entrepreneurs nor the farmers nor the capitalists determine what has to be produced. The consumers do that. If a businessman does not strictly obey the orders of the public as they are conveyed to him by the structure of market prices, he suffers losses, he goes bankrupt, and is thus removed from his eminent position at the helm. Other men who did better in satisfying the demand of the consumers replace him."[19]

So, here we are: it is consumers' choice which is regarded as the driving force of a competitive market economy. This concept is then combined with the idea of individual freedom:

"Liberty and freedom are the conditions of man within a contractual society. Social cooperation under a system of private ownership of the factors of production means that within the range of the market the individual is not bound to obey and to serve an overlord. As far as he gives and serves other people, he does so of his own accord in order to be rewarded and served by the receivers. He exchanges goods and services, he does not do compulsory labor and does not pay tribute. He is certainly not independent. He depends on the other members of society. But this dependence is mutual. The buyer depends on the seller and the seller on the buyer."[20]

[18] MISES (1996 p. 2).
[19] MISES (1996 p. 269, emphasis added).
[20] MISES (1996 p. 282).

So, in sum, classical liberal concepts such as those developed by *Adam Smith* and later by *von Mises* and the subjectivist Austrian school of economics set the stage for a new liberal ("neo-liberal") learning in Germany that became known as the "ordoliberal school" of thought. It started out as the "Freiburg School" and later developed into the multifaceted contemporary school of ordoliberalism.

III. THE NEW LEARNING OF THE "FREIBURG SCHOOL"

1. THE BACKGROUND

The group of jurists and economists whose thoughts became known as the "Freiburg School" was composed of jurists and economists who in the 19thirties joined in order to pursue an interdisciplinary research project for a fundamental reconstruction of economic and legal sciences.[21] Their intention was to overcome the traditional German historical school of economics (which had been purely descriptive) as well as the Austrian school of economics (which was considered purely theoretical). The first was lacking any potential for theoretical analysis, the second was lacking an awareness of the relevance of (legal) institutions for the proper functioning of the economy. Both were regarded as inadequate to explain and resolve the economic (and political) problems of the day resulting from the Great depression of the late 19twenties. The members of the "Freiburg School" attributed the shortcomings of the prevailing economic, legal and political conditions to a breakdown of the balance between public power (which was taken over by the Nazi state) and private power (which was hijacked by influential interest groups and highly integrated and cartelized industrial complexes). A future reform (after the expected fall of the Nazi regime) would therefore have to focus on an institutional arrangement that would effectively check public as well as private power. The "Freiburg group" was searching for a totally new design for a system that would be able not only to avoid unwarranted government intervention in economic affairs but also to effectively control the market power of private actors and the limits of governmental powers as well as of private

[21] See for a comprehensive account of the „Freiburg School": GERBER (1988 p. 222); see also GERBER (1994); STREIT (1992); RIETER/SCHOLZ (1993).

market power.

As liberals, the members of the "Freiburg School" all shared the conviction that only the institution of a competitive market economy was able to guarantee a society that would be at the same time prosperous, free and equitable. In this regard, they clearly followed *Adam Smith's* fundamental insight that individual economic freedom is the basis for a properly functioning market and that the resulting rivalry among market participants results quite naturally in an enhancement of overall welfare. Some members of the group emphasized in addition the importance of an equitable distribution of the benefits of competitive markets. This implied mainly that those who would be unable to survive on the basis of what they could (or could not) earn on the market should be supported by transfer payments (hence the concept of a "social market economy"[22] which later became the official German model of organizing the post-war economy).[23] But the most important cornerstone of the reform concept was based in the traditional liberal notion of individual freedom of action on the market, i.e. the freedom to engage in exchange transactions. The potential for the emergence of powerful positions on the market was fully recognized, but competition was regarded as the proper means to control such private power. Competition was seen as a control mechanism that was preferable to direct control by the government which would risk the re-emergence of unwarranted state intervention with individual freedom. All of this was still pretty much in line with classical liberalism but, in some important respects, also went far beyond.

2. THE INSTITUTIONAL APPROACH (THE ROLE OF THE LAW)

The contributions of the new learning introduced by the "Freiburg School" to our understanding of markets and competition was, first of all, a new emphasis on their institutional underpinnings. The fundamental insight was that in practice there can be no freedom and consequently no competition unless it is granted and protected by law. It was the most eminent jurist among the members of the school, *Franz Böhm*, who in his important publication of 1933 on "Wettbewerb und Monopolkampf" [Competition and the Struggle for Monopoly][24] intended, according to his own words, to translate the economic principles that govern markets into legal principles. He

[22] The term was originally coined by MÜLLER – ARMACK (1947).
[23] The term "social market economy" has found its way even into the Lisbon Treaty: see Article 3(3) (2) EU.
[24] BÖHM (1933).

argued that participants in competitive markets must be empowered and at the same time controlled by legal rules which grant equal freedom to all (consumers as well as producers), private property rights pertaining to economic resources, freedom of contract, enforcement of and full responsibility for obligations resulting from contractual agreements as well as liability for damages inflicted upon others. Such legal institutions are, according to *Böhm*, constitutive elements of markets and competition. They represent nothing less than an "economic constitution" largely based on private law. It turns market participants into legal subjects and the market society into a "private law society". It follows that competition is the result of individuals making use of their rights to freely engage in market transactions. It is worth mentioning that *Franz Böhm* expressly referred to *Adam Smith* who, on first sight, may seem to have neglected the legal underpinnings of the "system of natural liberty". But a closer look reveals that not only his lectures on jurisprudence[25] are proof to the contrary. He was not only the father of liberal economics but also at the same time an eminent jurist and legal philosopher. And he was quite explicit in his writings that competition as a mechanism that allows consumers to control producers (or in more general terms: buyers to control sellers) must be based on legal institutions. He stated in very clear terms that

> "commerce and manufacturers can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payments of debts of all those who are able to pay."[26]

Freedom for *Adam Smith* does not naturally fall from heaven, but it is rather a matter of legislation, in his own terms: a matter of the state's "administration of justice". It has therefore quite rightly been said that the "invisible hand" of the market is guided by the "visible hand" of the law.[27] *Böhm* can therefore be said to have explored in detail the implications of *Adam Smith's* basic idea in light of the development of modern private law.

[25] SMITH (1978).
[26] SMITH (1776, Book V, Ch. III, p. 392).
[27] See MESTMÄCKER (1984, p 104).

3. THE SYSTEMIC APPROACH (THE CONCEPT OF 'ORDER')

The second innovative element of the new learning introduced by the "Freiburg School" was the emphasis on the systemic nature of a competitive exchange economy. In this regard *Franz Böhm's* concept of competition as a matter of the "legal order" was matched by *Walter Eucken's*, the economist's, concept of "economic order".[28] *Eucken's* ambition was to bring economics back into touch with reality. His basic approach was morphological. The starting point was the "economic problem", i.e. the problem of allocating scarce resources which *Eucken* conceived as a problem of economic planning. Therefore, for him the characterizing center piece of an economic system was economic planning, i.e. the allocative decision making by relevant actors. He started from an empirical study of how such economic decision making was organized in different economic systems, in other words: how individual plans are coordinated so as to establish order in the sense of an organized whole instead of chaos. By way of abstraction, he then identified a number of pure forms of economic orders, the two extremes being the centrally directed economy (Zentralverwaltungswirtschaft) and the decentralized exchange economy (Verkehrswirtschaft). The first is characterized by coordination of individual planning through hierarchy, the latter coordinates individual planning through market transactions. In other words: The first relies on central planning (presumably by the state), the latter relies on decentralized planning (by individual market participants). Planning clearly requires choice making and *Eucken* would certainly agree with a concept that characterizes competitive markets as social mechanisms for the coordination of consumers' and producers' choices. *Eucken's* liberal convictions lead him quite naturally to favour competitive markets as the most promising combination of individual freedom to make choices and the resulting prosperity of society at large (today we would say: efficiency). It is not difficult to recognize this as a reformulation of *Adam Smith's* "system of natural liberty" with its "unintended" positive consequences.

4. THE QUEST FOR COMPETITION RULES (CONTROL OF MARKET POWER)

There is, however, one crucially important difference between the "Freiburg School's" approach and *Adam Smith's* as well as the Austrians' approaches. The difference pertains to the conviction

[28] See for an excellent account of Eucken's approach: WEISZ (2001 p. 129).

of the "Freiburg School" that free competition may easily lead to self-destruction. Monopolization and cartelization, if left unchecked, would cause dysfunctional imbalances in the market mechanism. Corrections by way of state intervention would, however, be similarly dysfunctional in a system of decentralized economic planning (the German state control over cartels had proven to be a total failure[29]). What was therefore indispensible for the proper functioning of competitive markets was, according to the "Freiburg School", the legal institutionalization of binding rules which would determine the borderline between (lawful) competitive and (unlawful) anti-competitive market conduct. *Böhm* characterized such competition rules as "rules of the game" which would allow only "competition on the merits" and outlaw other practices that would lead to the artificial formation of market power (by way of cartelization or monopolization).[30] The disturbing influence of market power upon competition was the major concern also for *Eucken*.[31] The "Freiburg School" therefore argued, firstly, in favour of a legal prohibition of cartels;[32] secondly, when it came to dominant positions in the market they tended to suggest control by a state agency (especially where market power was the unavoidable result of success in the market or of market forces in case of a natural monopoly) if not their dissolution by way of divestiture (de-concentration).[33] The underlying principle was that the limits of governmental intervention in the economy as well as the limits of private power on the market were turned from matters of discretionary political decision-making into legal questions to be finally decided by independent courts.

5. SHORTCOMINGS

To be sure, the original learning of the "Freiburg School" of ordoliberalism had its conceptual shortcomings which were responsible for a number of fundamental misunderstandings. The first important shortcoming was related to the use of the model of perfect (or complete) competition as the benchmark for assessing restraints of competition. This approach neglected the fact that under conditions of perfect competition there is no competition at all in terms of rivalry among

[29] See KRONSTEIN/LEIGHTON (1946).
[30] BÖHM (1937 p.120).
[31] EUCKEN (2004 p.291).
[32] *Id.*, p. 138.
[33] A similar suggestion was made, by the way, in the US by representatives of the "Harvard School" of Antitrust such as KAYSEN/TURNER (1959 p.111).

market participants (see for more details below). In other words: competition may be better understood as market actors' competitive struggle for market power. Then a restraint of competition cannot be defined by a deviation from perfect competition, but rather by a practice that distorts the rules of the game for this struggle by negatively impacting the "system of natural liberty" based on individual rights to engage in market transactions (see for more details below).

The second shortcoming was the uncompromisingly hostile attitude towards market power even where it is the result of competition on the merits. This gave rise to the charge that the "Freiburg School" would protect competitors instead of competition and would in particular protect small and medium-sized firms.[34]

The third shortcoming was caused by some adherents to the "Freiburg School's" approach who attempted to formalize the notion of competition on the merits by defining certain types of market conduct (e.g. below cost pricing by dominant firms) as *per se* unlawful without sufficient economic reasoning and justification. This prompted the charge that the "Freiburg School" was formalistic and economically not well founded.

It shall be explained below that the "Freiburg School" of the mid-twentieth century has undergone a number of fundamental changes which eliminated these shortcomings without giving up its basic insight that competitive markets are not self-sufficient but require proper legal underpinnings including laws against restraints of competition initiated by the market participants themselves. In this sense the "Freiburg School" must be appreciated as a German version of institutional economics.

6. LASTING MERITS

For the present context it remains to be stated that, whatever the shortcomings of the original "Freiburg School" may have been and apart from its additions to the traditional learning, the gist of the new learning was its continuing focus on individual economic freedom (i.e. producers' and consumers' sovereignty with regard to economic planning) as the legally protected basis for a

[34] See WHISH/BAILEY (2012 p.22).

system of decentralized planning (i.e. a system of competition). It went without saying that "planning" necessarily implied choosing among alternative economic options. For the "Freiburg School" it was axiomatic that such a system (i.e. a competitive market economy) would be governed by consumers who were expressly regarded by *Böhm* and *Eucken* as the "arbiters" in the process of competition. Competition was literally conceived as a process of selection based on what we would call today "consumers' choice". This is why the "Freiburg School" must be understood as the first attempt to integrate law and economics in order to explore the prerequisites for the proper functioning of competition on the basis of the freedom of consumers' choice.

The "Freiburg School's" approach was new then in the sense that it went far beyond classical *laisser-faire* liberalism. *Eucken*, in order to avoid any misunderstanding, expressly rejected the new learning to be confused with "liberalism" or "neo-liberalism".[35] Hence the new label "ordo-liberalism" which has unfortunately caused some confusion outside Germany.

IV. BEYOND THE "FREIBURG SCHOOL": CONTEMPORARY ORDOLIBERALISM

1. THE QUEST FOR MODERNIZATION

Since its inception within the framework of the "Freiburg School", German ordoliberalism has undergone considerable refinements which are important to notice and to properly understand. This is especially important for an assessment of the impact of German ordoliberalism on EU competition law. Outside Germany, the development after "Freiburg" is barely recognized, due in part to the scarcity of ordoliberals' publications in English,[36] but in part also due to *David Gerber's* widely used though unfortunately truncated presentation of the original "Freiburg

[35] EUCKEN (2004 p. 374): „Die Prinzipien, die hier dargestellt wurden, werden bisweilen ‚liberal' oder ‚neoliberal' genannt. Aber dieser Bezeichnung ist oft tendenziös und nicht zutreffend" [The principles laid out here are sometimes called 'liberal' or 'neoliberal'. But this labeling is often tendentious and inaccurate].

[36] See however EUCKEN (1950), original German version: *Grundlagen der Nationalökonomie* (1940); see also MÖSCHEL (1989); see for a short but illuminating presentation of the core tenets of contemporary ordoliberalism SCHWEITZER (2012).

School" as *the* German school of ordoliberalism.[37] This has given rise to many misunderstandings, misrepresentations and ill informed statements which made it easy for critics to dismiss the ordoliberal approach as formalistic, non-appreciative of economic analysis, overly concerned about market power, protective of small enterprises and of competitors instead of competition, favouring equity instead of efficiency, and even pro-regulatory.[38] None of these charges are justified in light of the development that ordoliberalism has undergone over the last decades. The second generation of ordoliberals which followed the Freiburg group of "founding fathers" has been receptive of modern insights into the operation of competitive markets without, however, giving up the core elements of the "Freiburg School's" learning, most importantly the focus on individual freedom, consumer choice and the specific notion of "ordo".[39] Three considerations may be identified as having influenced the ordoliberal approach considerably:

2. FROM "PERFECT" TO "WORKABLE" COMPETITION

Firstly, the model of "perfect (or complete) competition" has since long been acknowledged as an inappropriate point of reference for the application of competition rules to real market behaviour and for the identification of restraints of competition.[40] The model was finally recognized as what it is: no more than a model that explains interrelationships between prices, costs and output. It may allow predictive propositions, but these are totally inadequate to be converted into normative propositions that would justify competition policy proposals. The extremely rigid prerequisites of the model (homogeneity of goods and services offered and demanded on the market by market participants none of whom have any influence on market conditions, full transparency of the market and complete information of all market participants, absence of transaction costs and barriers to entry, absence of any impediments for immediate reactions and adjustments by market actors to changes of market data) exclude any room for

[37] See for example WHISH/BAILEY (2012, at p. 22, n. 100), who on the basis of their reference to GERBER´s publication (1988), identify German ordoliberalism exclusively with the "Freiburg School". For a first hand critique of Gerber's presentation see MESTMÄCKER (2011 pp. 25, 39 *et seq*.).
[38] See GERBER (1998 p. 247).
[39] See for a comprehensive presentation of the contemporary ordoliberal approach to competition law the leading treatise of MESTMÄCKER/SCHWEITZER (2004); see for an excellent account of the modernization of ordoliberalism also: BROYER (2001 pp.93, 114).
[40] See for the modern rather nuanced ordoliberal concept of competition MESTMÄCKER/SCHWEITZER (2004, p. 72 *et seq*.).

competition in terms of rivalry, because no market participant could expect to profit from a move away from the equilibrium. It was *Friedrich von Hayek* who in his Stafford Little Lecture on "The Meaning of Competition"[41] given in 1946 at Princeton University had clearly and convincingly stated

> "that what the theory of perfect competition discusses has little claim to be called 'competition' at all and that its conclusions are of little use as guides to policy. The reason for this seems to be for me that this theory throughout assumes that state of affairs already to exist which, according to the truer view of the older theory, the process of competition tends to bring about (or to approximate) and that, if the state of affairs assumed by the theory of perfect competition ever existed, it would not only deprive of their scope all the activities which the verb 'to compete' describes but would make them virtually impossible."[42]

Consequently, contemporary ordoliberalism recognizes that only significant deviations from the model of "perfect" or "complete competition" may give rise to antitrust concerns. It is rather common ground today that market power in terms of the ability to raise prices without losing too many customers is a pervasive phenomenon in real markets due – among other factors – to product differentiation and differences in production costs even for homogeneous goods. In other words: some degree of market power is almost a prerequisite for competition as rivalry among producers (sellers) who are then struggling for the enhancement of their share of the market. Also, it is generally accepted that where market power or even monopoly is the result of success on the market there is no justification to punish it. Contemporary ordoliberal thought recognizes that market power, even where it gives rise to a "dominant position" in the market, cannot be held illegal *per se*.[43] This is recognized as an unavoidable antinomy inherent in the concept of the freedom to compete which is also granted to dominant undertakings.[44] Market dominance must, however, be acquired by lawful means. It should neither be allowed to result from external growth (by way of mergers or acquisitions) nor be abused in ways that have a negative impact upon the market structure and, consequently, on the options available to consumers' choice (thereby damaging "workable" competition).

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[41] Reproduced in HAYEK (1963 p. 92).
[42] *Ibid*.
[43] Judge Learned Hand's famous formula that "the successful competitor, having been urged to compete, must not be turned upon if he wins" (US v. Aluminium Co. of America, 148 F. 2d 416, 2nd Cir. 1945) is common ground among contemporary ordoliberals.
[44] For an in depth ordoliberal analysis of the problem of private economic power and its control by means of competition see BÖHM (1961 p.25).

3. COMPETITION AS A DYNAMIC PROCESS OF DISCOVERY

The second point which is interrelated with the foregoing considerations and which has refined ordoliberal thinking considerably was *von Hayek's* concept of competition as a dynamic process, more precisely: as a discovery process,[45] which produces all the information necessary to determine consumers' wants, their demand for specific goods and services and their willingness to pay as well as all the information necessary for producers to determine what to produce at which costs. *Von Hayek* convincingly argued that the availability of these data cannot be assumed (as the theory of perfect competition is doing), they can only emerge from market transactions. According to *von Hayek*:

"[…] the starting point of the theory of competitive equilibrium assumes away the main task which only the process of competition can solve."[46]

And he goes on to say:

"[Consumers'] knowledge to the alternatives before them is the result of what happens on the market, of such activities as advertising, etc.; and the whole organization of the market serves mainly the need of spreading the information on which the buyer is to act."[47]

Consequently, rather than sticking to the traditional static approach to competition, ordoliberalism has fully captured the dynamic concept of competition as an information producing process of interaction between market participants.[48]

4. LIMITS TO COMPETITION

The third aspect of ordoliberalism's development relates to the recognition of market failures that may require the state to play a positive role in order to compensate for the limits to

[45] HAYEK (1963 p. 94).
[46] See *ibid*., (p. 96).
[47] *Ibid*.
[48] See MESTMÄCKER/SCHWEITZER (2001, p. 80 *et seq*).

competition.[49] This applies, in particular, to "natural monopolies" which require state regulation as well as to "public goods". Already *Adam Smith* listed among the duties of "the sovereign"

> "the duty of erecting and maintaining certain public works and certain public institutions which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society."[50]

The creation and protection of legal institutions which are the indispensable underpinnings of competitive markets figures prominently among the duties of the state. In *Adam Smith's* words, the proper "administration of justice" is in modern terminology a "public good" that needs to be produced by the state. This includes, at any rate, a system of private law, and, according to today's mainstream ordoliberalism, also a system of competition rules which protect market agents' freedom of making use of their private rights by preventing that market agents themselves distort the "rules of the game" instead of being governed by them.

5. THE PROFILE OF CONTEMPORARY ORDOLIBERALISM

These most important refinements of the "Freiburg School's" approach to competition may be appreciated as a modernization of the traditional learning, but to a certain degree they have at the same time resulted in a loss of ordoliberalism's unambiguity. Many adherents to the ordoliberal approach developed their own nuanced views on its central paradigms. *Hayek's* concept of competition as a dynamic process of discovery was, for instance, complemented by the *Schumpeterian* notion of rivalry as a process of "creative destruction",[51] i.e. a process of constant emergence and erosion of market power, where one or some innovative firms strive to outcompete others who are then challenged in turn to overtake the lead by more effective innovation and so on (in Germany it became usual to speak of "vorstoßender Wettbewerb" [pioneering competition]). Others developed the *Hayekian* approach to competition further into the notion of a cybernetic, self-regulating and evolutionary system based on voluntary

[49] See *ibid*., (p. 90 *et seq*.).
[50] SMITH (1776, Book IV, Ch. IX, p. 180-81).
[51] See SCHUMPETER (1942, ch.7).

transactions whose concrete effects can neither be anticipated nor in any way measured.[52] Another strand of ordoliberal thought has integrated the fundamental insights of the institutional economics movement, especially the relevance of transaction costs and incomplete information of market actors for the assessment of their competitive behaviour on markets.[53]

All of these variants of contemporary ordoliberalism have, however, never questioned – but rather reinforced – the emphasis on the three core tenets dating back even to *Adam Smith*, namely

- that competition results from the individual freedom of producers to chose what they want to offer and of consumers to chose what they want to buy;
- that competition, therefore, must be understood as a system of interaction between choice making individuals who by making their choices reveal their preferences and produce the kind of information that other individuals need to make their choices;
- the fundamental role of the law for providing individuals with legal rights the unrestricted use of which forms the basis of competitive rivalry among producers and of consumers' freedom of choice among alternative sources of supply.

In the vein of *Adam Smith*, *Walter Eucken*, *Franz Böhm*, and *Friedrich von Hayek*, contemporary mainstream ordoliberalism continues to insist that a competitive market system can only be construed on the basis of an adequate system of private law buttressed by a set of effective competition rules.[54] The most prominent living representative of German ordoliberalism, *Ernst-Joachim Mestmäcker*, has further explored this concept and its important legal implications. His influential publications have always emphasized the concept of a rights based individual "freedom of action" (i.e. freedom of choice) as the cornerstone of the system of competition which is protected by the competition rules against private restrictions of just that freedom.[55]

[52] See, e.g., HOPPMANN (1981 p. 219).
[53] See VANBERG (1998); RICHTER/FURUBOTN (1997); see for an analysis of the parallels and divergences between ordoliberal thought and the "New Institutionalist School": BROYER (2001 p. 118).
[54] Today the view that "institutions matter" is shared much more widely than an analysis of ordoliberalism alone may suggest. See, e.g., the World Bank's World Development Report 2002 on *Building Institutions for Markets* (2002) where the World Bank stated in its foreword "that markets are central to the lives of poor people" and "that institutions play an important role in how markets affect people's standards of living and help protect their rights".
[55] See, in particular, Mestmäcker's fundamental critique of Richard Posner's purely welfare economic theory of law which substitutes legal standards by efficiency criteria, in: MESTMÄCKER (2007).

However, it is important to understand that this individual freedom is conditioned upon the workability of the whole system of interaction, more precisely: on the freedom of all market participants to voluntarily engage in mutual transactions. Consumers' freedom of choice is therefore considered dependent upon producers' freedom to compete and vice versa.

From an ordoliberal point of view, it is the role of competition law, therefore, to protect competition *as a system* within which individuals are free to make their choices on the market. In order for consumers to be able to make choices, it is indispensable that there exists a sufficient variety of competing producers (suppliers). This brings us to the relevance of the "market structure" which reflects the number of producers (suppliers) and their market shares. Consumers' freedom (or: consumers' sovereignty for that matter) to chose between alternative products or services offered on the market is dependent upon the degree of decentralization of production. The higher the degree of concentration, the lower is the number of alternatives available to consumers and the more limited is consumers' freedom of choice. It follows that a restraint of competition is characterized by a limitation of consumers' choice which depends on the rivalry among a sufficient number of producers. Hence, from an ordoliberal point of view, a restraint of competition may be found wherever (1) the number of freely competing producers is artificially reduced in ways that do not result from the normal process of competition itself, and (2) where this reduces the scope of alternatives among which consumers may freely chose.

This focus on the protection of freedom of action of market participants and especially of consumers' freedom of choice is sometimes said to protect competitors instead of competition.[56] This criticism is unfounded. Market participants, including competitors, are protected for the sake of the proper functioning of the competitive process. How could there possibly be competition without competitors?

Competitors must therefore be understood as an indispensable element of the system of competition and through the protection of their freedom of action (choice) we protect the system of competition.

[56] See, e.g., WHISH/BAILEY (2012 p. 22).

V. ORDOLIBERAL THOUGHT AND EU COMPETITION LAW

It is no accident that the Treaty of Rome of 1957 provided for the establishment of a "system [sic!] ensuring that competition in the internal market is not distorted" (Art. 3 lit. g EEC-Treaty) and that this principle is still today part of the "internal market" concept (Art. 3 EU-Treaty in conjunction with Protocol No. 27 on the Internal Market and Competition). This indicates that the treaty lends itself easily to be interpreted in light of the systemic approach to competition which is the hallmark of ordoliberalism. The modernized version of ordoliberalism did in fact have an important impact on EU competition law and policy.[57] This is widely acknowledged for the formative period[58] of the EU when the leading persons responsible for competition policy in the EU Commission were recruited from German ordoliberal circles. They were strong rivals of those who rather intended to follow the French model of centralized governance of the European economy through "industrial policy". The German Commissioner *von der Groeben* was able to have the following statement included in the Commission's Memorandum on an action program for the second phase of integration 1962-1965 which was (unsuccessfully) designed by the Commission to install the French model of "planification" on the level of the European Economic Community:

> "As a matter of economics competition and even imperfect competition satisfies the need of buyers and consumers to a high degree. The more effective competition is, the stronger are the motivation and necessity for industry and trade to fuller exploit opportunities to improve and rationalize production and distribution facilities in the interest of consumers. In this way competition simultaneously contributes to technical and economic progress. Finally, competition prevents or stifles tendencies of higher costs and prices, more particularly prevents to recoup higher costs through prices. Competition contributes to a more equal distribution of profits over the different sectors of the economy and minimizes the danger of false investments. In addition, the competitive order is to confer on all members of society the highest possible degree of personal liberty."[59]

[57] See GERBER (1998 p. 334); PATEL/SCHWEITZER (2013).
[58] See MESTMÄCKER (2013 p.191).
[59] Kommission *Memorandum über das Aktionsprogramm der Gemeinschaft für die zweite Stufe [*Commission *Memorandum on the Action Programme of the Community for the Second Phase]*, Brussels 24 October 1962, COM (62) 300, para. 23 (English translation quoted from MESTMÄCKER, *ibid*. at p. 197).

When the Commission and the European Court of Justice later developed their interpretation and application of the competition rules, it became also evident that ordoliberal concepts prevailed.[60] The initially controversial interpretation of Article 86 EEC [later Article 82 EC; now: Article 102 TFEU] is particularly revealing. Whereas some authors favored the position that this provision was meant exclusively to prevent the direct infliction of harm upon consumers by way of exploitative abuses of market dominance,[61] the opposing view was that the provision also meant to prevent indirect harm to consumers through the elimination of competitors by way of exclusionary abuses.[62] This latter position was clearly reflecting the ordoliberal conviction that "the purpose of the competition rules is to preserve the freedom of choice of those who transact business" and "the abuse therefore would materialize when the dominant position is used to restrain or eliminate the freedom of decision of either competitors or of the consumers".[63] Fully in line with this conviction, the European Court of Justice in the *Continental Can* case made its famous statement regarding the purpose of Article 86 EEC [later Article 82 EC; now: Article 102 TFEU]:

"The provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty."[64]

Accordingly, the European Court of Justice defined in *Hoffmann-La Roche* the concept of abuse in the following terms:

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

[60] This is the dominant view in spite of dissenters such as MAIER-RIGAUD (2012); see, e.g., GORMSEN (2005 pp. 5, 11), who acknowledges that in any case the jurisprudence of the EU Commission and the courts has been influenced by ordoliberal thought.
[61] JOLIET (1970 p. 250).
[62] See for an early in depth analysis of Article 86 EEC [now Article 102 TFEU] from an ordoliberal point of view which emphasized the protection of competition against structural changes in addition to the direct protection of consumers against exploitation and which paved the ground for the landmark decision of the ECJ in the *Continental Can* case (see below at n. 61): MESTMÄCKER (1973a pp.613, 639; 1973b p. 36).
[63] DERINGER (1968, p.533).
[64] ECJ Case 6/72 *Continental Can v. Commission* [1973] ECR 215, para. 26.

the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[65]

Inspite of the Commission's somewhat misleading "more economic approach" rhetoric in its recent guidelines,[66] these jurisprudential holdings are still good law.[67] The emphasis on the protection of the competitive market structure for the sake of the protection of market participants' freedom of action (freedom of choice) as the basis for the competitive process has recently become particularly clear in the case *TeliaSonera Sverige* where the European Court of Justice held:

"In order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition."[68]

The Commission is far from offering a coherent approach in its various guidelines. As has been demonstrated elsewhere, the Commission, in order to identify a restriction of competition, oscillates between a "consumer harm"-test, a "negative market effects"-test, a "market power"-

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

[66] For a critical assessment of the Commission's *Article 82 Guidance of 2008* see MESTMÄCKER (2011).

[67] See ECJ Case C-95/04 *British Airways v. Commission* [2007] ECR, I-2331, 2411, para. 106; CFI Case T-340/03 *France Télécom v. Commission* [2007] ECR, II-117, 193, para. 266; CFI Case T-201/04 *Microsoft v. Commission* [2007] ECR, II-3601, 3824, para. 664; see also the recent judgment of the ECJ in Case C-549/10 *Tomra Systems ASA et al. v. Commission* [2012] ECR, I-0000, para. 59 *et seq*., where the Court analyzed a rebate scheme in light of Article 102 TFEU: The Court (as well as the Commission itself!) relied on the exclusionary effect of the scheme (i.e. its negative impact on the market structure!) rather than on the equally efficient competitor-test which forms an essential part of the "more economic approach" as outlined in the Commission's Guidance regarding Article 102 TFEU (*supra* n. 2). See also most recently the summary of the CFI's approach to the assessment of rebate systems in Case T-286/09 *Intel/Commission* [2014] ECR, II-0000, paras. 72-94. - It would be a totally unwarranted departure from this jurisprudence of the ECJ based on *Continental Can* and worse than merely turning the wheel back, if exploitation were now made an indispensable element of the notion of "abuse" in Article 102 TFEU even in cases dealing with the exclusionary effect of a dominant undertaking's practice as suggested by Pinar Akman *The Concept of Abuse in EU Competition Law and Economic Approaches* (2012) 96 *et seq*.

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

test and a "competitive process"-test.[69] On the one hand, the Commission seems to focus on the direct welfare loss of consumers caused by the business strategy under consideration, on the other hand it seems to be still concerned with the protection of effective competition as a process.[70] To the extent that efficiency is attributed to the competitive process as such, this is in line with the established concepts based on ordoliberal thought, especially with the "consumer choice" paradigm. To the extent, however, that the Commission attempts to attribute efficiency effects to specific business conduct, it misses the relevant point. This brings us back to the opposition of the "consumer choice" concept and the "consumer welfare" (or "efficiency") paradigm.

VI. "CONSUMER CHOICE" VERSUS "CONSUMER WELFARE"

The ordoliberal focus on market participants' freedom of action is sometimes said to disregard economic efficiency as competition law's objective.[71] It has been argued, in particular, that since EU competition law has had efficiency as its aim from the very beginning, ordoliberalism cannot have had an influence upon its formation.[72] This argument is based on a misunderstanding of the role that efficiency plays in the context of an ordoliberal approach to competition as opposed to the "consumer welfare" approach. It will be shown below that ordoliberalism has always appreciated and emphasized the positive welfare (i.e. efficiency) effects of competition, but it refuses to measure the allocative or dynamic efficiency effects of individual business strategies which are instead left to pass the test of "consumers' choice" in the market.

Since *Adam Smith* it has always been the conviction of liberals including ordoliberals that competitive markets are the best way to promote efficiency in terms of the general welfare of the people. The important point, however, is that the ordoliberal school considers total welfare as the result of a truly competitive process. Since competition is conceived as a dynamic process of discovery based on market participants' voluntary transactions, general welfare effects cannot be

[69] See BEHRENS (2013 p. 555).
[70] See the quotation from the *Guidance on the Commission's enforcement priorities in applying Article 82 [now Article 102]*, *supra* at n. 2.
[71] See, e.g., AKMAN (2012 p. 55 *et seq*., 60); see also AKMAN (2009 p. 267).
[72] *Id.*

attributed to individual market transactions but only to the whole process of competition as such. Two distinctions need to be made here: On the one hand, we have to distinguish between productive, allocative and dynamic efficiency; on the other hand, we have to distinguish between the firm level and the level of the economic system at large.[73] On the micro-level of the individual firm, it may be relatively easy to determine the productive efficiency of a specific business strategy in terms of lower production costs (due, for instance, to economies of scale or transactions cost savings) resulting in lower prices or larger output. On the macro-level of the whole economy, however, it is almost impossible to precisely measure allocative efficiency (in terms of satisfaction of consumers' wants[74]) or dynamic efficiency (in terms of the development of innovative or higher quality products in the future). This depends on consumers' preferences regarding non-price criteria such as quality, speed of delivery, after sales service, new or better products etc. The problem is that these data can only be derived from consumers' preferences as revealed by market transactions. It follows that at least the determination of allocative and dynamic efficiency effects of a specific business strategy must be deferred to the competitive process that allows consumers to make their choices. So, in the end, any business conduct that appears efficient on the micro-level of the individual firm(s) must pass the efficiency test on the macro-level of the system of competition where consumers decide what they want.[75] Exactly this is why Article 101 (3) TFEU allows an efficiency defence (on the micro-level) for the justification of an anti-competitive agreement or concerted practice (typically based on productive efficiencies[76] or even on consumer choice arguments[77]) while at the same time insisting that sufficient competition on the market is left so that the overall effects of the justified restraint of competition can be tested (on the macro-level) in light of consumers' choice. This is a recognition of the fact that it is not for the competition authority or the courts to measure the

[73] For a constitutional economics perspective see, e.g., VANBERG (2011 at p. 59): "The relevant issue is, therefore, not about whether economic efficiency arguments have a role to play in advising competition policy. It is, instead, about the proper level at which they have to play their role."

[74] This is what BISHOP/WALKER (2010, p. 25) have in mind when they define allocative efficiency as relating to the difference between the cost of producing the marginal product and the "valuation of that product by consumers".

[75] Constitutional economics distinguishes between the (constitutional) choice between different sets of competition rules and the (sub-constitutional) choices made under those rules. Whereas at the latter level economic freedom of consumers may be the proper goal to be protected by competition rules, if those rules are chosen on the constitutional level, efficiency will determine the choice of competition rules on the constitutional level. See VANBERG (2011).

[76] For example: an "improvement of production" may be based on economies of scale resulting from a specialization agreement.

[77] For example: the promotion of "technical or economic progress" may be based on the development of new or better products, i.e. on an enhancement of the options available to consumers.

overall efficiency effects of the business strategy under consideration, but exclusively for the consumers themselves.

In opposition to the ordoliberal school of thought, the "more economic approach" to competition law promoted by the Commission of the European Union, is – at least to the extent that it emphasizes the "consumer harm"-test – informed by the neoclassical economic analysis of the "Chicago School",[78] modified, however, by "Post-Chicago" approaches. It used to start from the *homo oeconomicus* model of individuals' behaviour. According to this model, economic actors in the market are wealth maximizers. Hence, if markets are to serve individuals' interests, competition should operate so as to maximize welfare. Accordingly, competition law should be interpreted and applied so as to avoid punishing wealth maximizing behaviour as anti-competitive. One of the pioneers of the "Chicago School" was *Robert Bork*, who in his influential book on "The Antitrust Paradox",[79] reduced the problem of an adequate interpretation and application of antitrust law (in European terms: competition law) to the application of the "consumer welfare" calculus. This calculus would require a comparison of the "dead-weight" loss of a potentially anti-competitive conduct and the resulting cost savings. This calculus, *Bork* continued to argue,

> "… can be used to illustrate all antitrust problems, since it shows the relationship of the only two factors involved, allocative inefficiency and productive efficiency. The existence of these two elements and their respective amounts are the real issue in every properly decided antitrust case. They are what we have to estimate – whether the case is about the dissolution of a monopolistic firm, a conglomerate merger, a requirement contract, or a price-fixing agreement."[80]

Bork acknowledged, however, that we cannot directly measure efficiencies or inefficiencies and that the consumer welfare calculus merely illustrates a relationship. Instead he suggested that the only relevant and manageable criterion for assessing the potentially anti-competitive effects of a specific market conduct should be its impact on output. Only output reducing behaviour should therefore be considered anticompetitive.[81] According to neoclassical price-theory, the flip side of

[78] For a detailed first hand ordoliberal account of the "more economic approach", see MESTMÄCKER (2011 pp. 25, 44 *et seq*.); see also PATEL/SCHWEIZER (2013 pp. 207, 220).
[79] BORK (1978 p. 107).
[80] *Id*.
[81] *Id*. 122.

output reduction is the increase of prices. *Bork's* and the "Chicago School's" approach may therefore be summarized as follows: A restraint of competition can be assumed only, if a specific market behaviour leads to an increase of prices or a restriction of output. *Bork* expressly disapproved of the notion that competition implies rivalry and that the elimination of rivalry should therefore be the relevant criterion.[82] As already stated by *Adam Smith*, rivalry (among producers) clearly involves consumer choice. Consequently, the rejection of the rivalry paradigm implies the rejection of the "consumer choice" paradigm. *Bork* felt that the rivalry (or consumer choice) paradigm was too broad a standard for antitrust law, because it would catch also behaviour that enhances productive efficiency. So, what should really matter, is productive efficiency which may easily be translated into "consumer welfare" in terms of lower prices and larger output.

Richard Posner, another pioneer of the "Chicago School", is a little more careful. According to him, competition should also be viewed "as a state in which consumer interests are well served rather than as a process of rivalry that is diminished by the elimination of even one tiny rival".[83] (None of the proponents of competition as a process of rivalry based on consumer choice have ever suggested that "the elimination of even one tiny rival" should give rise to an antitrust problem!). Posner admits, however, that "it is very difficult to measure the efficiency consequences of a challenged practice". And he concludes that "[e]fficiency is the ultimate goal of antitrust, but competition [obviously in terms of a process of rivalry] is a mediate goal that will often be close enough to the ultimate goal to allow courts to look no further." What prevents *Posner* from recognizing that competition as a process of rivalry based on consumer choice is the optimal way of serving consumers' interests? The neoclassical *homo oeconomicus* model assumes that market agents always act in a rational way, i.e. they know their preferences, they reveal their preferences by demonstrating their willingness to pay for a specific good or service offered on the market, they are able to translate any non-monetary characteristic of an object of their desire into monetary terms (i.e. prices), they are fully capable of taking decisions on the basis of all relevant information and to immediately react to changing prices. If this were true in real life, why then is the neoclassical approach not supporting the (subjective) "consumer

[82] *Id*. 135.
[83] POSNER (2001 pp. 28, 29).

choice" paradigm but rather a "consumer welfare" concept which is fraught with all the difficulties of objective measurement of welfare effects?

The answer has to do with the history of welfare economics. It developed out of the theory of public finance and used to be primarily targeted at the assessment of the welfare effects of government projects and economic policy measures. Here the comparative assessment of different "states of the world" according to the Pareto-, the Kaldor-Hicks- and other welfare criteria makes sense to the extent that the welfare calculus can be made in a roughly correct way. Looking at the enforcement of antitrust or competition laws by the state from this perspective misses the point, however. The question is not whether a governmental measure against a potentially anti-competitive business strategy is justified, because it may enhance overall welfare by preventing "consumer harm". From a liberal perspective, the state's role here is not to invest taxpayers' money in governmental projects as efficiently as possible, but to enforce the "rules of the game" which are constitutive for competitive markets to work efficiently. This presupposes the protection of market players' freedom to engage in transactions that comply with their preferences, in particular to protect consumers' freedom of choice as the driving force behind competition which will lead to the promotion of overall welfare. The overall welfare effects of a certain business strategy cannot be anticipated. Even *Bork* recognized the problem of measurement, but his way out of the dilemma comes at the price of oversimplification. The purely output and/or price oriented definition of "consumer welfare" or "consumer harm" for the purposes of identifying restraints of competition is by far too simplistic. Price and output may be the criteria that neoclassical economic theory is most easily able to capture. But that does not prove the relevance of these criteria. It may rather remind us of the man who in the middle of the night lost his keys somewhere and now searches for the keys underneath the streetlight simply because it happens to be less dark there. In *Robert Bork's* own words:

"Economists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured."[84]

[84] BORK (1978 p. 127).

The Commission is therefore well advised to apply its "more economic approach" not in too narrow terms. Some statements of the Commission in its various Guidelines[85] indicate indeed a broader view of "consumer welfare" than the "Chicago School's" price or efficiency paradigm would suggest.[86] Various "Post-Chicago" approaches have questioned the rigid assumptions of the "Chicago School" without, however, establishing a new "school" yet.[87] The behavioural economics approach has called the *homo oeconomicus* into question, the evolutionary economics approach emphasizes the dynamics of competitive markets, another important approach applies game theory to competition analysis, and modern industrial economics emphasizes the relevance of econometric studies for the analysis of antitrust cases. So, today there is no monolithic "Chicago" approach anymore, but the "efficiency paradigm" appears still to be the common denominator of the "Post-Chicago" learning. The Commission's enforcement practice seems to be open to these new approaches, but also indicates a strong inclination to apply a welfare maximization approach in terms of the "consumer welfare" paradigm.[88] It has been stated already that this is not in line with the jurisprudence of the ECJ which until now sticks to a structural approach based on the "consumer choice" concept.[89]

VII. CONCLUSION

German ordoliberalism, which has shaped EU competition policy and law, has come under attack from the "Chicago School" oriented welfare economic approach to competition precisely because it has been and continues to be based on the "consumer choice" paradigm instead of the neoclassical "consumer welfare" concept. It has therefore been charged with being out of touch

[85] See, e.g., the statement quoted *supra* at n. 2.
[86] A recent study by PriceWaterhouseCoopers of consumers' behaviour in internet trade, reported in the German daily newspaper *Frankfurter Allgemeine Zeitung*, Nr. 4 of 6 January 2014, at p. 23, reveals that consumers' fixation on price is a myth. More important factors turned out to be, for instance, speed of delivery or innovative products.
[87] For a cross-selection of introductions into the various approaches see DREXL/KERBER/PODSZUN (2011).
[88] See, e.g., Commission Case COMP/C-3/37.990 *Intel*, para. 925, where the Commission, merely in order to support the finding of an infringement of Article 102 TFEU by Intel's practice to grant exclusionary loyalty rebates based on the traditional test, considered it necessary to also find (direct) consumer harm by conducting an "as efficient competitor" analysis on the basis of the *Guidance on the Commission's enforcement priorities in applying Article 82 EC [now Article 102 TFEU]*; upon appeal to the CFI, the court recently upheld the Commission's decision and summarized its own approach to the assessment of rebate systems (very much along established lines) in Case T-286/09 *Intel/Commission* [2014] ECR, II-0000, paras. 72-94. See also the judgment of the ECJ in *Tomra Systems* (*supra* n. 67).
[89] See for references *supra* n. 67.

with economic theory. This contribution demonstrates the contrary. The fundamental question remains: What are the criteria that an economic theory must meet in order to be able to adequately inform competition policy and law?

Real life phenomena such as economic competition are by far too complex to be grasped by any one theoretical model. Abstraction from reality is indispensable, but it must not go too far if competition theory is to have an impact upon competition policy. A good theory about competition must therefore be both: adequate and tractable. Adequacy requires a sufficient degree of complexity which is close enough to reality; tractability requires a sufficient degree of reduction of complexity in order for a theory to be manageable also for enforcement agencies and market agents themselves. In short: the theory underlying competition policy (and law) must neither be overcomplex nor undercomplex.

The "Chicago School's" price or efficiency concept proves to be undercomplex, because it is unable to adequately reflect the non-price dimensions of consumer preferences. "Post-Chicago" approaches demonstrate that a narrowly defined *homo oeconomicus* model of rational behaviour cannot justify conclusions to be drawn from micro-level productive efficiencies to general welfare effects in terms of allocative and dynamic efficiencies on the macro-level. The latter can only be determined by a process that allows consumers to reveal their preferences. In order for this to happen, consumers' freedom of choice is of the essence and this in turn presupposes a sufficiently competitive market structure that reflects rivalry among producers. We cannot know in advance what consumers want. What we know, however, is that consumers do not always want more and more of the same at lower and lower prices, they rather want options and relevant alternatives. More importantly, consumers' rationality is "bounded" as we know. So, instead of speculating about "consumer welfare" why don't we give consumers the chance to decide for themselves? There is no justification for a break with the ordoliberal "choice" paradigm which focuses on the legally protected economic freedom of market agents within the framework of a market structure which is not artificially constricted by producers at the expense of the alternatives that are open to consumers' choices. In light of past experience, this approach appears adequate for the purposes of competition law and at the same time tractable by enforcement agencies. We may as well say, in *Averitt's* and *Lande's* words, that "the consumer

choice approach is fundamentally superior to the price and efficiency paradigms *because it asks the right question*".[90]

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[90] AVERITT/LANDE (2007 p. 178).

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