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Exploring the ordoliberal paradigm:  
The competition-democracy nexus

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**Department of Law**

**EXPLORING THE ORDOLIBERAL PARADIGM:  
THE COMPETITION-DEMOCRACY NEXUS**

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## **Abstract**

The present article purports to shed a new light on ordoliberalism and to explore its role in EU Competition Law. For this purpose, the article analyses the ordoliberal school of thought in its historical context and re-conceptualizes its understanding of competition law that has been subjected to numerous misrepresentations in the existing literature. The main argument presented here is that the ordoliberals perceived a direct link between competition and democracy as the normative underpinning of competition law. This competition-democracy nexus rests upon the assumption of interdependence between the economic, social and political order and argues that both consequentialist and deontological values legitimize competition law and should guide its interpretation. Thus, competition should be protected as such, since it sets the boundaries of economic power and creates the preconditions for economic freedom and equality of opportunity. In this sense, competition law seeks to ensure that the functioning of the market does not undermine and is conducive to a democratic society. Further, we claim that the nexus idea could provide us with a better understanding of EU Competition Law than a fully-fledged welfarist approach. In particular, the nexus idea could be traced in the field of Art. 101 and Art. 102 TFEU in the CJEU's deontological understanding of competition (i); the Court's balancing between procedural and consequentialist goals (ii), and in the Court's form-based approach (iii) that is responsive to input from economics (iv).

## **Keywords**

Ordoliberalism, Goals of EU Competition Law, More Economic Approach, Form-based approach, Democracy

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## Introduction\*

More than thirty years after the publication of Robert Bork's ground-breaking book in 1978,<sup>1</sup> EU Competition Law is currently facing its own 'antitrust paradox'. In particular, even though the consumer welfare objective has found numerous advocates amongst competition law scholars, practitioners and enforcers also on this side of the Atlantic,<sup>2</sup> the Court of Justice of the European Union ('CJEU' or 'the Court')<sup>3</sup> continues to be reluctant to follow a strict welfarist approach.<sup>4</sup> The scholarly literature tends to attribute this apparent paradox to the allegedly on-going influence of ordoliberalism on EU Competition Law and the Court's reasoning.<sup>5</sup> Accordingly, numerous decisions of the CJEU have been considered as setting unsatisfactory law due to their ordoliberal origin. In general, ordoliberalism has been criticized as an unworkable, inefficient and formalistic paradigm that prevents EU Competition Law from being fully efficient.<sup>6</sup> Hence, abandoning the ordoliberal concepts and fully endorsing a welfarist approach is perceived by the advocates of a 'more economic approach' as a necessary step for developing a better understanding of the subject matter of EU Competition Law, enhancing its legitimacy and informing its legal hermeneutics.

Arguably, ordoliberal thinking has played an important role in the development and the application of European competition rules.<sup>7</sup> However, it remains unclear what the core conceptual elements of this

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<sup>1</sup> Robert H Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993).

<sup>2</sup> Neelie Kroes, 'European Competition Policy – Delivering Better Markets and Better Choice' (SPEECH/05/512, 15 September 2005) [http://europa.eu/rapid/press-release\\_SPEECH-05-512\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm) accessed 23 March 2016. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20. para. 5.

<sup>3</sup> The 'EU Courts' comprise the Court of Justice ('CoJ') and the General Court ('GC') and collectively make up the Court of Justice of the European Union ('CJEU').

<sup>4</sup> The welfarist approach has many different formulations, yet its main topos is that the value of any institution derives from its welfare maximization properties. Thus, 'efficiency is the ultimate goal of antitrust, and competition is a mediate goal that will often be close enough to the ultimate goal to allow the courts go no further'. See Richard A Posner, *Antitrust Law* (University of Chicago Press 2001) 29. Further, efficiency could be defined as maximizing total or consumer welfare. For a definition of consumer welfare see Robert O'Donoghue and A. J Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006) 4. However, assessing what is the most workable conception of efficiency is beyond the scope of this study. In this respect, we use the terms efficiency and welfare-maximization as interchangeable. There are numerous welfarist approaches and some of them incorporate elements of ordoliberal thinking. Here we use the term in a schematic way as a device allowing us to clarify the main features of the ordoliberal approach

<sup>5</sup> See for instance A. J Padilla and Christian Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008). Philip Marsden, 'Some outstanding issues from the European Commission's Guidance on Article 102: Not-so-faint echoes of Ordoliberalism' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (Oxford University Press, USA 2010); Patrick Rey and James S Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38(1) World Competition 3; Christian Ahlborn and David S Evans, 'The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe' (2009) 75(3) Antitrust Law Journal.

<sup>6</sup> Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, University of East Anglia 2007) 3; Padilla and Ahlborn (n 5); Rey and Venit (n 5).

<sup>7</sup> David J Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42(25) American Journal of Comparative Law 25; David J Gerber, *Law and Competition in Twentieth Century Europe:*

school of thought are and to what extent it has affected the application of the law. In fact, the label ‘ordoliberalism’ has been adopted as an easy explanatory factor for the legal development of EU Competition Law without being further analysed.<sup>8</sup> Currently, it is simply used as the synonym for outdated legal formalism or weak economic reasoning and as an epithet for everything that does not correspond to the more economic approach.<sup>9</sup> Nonetheless, the contemporary academic debate does not fully answer a quite intuitive question: How is it that this anachronistic paradigm, developed more than half a century ago<sup>10</sup> in the peripheral German university-town of Freiburg and with a tendency to produce poor results, still affects EU Competition Law?<sup>11</sup>

This paper intends to shed new light on ordoliberalism and provide a new angle to the debate. In particular, it aims to clarify the conceptual foundations of ordoliberalism and explore their linkages with the existing case law. The main argument presented here is that ordoliberalism still influences EU Competition Law in particular by virtue of its idea of a competition-democracy nexus. This concept of a direct link between competition and democracy, which is deeply entrenched in EU Competition Law, rests upon the assumption of interdependence between the economic, social and political order.<sup>12</sup> Ordoliberalism implies that the form of the economic order does not only bear economic consequences, but also affects the social and political sphere. Thus, competition rules aim to prevent distortions that could undermine the competitive process to the detriment of the public interest. We contend that this ordoliberal idea offers a solid basis for understanding European competition rules and strengthening their legitimacy, for it can explain the law as it currently stands and orientate its interpretation.

The argument is developed in three steps. First, we briefly provide a theoretical definition of the notions of democracy and the competition-democracy nexus (I). Secondly, we analyse the different dimensions of the competition democracy nexus in their historical context (II). This nexus, the argument goes, constitutes the underlying rationale of the ordoliberal understanding of competition and its law. The third part explores how the ordoliberal nexus influences the application of Articles 101 and 102 of Treaty on the Functioning of the European Union (‘TFEU’) (III). This analysis seeks to illustrate in what sense

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*Protecting Prometheus* (Clarendon Press; Oxford University Press 1998); Kiran K Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law*; Peter Behrens, ‘The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU’ (Discussion Paper N°7/15, Europa-Kolleg Hamburg 2015) 33; Heike Schweitzer, ‘The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC’ in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 128–138. For a different point of view see Akman (n 6); Pinar Akman and Hussein Kassim, ‘Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy\*’ (2010) 48(1) *JCMS: Journal of Common Market Studies* 111; Pinar Akman, ‘The Role of ‘Freedom’ in EU Competition Law’ (2014) 34(2) *Leg Stud (Soc Leg Scholars)* 183. For a critical review of Gerber’s and Akman’s account of ordoliberalism and its impact on the drafting of EU competition rules see Behrens, ‘The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU’ (n 7).

<sup>8</sup> As observed for instance by Mel Marquis, ‘Introduction, Summary, Remarks’ in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) xxxi, fn. 16.

<sup>9</sup> Rey and Venit (n 5), 23.

<sup>10</sup> See as ‘founding-text’ of the Ordoliberal paradigm or the so-called *Freiburger Schule*: Franz Böhm, Walter Eucken and Hans Großmann-Doerth, ‘Unsere Aufgabe (The Ordoliberal Manifesto) - 1936’ in Nils Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008).

<sup>11</sup> Arguably, the influence of ordoliberalism is not confined to EU Competition Law, but currently also orientates the EU’s economic and monetary policy. See in this sense The Economist, ‘Germany and Economics - Of Rules and Order - German Ordoliberalism Has Had a Big Influence on Policy During The Euro Crisis’ (9 May 2015); Francois Denord, Rachel Knaebel and Pierre Rimbart, ‘L’Ordolibéralisme Allemand, Cage de Fer pour le Vieux Continent’ *Le Monde Diplomatique* (1 August 2015). This aspect of ordoliberalism, however, goes beyond the scope of this inquiry and according to the authors is not necessarily related to the ordoliberal paradigm in EU Competition Law.

<sup>12</sup> Walter Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 16, 304-308; Frank Maier-Rigaud, ‘On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Elgar 2012) 137.

the ordoliberal paradigm explains the law as it is and how it guides its interpretation. Moreover, it aims to demonstrate that the ordoliberal conception of the competition-democracy nexus allows for an economically informed categorical thinking. In this regard, ordoliberal thinking could guide and delimit the more economic approach by proposing a framework capable of accommodating the concept of efficiency and attributing to it its due value. This may explain the Court's continuous reluctance to adopt a purely welfare-oriented reasoning in competition cases.

### Setting the scene

Anyone opening nowadays an antitrust textbook, will probably soon discover that consumer welfare constitutes, according to the predominant view, the central goal of EU Competition Law.<sup>13</sup> From this perspective, the claim that there is a link between competition (law) and democracy seems to be rather counterintuitive. However, the European Competition Law paradox described above shows that the so-called more economic approach fails to fully explain the normative underpinnings and the application of EU Competition Law. In other words, there is an important contradiction between the precepts of the dominant theory of antitrust and the practice of EU Competition Law. While the more economic approach criticizes the divergence of EU Competition Law from the normative goal of welfare maximization and pushes for legal reform, our account of the ordoliberal paradigm offers a different angle.

The concept of a 'competition-democracy' nexus, we argue, provides an alternative framework for analyzing and explaining EU Competition Law. This framework offers a more complete and coherent account and normative basis for EU Competition Law than the more economic approach. The key point of the argument put forward in this paper is that the democratic legitimacy of competition law relies on a combination of what Fritz Scharpf calls 'input-oriented legitimacy' and 'output-oriented legitimacy'.<sup>14</sup> These two categories mirror two dimensions of democratic self-government and show how different principles, goals and institutional rules contribute to the democratic legitimacy of an institution.<sup>15</sup> In addition, these two categories comprise a way of conceptualizing competition law that is reflected in the Court's reasoning.

The input-oriented legitimacy of a democratic system refers to what Abraham Lincoln called 'government by the people'.<sup>16</sup> It is based on certain institutional rules ensuring the democratic decision-making as self-determination of the citizens. Thus, input-oriented legitimacy refers to democracy as participation and expression of the general will of the citizens.<sup>17</sup> It also relies on the procedural safeguards of the democratic process, which ensure equality of opportunity, individual freedom, autonomy and the fundamental rights of the constituents.

Conversely, the category of output-oriented legitimacy refers to what Lincoln described as 'government for the people'.<sup>18</sup> This form of democratic legitimacy is based on institutional rules, which enable a political system to achieve consequentialist goals in the general interest, while respecting certain limits

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<sup>13</sup> O'Donoghue and Padilla (n 4) 4; Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010) 30; Richard Whish and David Bailey, *Competition law* (Oxford University Press 2012) 19; Kroes (n 2).

<sup>14</sup> Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 2.

<sup>15</sup> We use the term institution in the sense of Douglas North: "Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic." Douglas C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 3.

<sup>16</sup> Scharpf (n 14) 2.

<sup>17</sup> *ibid* 8 ft. 2; 10f.

<sup>18</sup> *ibid* 2.

of political power.<sup>19</sup> Such limits constitute in turn the precondition of input-legitimacy, for they prevent deontological values, which constitute the very basis of the democratic process, from being sacrificed in the pursuit of a consequentialist goal. Thus, output-oriented legitimacy is related to consequentialism and suggests that an institution or a polity is justified as long as it achieves the greatest net satisfaction summed over all the individuals subjected to it.<sup>20</sup> Nonetheless, output-oriented legitimacy should also take into consideration the Lockean idea of the ‘boundaries of power’.<sup>21</sup> This implies that the quest for achieving ‘the greatest happiness for the greatest number’<sup>22</sup> is constrained by the boundaries set by the input-oriented legitimacy. Thus, every institution or polity must strike a balance between the achievement of outcome-oriented goals and the protection of deontological goals, so as to ensure its democratic legitimacy.

These two categories of input- and output-oriented legitimacy allow us to operationalize the ordoliberal conception of the competition-democracy nexus. First, by applying the concept of input- and output-oriented legitimacy to competition, we argue that competition constitutes an institution, which relies on different forms of democratic legitimacy. Secondly, we contend that the nexus concept sets forth criteria indicating how a certain institutional form of competition contributes to the legitimacy of a democratic political system.

### **The Ordoliberal conception of the competition-democracy nexus**

The ordoliberal nexus between competition and democracy can have two dimensions.<sup>23</sup> First, this relationship can be negative, implying that the distortions of competition might have a serious impact on a democratic polity and vice versa. Secondly, this relationship can also take the form of a positive link where competition is conducive to a democratic polity and vice versa.

#### ***The negative dimension***

In the first place, the ordoliberals formulated the competition-democracy nexus in a negative way. In light of the historical experience of the Weimar Republic and the Third Reich in Germany, they believed that the elimination of competition could undermine democracy in the political sphere and facilitate the rise of totalitarianism.<sup>24</sup> This negative link drew on the experience of the cartelisation and monopolisation of the German economy since the 1870s.<sup>25</sup> During the Weimar Republic, the incapability of *laissez-faire* liberalism to control the concentration of private economic power entailed the destruction of competition and undermined the social and political preconditions of democracy.

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<sup>19</sup> *ibid* 13.

<sup>20</sup> John Rawls, *A Theory of Justice [1971]: Revised Edition* (Harvard University Press 2003) 22.

<sup>21</sup> John Locke, *The second treatise of government [1689]* (Reclam 2012) Chapter XI, § 135, p. 218.

<sup>22</sup> James H Burns and Hart, Herbert L. A (eds), *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government* (Clarendon Press 1977) 393.

<sup>23</sup> We agree with Prof. Behren’s reservations against associating ordoliberalism exclusively with the Freiburg School and partially share his view that ordoliberalism is a dynamic and diverse school of thought, rather than a monolithic paradigm. See Behrens, ‘The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU’ (n 7) 12. The idea of a ‘competition-democracy’ nexus has, however, initially been coined by the members of the Freiburg School and also constitutes the normative DNA of the understanding of competition law of second and third generation of ordoliberals.

<sup>24</sup> Gerber, ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe’ (n 7) 28. Michel Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978-1979* (Gallimard; Seuil 2004) 80.

<sup>25</sup> Ernst-Joachim Mestmäcker, ‘The Development of German and European Competition Law with Special Reference to the EU Commission’s Article 82 Guidance of 2008’ in Lorenzo F Pace (ed), *European Competition Law: The Impact of the Commission’s Guidance on Article 102* (Edward Elgar 2011) 34–36.

According to the ordoliberal account, the weak Weimarian state failed *inter alia* because it allowed the private market participants to decide on the ‘rules of the game’. As a result, various private actors were able to exercise coercion on others by restricting their rights and freedoms and unduly exclude them from the market.<sup>26</sup> Consequently, market participants could not freely participate in the market on equal terms, while powerful actors could effectively violate other citizens’ economic rights, freedoms and opportunities. This excessive concentration and abuse of private economic power impaired competition and undermined the input-oriented legitimacy of the market process. For this reason, ordoliberals concluded that *laissez-faire* capitalism is inherently unstable<sup>27</sup> and that competition law should prevent economic freedom from destroying its own prerequisites.<sup>28</sup>

In parallel, powerful market players were able to convert their economic into political power and corrupt via interest capture various political institutions. Hence, the cartelisation and monopolisation of the German Economy also entailed, according to the ordoliberals, important social and political consequences, for it led to economic, social and political ‘group anarchy’ (*Gruppenanarchie*) between powerful interest groups.<sup>29</sup> These economic phenomena transformed the Weimarian economic and political system into a ‘neo-feudal’ system, undermining the independence of the state, as well as the supporting social structures of democracy.<sup>30</sup> Therefore, the concentration of market power did not only jeopardize the competitive process, but also harmed the input-oriented legitimacy of the political system by curtailing the procedural guarantees of equal participation in the political game. Such development also had significant ramifications on the political rights of the citizens.<sup>31</sup>

In the same vein, the ordoliberals contended that *laissez-faire* liberalism enabled the rise of the centrally planned economy associated with the Nazi Regime.<sup>32</sup> In their eyes, the increasing economic concentration and the subsequent hostility to competition led to a deep crisis of the German economy that undermined the legitimacy of the existing economic and political order. This raised popular demand for an intrusive role of the state in the economy and for strong political leadership. As a consequence, an increasing number of private cartels and monopolies was brought under the control of the state or was directly socialized.<sup>33</sup> Yet, instead of solving the problem of excessive concentration of market power, these measures entailed the coalition between private and public economic power that paved the

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<sup>26</sup> Heike Knortz, *Wirtschaftsgeschichte der Weimarer Republik: Eine Einführung in Ökonomie und Gesellschaft der ersten Deutschen Republik* (Vandenhoeck & Ruprecht 2010) 32, 81; Walter Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 53–55.

<sup>27</sup> In this respect, the ordoliberals are much closer to classical liberalism than modern libertarians or proponents of *laissez-faire* capitalism, since the portrayal of classical liberals as extreme opponents of government intervention is fundamentally misguided. See Lanny Ebenstein, *Chicagonomics: The Evolution of Free Market Economics* (St. Martin's Press 2015) 1–18.

<sup>28</sup> Wernhardt Möschel, ‘Competition Policy from an Ordo Point of View’ in Alan T Peacock, Hans Willgerodt and Daniel Johnson (eds), *German neo-liberals and the social market economy* (Macmillan for the Trade Policy Research Centre 1989) 149.

<sup>29</sup> Franz Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (Nomos 1980) 68.

<sup>30</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 326–330. Franz Böhm, ‘Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]’ in Daniel A Crane and Herbert Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 273. Knortz (n 26) 193.

<sup>31</sup> Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 68.

<sup>32</sup> Leonhard Miksch, ‘Versuch eines liberalen Programms [1949]’ in Nils Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 165; Leonhard Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (Verlag Helmut Küpper 1947) 212–217; Foucault (n 24) 110–113.

<sup>33</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 334; Mestmäcker, ‘The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008’ (n 25) 36.

way for the establishment of a centrally planned economy.<sup>34</sup> At the same time, the state relied heavily on cartels and monopolies as transmission belts for the implementation of its central economic planning.<sup>35</sup> Simultaneously, mighty economic groups continuously wielded their economic power in the political sphere<sup>36</sup> and reaped benefits from their support for the rising Nazi regime.<sup>37</sup>

To put it succinctly, the Nazi regime used a consequentialist discourse so as to reduce the institutional checks-and-balances that limited economic and political power. As a result, the rule of law was undermined and citizens were deprived of their political and economic freedoms.<sup>38</sup> These factors enabled the emergence of powerful private actors that supported the rise of a totalitarian regime.<sup>39</sup> The excessive concentration of economic power reinforced and was reinforced by the excessive concentration of political power in the hands of the State.

### ***The positive dimension***

It is, however, important to notice, that the Freiburg School did not limit itself only to the formulation of the abovementioned negative link. On the contrary, the ordoliberals tried to find out how competition as a specific institutional form of the market was compatible with and conducive to democracy.<sup>40</sup> Contrary to the image conveyed by the scholarly literature, ordoliberalism does not provide an obsolete 'doomsday theory'.<sup>41</sup> What it does do is establish a positive relationship between competition and democracy. This positive link epitomises in the three ordoliberal goals of competition, namely welfare-maximisation, economic freedom and procedural justice, which positively contribute to the legitimacy of competition itself as well as of the democratic polity.

Surprisingly, and contrary to the common critique that ordoliberals were incapable of taking into account economic knowledge and accommodating efficiency considerations,<sup>42</sup> this positive link also rests upon the goal of welfare maximisation. Indeed, the examination of ordoliberal thinkers' original texts reveals

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<sup>34</sup> Walter Eucken, 'Das Problem der wirtschaftlichen Macht' in Walter Eucken and Walter Oswald (eds), *Wirtschaftsmacht und Wirtschaftsordnung: Londoner Vorträge zur Wirtschaftspolitik und zwei Beiträge zur Antimonopolpolitik* (Lit 2001) 16–18. Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 293.

<sup>35</sup> Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' (n 25) 37; Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 213.

<sup>36</sup> Walter Eucken and T. W Hutchison, 'On the Theory of the Centrally Administered Economy: An Analysis of the German Experiment. Part II' (1948) 15(59) *Economica* 173, 182. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 213. The support of the rising NSDAP and its economic governance by powerful German industrialists and cartels is also discussed by historical research. David Abraham, *The Collapse of the Weimar Republic: Political Economy and Crisis* (Holmes & Meier 1986) 317–324. Adam Tooze, 'The German National Economy in an Era of Crisis and War, 1917-1945' in Helmut W Smith (ed), *The Oxford Handbook of Modern German History* (Oxford University Press 2011) 411.

<sup>37</sup> Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 40.

<sup>38</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 309, 332-334. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 82.

<sup>39</sup> Walter Eucken and Walter Oswald (eds), *Wirtschaftsmacht und Wirtschaftsordnung: Londoner Vorträge zur Wirtschaftspolitik und zwei Beiträge zur Antimonopolpolitik* (Lit 2001) 19–20. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 83; Walter Eucken, 'Staatliche Strukturwandlungen und die Krisis des Kapitalismus' (1932) 36 *Weltwirtschaftliches Archiv* 297, 298-300; 308; Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 83.

<sup>40</sup> Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 87; Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 14.

<sup>41</sup> Padilla and Ahlborn (n 5) 80–81.

<sup>42</sup> James S Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) *Fordham International Law Journal* 1157, 1158; Padilla and Ahlborn (n 5) 81; Gerber, *Law and Competition in Twentieth Century Europe* (n 7) 239.

that they clearly advocated in favour of competition as the most efficient instrument to increase total welfare.<sup>43</sup> By increasing welfare, competition contributes to the general interest of a democratic polity and, thereby, enhances the output-oriented legitimacy of the system. Nonetheless, unlike the welfarist approach, the Freiburg School did not perceive efficiency as the sole and ultimate goal of competition. Instead, it underlined that the efficiency-enhancing nature of competition must be reconciled with other goals ensuring a humane, free and democratic economic order.<sup>44</sup> Hence, efficiency is conceived as an important 'by-product'<sup>45</sup> of the competitive process, rather than as the ultimate goal of competition.

Consequently, the ordoliberals stressed not only the value of efficiency but also underlined the importance of economic freedom. They conceived economic freedom in a multidimensional way as private autonomy, freedom of choice for consumers and producers<sup>46</sup> and freedom to compete (market access).<sup>47</sup> Economic freedom constitutes, pursuant to the ordoliberal idea of interdependence<sup>48</sup> between the economic, social and political order, the precondition and counterpart of other fundamental and political rights such as the freedom of speech, the freedom of assembly, as well as the right to vote.<sup>49</sup> From this perspective, the exercise of economic freedom plays a similar role to that of political rights: it is essential for the good functioning of a democratic polity.<sup>50</sup> Therefore, the individual citizen cannot entirely enjoy her democratic economic and political fundamental rights if her autonomy is limited in the economic sphere by the exercise of arbitrary economic power by other citizens or the state.<sup>51</sup> At the same time, the ordoliberal concern for ensuring a socially sustainable economic order and the republican ideal of equal rights and freedoms also explain why economic freedom should not be perceived as an absolute and unrestricted individual right.<sup>52</sup> Thus, the exercise of economic freedom must be allowed as far as it does not undermine other citizens' economic freedom.<sup>53</sup>

In this respect, the dispersal of public and private economic power is an important feature of both competition and democracy, since it guarantees individual autonomy in both aspects, as economic and political freedom.<sup>54</sup> On the one hand, by setting bounds to economic power, competition law warrants a free and fair competitive process. On the other hand, the dispersal of economic power through

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<sup>43</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 306.

<sup>44</sup> *ibid* 140,305. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 210–222.

<sup>45</sup> Möschel (n 28) 146.

<sup>46</sup> Franz Böhm, 'Freiheit und Ordnung in der Marktwirtschaft [1971]' in Nils Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 305. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 221. Peter Behrens, 'The "Consumer Choice Paradigm" in German Ordoliberalism and its Impact upon EU Competition Law' (Eurpa-Kolleg Hamburg - Discussion Paper N°1/14 2014).

<sup>47</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 12) 48; 250; Heike Schweitzer, 'Efficiency, Political freedom and the Freedom to Compete: Comment on Maier-Rigaud' in Daniel Zimmer (ed), *The Goals of Competition Law* (Elgar 2012) 175–177.

<sup>48</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 16, 304-308.

<sup>49</sup> *ibid* 50. Ernst-Joachim Mestmäcker, 'Wirtschaftsordnung und Staatsverfassung' in Franz Böhm, Ernst-Joachim Mestmäcker and Heinz Saueremann (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift f. Franz Böhm z. 80. Geburtstag* (Mohr Siebeck 1975) 385.

<sup>50</sup> Franz Böhm, 'Das Problem der privaten Macht. Ein Beitrag zur Monopolfrage [1928]' in Nils Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 63.

<sup>51</sup> Franz Böhm, 'Die Bedeutung der Wirtschaftsordnung für die politische Verfassung: Kritische Betrachtungen zu dem Aufsatz von Ministerialrat Dr. Adolf ARNDT über das »Problem der Wirtschaftsdemokratie in den Verfassungsentwürfen«' (1946) 1(6) *Süddeutsche Juristen-Zeitung* 141, 141.

<sup>52</sup> Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 221.

<sup>53</sup> This means that ordoliberal freedom reflects a republican ideal according to which a person or group enjoys freedom to the extent that no other person or group has 'the capacity to interfere in [its] affairs on an arbitrary basis.' See Philip Pettit, 'Freedom as Antipower' (1996) 106(3) *Ethics* 576; Philip Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997); Eucken, *Grundsätze der Wirtschaftspolitik* (n 12) 250.

<sup>54</sup> Mestmäcker, 'Wirtschaftsordnung und Staatsverfassung' (n 49) 384.

competition ensures the integrity and impartiality of the political institutions, for it makes interest capture less likely.<sup>55</sup> By imposing checks and balances on private and public market power, competition protects political institutions and decision-making processes and guarantees an inviolable sphere of private activity.<sup>56</sup> Accordingly, competition as conceived by the ordoliberals not only stimulates welfare-maximizing behaviour, but constitutes above all the ‘most remarkable and ingenious instrument for reducing power known in history’.<sup>57</sup>

Moreover, the ordoliberal paradigm assumes that a competitive economic order is the precondition for the realisation of an open, pluralistic market. Accordingly, competition is perceived as fair, as long as market actors have equal opportunities to participate in the economic process.<sup>58</sup> For ordoliberals, the abuse of private or public market power leads to the arbitrary exclusion of market participants, and, thereby, reduces their opportunities to participate in the competitive process.<sup>59</sup> In contrast, a well-functioning competitive market leads only to the exclusion of the less efficient market players. Therefore, in the absence of abuses of excessive economic power, the competitive process guarantees economic freedom as equality of all,<sup>60</sup> and ensures that economic inequalities are only the result of different economic performance of the individual market participants and not the outcome of arbitrary power.<sup>61</sup>

Pursuant to the ordoliberals competition constitutes a ‘plebiscitary’<sup>62</sup> coordination process for the allocation of resources resting upon the guarantee of freedom and equality of opportunity. Consumers’ choice steers the economy in the same way as citizens’ votes influence political processes.<sup>63</sup> As long as no market participant is unfairly excluded from the process of competition, the results of competition are similar to the outcomes of a democratic procedure legitimised as a fair expression of the ‘*volonté générale*’.<sup>64</sup> In this respect, the ordoliberal paradigm conceives competition itself as a democratic and pluralistic economic institution. This means that it forges a positive link between competition and democracy. Ordoliberal competition accommodates the consequentialist goal of welfare maximization on the one hand, and the two procedural goals of economic freedom and fairness on the other. Hence, competition reinforces a democratic regime in a composite way; it enhances the input-oriented and the output-oriented legitimacy of the economic process. Competition makes the market an institution conducive to democracy. Competition is, therefore, from the ordoliberal perspective, an important, but not sufficient precondition and element of democracy.

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<sup>55</sup> Böhm, ‘Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]’ (n 30) 273–279.

<sup>56</sup> Böhm, ‘Die Bedeutung der Wirtschaftsordnung für die politische Verfassung: Kritische Betrachtungen zu dem Aufsatz von Ministerialrat Dr. Adolf ARNDT über das »Problem der Wirtschaftsdemokratie in den Verfassungsentwürfen«’ (n 51) 141.

<sup>57</sup> Böhm, ‘Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]’ (n 30) 279. See also Eucken describing competition as “instrument for the deprivation of power (*Entmachtungsinstrument*)” Walter Eucken, ‘The Competitive Order and its Implementation [1949]’ (2006) 2(2) Competition Policy International 219, 245.

<sup>58</sup> Böhm, ‘Freiheit und Ordnung in der Marktwirtschaft [1971]’ (n 46) 306; Gerber, ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe’ (n 7) 38.

<sup>59</sup> Böhm, ‘Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]’ (n 30) 274.

<sup>60</sup> Franz Böhm, ‘Rule of Law in a Market Economy [1966]’ in Alan T Peacock and Hans Willgerodt (eds), *Germany's social market economy: Origins and evolution* (Macmillan for the Trade Policy Research Centre, London 1989) 54.

<sup>61</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 315–316.; Böhm, ‘Die Bedeutung der Wirtschaftsordnung für die politische Verfassung: Kritische Betrachtungen zu dem Aufsatz von Ministerialrat Dr. Adolf ARNDT über das »Problem der Wirtschaftsdemokratie in den Verfassungsentwürfen«’ (n 51) 147.

<sup>62</sup> Böhm, ‘Freiheit und Ordnung in der Marktwirtschaft [1971]’ (n 46) 305; Foucault (n 24) 167.

<sup>63</sup> Böhm, ‘Freiheit und Ordnung in der Marktwirtschaft [1971]’ (n 46) 305.

<sup>64</sup> Böhm, ‘Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]’ (n 30) 268.

The welfarist approach contends that democracy can claim legitimate authority due to its welfare maximizing properties.<sup>65</sup> Competition is legitimate as long as it ensures beneficial outcomes for the democratic polity. By contrast, the procedural goals of economic freedom and fairness hint towards a deontological understanding of competition as a process. Such an understanding corresponds to a procedural conception of democracy, which cannot exist without the protection of certain deontological goals such as freedom, autonomy and equality of opportunity. Thus, the ordoliberal paradigm, without ignoring the welfare-enhancing qualities of competition, emphasizes its procedural dimension. Such an approach underlines that in certain occasions the output-oriented mechanisms (consequentialist values) are inadequate to legitimize the system. Input-oriented mechanisms (deontological values) should delimit the latter, and, thereby, ensure that the pursuit of certain outcomes does not lead to occasions where the existential conditions of the system could be undermined.

Nevertheless, it is important to notice that while ordoliberals assume that the protection of economic freedom under normal circumstances also enhances welfare and efficiency,<sup>66</sup> they clearly prioritize in case of conflict the procedural goals of economic freedom and fairness over the consequentialist ones.<sup>67</sup> In this respect, ordoliberalism clearly differs from the welfarist approach, which derives the legitimacy of competition exclusively from its welfare-maximizing properties.<sup>68</sup> More provocatively, by transposing into the economic sphere the Lockean idea of the necessity for democracy bounds of power, the ordoliberals made sure that economic freedom was not sacrificed in the quest for beneficial outcomes. By contrast, the welfarist approach rejects any form of limitation of the pursuit of efficiency. Every restriction of freedom or fairness violation could be legitimized on the basis of welfare maximization. Yet, underplaying the role of freedom and fairness may turn competition into an unjust institution.

### ***Institutional rules and a form-based approach as precondition of a positive nexus***

This account of both dimensions of the ordoliberal competition-democracy nexus, however, raises the question of how the ordoliberals get from the negative dimension, where the deterioration of competition undermines democracy, to the positive dimension, where competition contributes to democracy. In fact, the experience of two negative historical examples – *laissez-faire* liberalism and centrally planned economy<sup>69</sup> – made ordoliberals typify two types of failing economic organisation that had also detrimental political ramifications.

From these experiences the ordoliberals gained the insight that the main reason for the failure of competition and the deteriorating effects of economic power on democracy was the insufficient application of the rule of law in economic matters.<sup>70</sup> In fact, they recognised that competition as an ordering principle of the economy suffers from its fragile nature. Competition could only exist and deploy its beneficial effects in form of the positive nexus under certain conditions.<sup>71</sup> For the ordoliberals the competitive market did not just happen; it is an institutional structure that follows certain political

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<sup>65</sup> Scharpf (n 14) 6.

<sup>66</sup> Möschel (n 28) 146.

<sup>67</sup> Böhm, 'Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]' (n 30) 271.

<sup>68</sup> See in this regard Bork, *The Antitrust Paradox* (n 1) 7, 20-21, 90-115; Posner (n 4) 2; Bishop and Walker (n 13) 29-32; O'Donoghue and Padilla (n 4) 4.

<sup>69</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 12) 26-27.

<sup>70</sup> Foucault (n 24) 105-106. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 5.

<sup>71</sup> Foucault (n 24) 135.

and legal decision-making. Contrary to the neo-liberal conception of the market as a ‘natural order’,<sup>72</sup> a competitive market economy could not be established and sustained by the mere unrestricted interplay of market forces.<sup>73</sup> To put it differently, competition as ‘rules of the game’ cannot be guaranteed by the ‘market game’ itself in form of a spontaneous order. Instead, competitive markets could be achieved only via an artificial, state-created legal arrangement, which incorporates certain rules and organizing principles and provides for a certain form of the economic process.<sup>74</sup> Thus, competition and markets are considered to be products of deliberate political and legal action by the state.<sup>75</sup>

The legal rules set forth an institutional framework that is based on the ordoliberal notions of the ‘private law society’ (*Privatrechtsgesellschaft*)<sup>76</sup> and the ‘Economic Constitution’. (*Wirtschaftsverfassung*). On the one hand, the institutions of private law enable economic exchanges by providing the basic means for autonomous economic planning. At the same time, they delimit the legitimate scope of private autonomy.<sup>77</sup> Thus, from the equality of all before the (private) law follows that equal freedom of each constitutes a limit for the freedom of every other individual.<sup>78</sup> On the other hand, the ‘Economic Constitution’ represents a fundamental economic policy decision (*ordnungspolitische Gesamtentscheidung*) in favour of a specific form of a competitive economic order.<sup>79</sup> By circumscribing the scope of legitimate private action and by imposing the rule of law not only on the state, but also on all private market players, the ‘Economic Constitution’ protects the institution of competition, as well as the economic freedom of the market participants.<sup>80</sup>

The positive link between competition and democracy also materializes in the ordoliberal form-based approach towards competition and in particular in their conception of competition as a rivalrous market structure.<sup>81</sup> By virtue of its procedural, non-hierarchical characteristics competition constitutes from an ordoliberal perspective the sole market regime that is compatible with democracy, for it guarantees for each market participant an equal sphere of autonomy on which no other market player may impinge.<sup>82</sup> This idea of competition as a non-hierarchical and freedom-enhancing process is intertwined with the

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<sup>72</sup> The idea of the competitive market as natural order could be traced in Bork’s and Posner’s description of competition as natural, Darwinian selection process of the most efficient firm, yet it is much older. For instance, Herbert Spencer believed that successful businesses were a manifestation of the survival of the fittest since the market through a natural selection process rewards the fittest. John K Galbraith, *Economics in Perspective: A Critical History* (Houghton Mifflin 1987) 121; Bork, *The Antitrust Paradox* (n 1) 116; Posner (n 4) 19. For a critical analysis of the concept of ‘free market’ as ‘natural order’ see Bernard E Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Harvard University Press 2011) 26; 140-146; H.-J. Chang, ‘Breaking the Mould: An Institutionalist Political Economy Alternative to the Neo-liberal Theory of the Market and the State’ (2002) 26(5) *Cambridge Journal of Economics* 539, 540.

<sup>73</sup> Foucault (n 24) 135.

<sup>74</sup> *ibid* 165f. Miksch, ‘Versuch eines liberalen Programms [1949]’ (n 32) 167.

<sup>75</sup> Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 11. Miksch refers to competition as “state-created activity” (“staatliche Veranstaltung”). Foucault (n 24) 169. Mestmäcker, ‘Wirtschaftsordnung und Staatsverfassung’ (n 49) 383.

<sup>76</sup> For an account of the concept of ‘private law society’ in English see Böhm, ‘Rule of Law in a Market Economy [1966]’ (n 60); Stefan Grundmann, ‘The Concept of the Private Law Society: After 50 Years of European and European Business Law’ (2008) 16(4) *European Review of Private Law* 553.

<sup>77</sup> Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 106–109.

<sup>78</sup> *ibid* 116.

<sup>79</sup> Mestmäcker, ‘Wirtschaftsordnung und Staatsverfassung’ (n 49) 383. Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 55, 245. Mestmäcker, ‘Wirtschaftsordnung und Staatsverfassung’ (n 49).

<sup>80</sup> Miksch, ‘Versuch eines liberalen Programms [1949]’ (n 32) 164–167.

<sup>81</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 20-22, 245-46, 301-302. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (n 29) 120.

<sup>82</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 249; Böhm, ‘Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]’ (n 30) 269; Böhm, ‘Freiheit und Ordnung in der Marktwirtschaft [1971]’ (n 46) 121.

protection of a competitive market structure ensuring rivalry.<sup>83</sup> Only the preservation of a market structure characterised by a sufficient number of players can safeguard competition as a checks-and-balances system where the players constrain each other's market power and preserve consumers' freedom of choice.<sup>84</sup>

As a result, certain categories of market conduct are incompatible with this *ideal type* of a non-hierarchical process of coordination of autonomous plans, since they may undermine the economic freedom or equality of opportunity of other market participants. For this purpose, the ordoliberals distinguish between legitimate and illegitimate categories of competition in the form of business practices. This distinction is epitomised in the dichotomy between 'performance competition' (*Leistungswettbewerb*) and 'impediment competition' (*Behinderungswettbewerb*).<sup>85</sup> The category of performance competition encompasses business conduct based on economic performance in terms of lower prices, higher quality or product variety or innovation. Conversely, business practices to which enterprises could only recur thanks to considerable market power fall under the category of 'hindrance competition' when they result in an undue exclusion of competitors. These practices are deemed illegitimate due to their hierarchy-inducing coercive nature.<sup>86</sup>

In this setting, the form-based approach establishes *ex ante* certain categories of business behaviour such as cartel agreements, fidelity rebates, predatory pricing, price-discrimination, refusals to deal as illegal,<sup>87</sup> based on the presumption that they are harmful to competition by restricting the rights of market participants in terms of economic freedom, equality of opportunity and/or since they reduce welfare. Undoubtedly, these presumptions remain rebuttable and could be amended or abandoned in light of emerging economic knowledge.

Nonetheless, this form-based approach clearly differs from a fully-fledged welfarist approach, which relies exclusively on the utilitarian calculus of welfare maximization as the only criterion for legitimizing legal rules and assessing the legality of economic conduct.<sup>88</sup> As a consequence, while such an approach argues in favour of appraising merely the actual welfare-maximizing or -reducing consequences of a business practice, the ordoliberals also consider the conformity of such practices with the other values of the competitive process.<sup>89</sup> By balancing different goals and values in order to ensure the input- and output-oriented legitimacy of the competitive process, the ordoliberal approach does not rely solely on balancing welfare-enhancing and -reducing effects, but rather carries out a balancing test of conflicting individual rights, freedoms and interests.<sup>90</sup>

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<sup>83</sup> Böhm, *Freiheit und Ordnung in der Marktwirtschaft* [1971] (n 29) 63.

<sup>84</sup> Böhm, 'Rule of Law in a Market Economy [1966]' (n 60) 54. Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (n 7) 16.

<sup>85</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 12) 247–249.

<sup>86</sup> Böhm, *Freiheit und Ordnung in der Marktwirtschaft* [1971] (n 29) 64.

<sup>87</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 26) 296.

<sup>88</sup> Robert H Bork, 'The Goals of Antitrust Policy' (1967) 57(2) *The American Economic Review* 242, 242. Bork, *The Antitrust Paradox* (n 1) 7, 20–21, 90–115; Posner (n 4) 2. Eleanor M Fox and Lawrence A Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 *N.Y.U. L. Rev.* 936, 957; David J Gerber, 'Comparative Antitrust Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1201.

<sup>89</sup> See for an ordoliberal critique of Posner's legal theory Ernst J Mestmäcker, *A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law* (Mohr Siebeck 2007).

<sup>90</sup> Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' (n 25) 48.

## The competition-democracy nexus and European Competition Law

In this part, we argue that despite the current orthodoxy according to which competition law is desirable solely for its welfare-maximizing properties, the structure of EU Competition Law and the case law of the Court seem to be compatible in many instances with an ordoliberal understanding of competition law<sup>91</sup> and the idea of a competition-democracy nexus. The argument made here is not that the Court relies exclusively on ordoliberalism when deciding competition cases. On the contrary, the Court's reasoning often appears to be quite eclectic, for it often oscillates between ordoliberal concepts and a more economic approach.<sup>92</sup> Moreover, inconsistencies in the Court's case law<sup>93</sup> hint towards inner tensions. In fact, in several cases the Court seems divided between different approaches rather than monolithically endorsing a clearly ordoliberal or a 'more economic' position.<sup>94</sup> The welfarist rationale of the more economic approach, however, fails to explain this eclectic approach and the Court's inner tensions. The ordoliberal concept of a competition-democracy nexus might, therefore, complement and enhance our understanding of EU Competition Law and the Court's reasoning.

The influence and persistence of the ordoliberal idea of a link between competition and democracy could be traced in the field of Art. 101 and Art. 102 TFEU primarily in the CJEU's deontological understanding of competition based on its procedural characteristics (i); the Court's balancing of procedural and consequentialist goals (ii); the Court's form-based approach (iii), that could also be responsive to input from economics (iv). From this perspective, the idea of a competition-democracy nexus may explain better the content and interpretation of Art. 101 and 102 TFEU than does a fully-fledged welfarist approach. Moreover, contrary to what is adduced by the proponents of the 'more economic approach', the ordoliberal competition-democracy nexus is not necessarily bound to an economically illiterate formalistic approach, but could accommodate current economic thinking. Hence, even though ordoliberalism does not offer a complete analytical model,<sup>95</sup> its conception of a competition-democracy nexus allows for economically informed categorical thinking and in that way it could be a first step towards a European School in Competition Law.

### *The CJEU's ordoliberal understanding of competition*

Firstly, the ordoliberal idea of a competition-democracy nexus can be traced in CJEU's institutional understanding of competition. In the field of Art. 101 TFEU, the Court stressed in *T-Mobile Netherlands* that 'Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such'.<sup>96</sup> Similarly, with regard to Art. 102 TFEU the Court highlighted already in *Continental Can* that '[t]he provision [of Art. 86] is not only aimed at practices which may

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<sup>91</sup> Numerous scholars adopt a similar position. See Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (n 7). Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (n 7).

<sup>92</sup> Pablo I Colomo, 'Intel and Article 102 TFEU Case Law' (LSE Law, Society and Economy Working Papers 29/2014, London School of Economics and Political Science 2014) 12.

<sup>93</sup> For instance *Case C-23/14 Post Danmark* ECLI:EU:C:2015:651.

<sup>94</sup> See for instance for instance the conflicting views between the General Court and the Court in *GlaxoSmithKline Case T-168/01 GlaxoSmithKline Services v Commission* ECLI:EU:T:2006:265; *Case C-501/06 P GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610.

<sup>95</sup> Doris Hildebrand, 'The European School in EC Competition Law' (2002) 25(1) *World Competition* 3, 4.

<sup>96</sup> *Case C-8/08 T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 para. 38. The Court follows here Advocate General Kokott's *Opinion in Case C-8/08 T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:110 para. 58.

cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty'.<sup>97</sup>

The Court has resisted the welfarist orientation of the Commission's modernization initiative.<sup>98</sup> In one of the first cases after the issuance of the Commission Guidance Paper on Art. 82 EC the Court reaffirmed that the function of competition rules is 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers'.<sup>99</sup> By recognizing that margin squeeze is a stand-alone practice, the Court highlighted that consumer welfare is not the sole goal of EU Competition Law.<sup>100</sup> Protecting the competitive process implied that the very existence of margin squeeze, absent of any objective justification, was abusive, without the need to establish that the retail prices to end-users were in themselves excessive or predatory.<sup>101</sup> This followed from the fact that Art. 102 TFEU does not focus exclusively on practices that directly harm consumers, but also aims at protecting consumers from practices that indirectly harm them due to their negative impact on competition.<sup>102</sup> In a similar vein, the Court also starkly rejected in *GlaxoSmithKline* the General Court's<sup>103</sup> attempt to adopt consumer-welfare as the exclusive standard for finding a restriction of competition.<sup>104</sup>

The Court's approach, thus, does not fall short of the ordoliberal topoi that competition is not only a means to achieve consumer welfare.<sup>105</sup> Competition is also perceived as an end the protection of which is in the 'public interest' of a democratic society. Hence, this understanding of competition clearly embodies the ordoliberal perception of competition as a process and institution that preserves a rivalrous market structure and has an intrinsic value.<sup>106</sup> Such a structure simultaneously guarantees and promotes both outcome-oriented and procedural goals and values that are indispensable for a democratic economic order. The Court's wording suggests that the consequentialist goal of welfare and the deontological values of freedom and equality of opportunity are equally important for competition. Such a value pluralistic approach implies that both goals should be protected on equal terms and that there is no hierarchy among these independent values within the European Competition Law framework, contrary

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<sup>97</sup> *Case 6/72 Europemballage Corporation and Continental Can Company v Commission* ECLI:EU:C:1973:22 para. 26.

<sup>98</sup> An economic approach to Article 82 2005. <http://ec.europa.eu/dgs/competition/economist/eagcp.html> 8; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20. (n 2) para. 5; Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97–118 para. 13; Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101, 27.4.2004, p. 2–42 para. 5. For a more comprehensive approach of the modernization initiatives towards a more economic approach see Anne C Witt, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really About More Economics?' (49) 2012(1) Common Market Law Review 217; Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing forthcoming).

<sup>99</sup> *Case C-52/09 TeliaSonera Sverige* ECLI:EU:C:2011:83 para. 22. For an analysis of EU Competition Law as a framework that protects the competitive structure and dynamic of the market see Hildebrand, 'The European School in EC Competition Law' (n 95) 3.

<sup>100</sup> *Case C-52/09 TeliaSonera Sverige* (n 99) paras. 24, 34.

<sup>101</sup> *ibid* para. 34.

<sup>102</sup> *Case C-52/09 TeliaSonera Sverige* (n 99) para. 24; *Case C-209/10 Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172 para. 20.

<sup>103</sup> *Case T-168/01 GlaxoSmithKline Services v Commission* (n 94) para. 118.

<sup>104</sup> *Case C-501/06 P GlaxoSmithKline Services and Others v Commission and Others* (n 94) paras. 62–64. Nonetheless, it should be noted that in certain cases the Court is more responsive to the more economic approach. See in this regard Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2014) 1048–1049.

<sup>105</sup> See AG Kokott's *Opinion in Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) paras. 43, 58.

<sup>106</sup> See in this regard AG Kokott's understanding of competition as 'structure of the market' and 'institution' *ibid* para. 58.

to what the welfarist approach maintains.<sup>107</sup> Instead, it clearly underscores the ordoliberal idea that both types of goals must be balanced, so as to guarantee the input- and output-oriented legitimacy of competition as a democratic institution.

Conceptualizing competition as an institution based also on deontological values is fundamentally different from a welfarist approach. According to the latter, all social institutions should be evaluated exclusively depending on their consequences on individuals' well-being.<sup>108</sup> In this respect, the value of competition derives entirely from its welfare maximization properties and is justified as long as it increases society's welfare.<sup>109</sup> Thus, EU Competition Law should be perceived as an instrument for enhancing welfare without having value per se.<sup>110</sup> Such an approach bases the legitimacy of competition only on its output-oriented characteristics, without taking into account the importance of its procedural characteristics and its role within a democratic polity.

On the contrary, the ordoliberal paradigm maintains that competition constitutes an end in itself, separate from the outcomes that may be produced for consumers, economic efficiency, market integration or industrial growth. The process itself contains an inherent value and cannot be abolished, even if it is not always the most effective mode to reach welfare maximization.<sup>111</sup> In light of the above, it becomes clear that by securing the independence of competitors' decision-making capacity, the law protects individual autonomy as a prerequisite of the competitive process.<sup>112</sup>

Moreover, the Court's reference to a competitive market structure makes the ordoliberal concept of the 'competitive process' more tangible as a deontological goal. Competition is perceived as a sort of checks-and-balances system in which the independent decisions of individual market players constrain each other's exercise of economic power and create a form of interdependence between them. Furthermore, a sufficient degree of diversity of market players is necessary for the consumers to be able to choose freely. Accordingly, the competitive process relies on the preservation of a certain degree of rivalry and thus on a certain number of at the same time *independent* and *interdependent* players that reciprocally constrain their exercise of legitimate economic freedom and power.

This might explain why in its recent *Post Danmark II* judgement the Court points out the importance of even less-efficient competitors for competition in a highly-concentrated market characterised by

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<sup>107</sup> Abayomi and Al-Ameen, 'Antitrust pluralism and justice' in Daniel Zimmer (ed), *The Goals of Competition Law* (Elgar 2012) 265ff. For a discussion of CJEU's case law as endorsing a goal pluralism and not following a theory of a unitary objective see Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] CLES Working Paper Series, 32 ff.

<sup>108</sup> Louis Kaplow and Steven Shavell, *Fairness versus welfare* (Harvard University Press 2002) 15.

<sup>109</sup> O'Donoghue and Padilla (n 4) 4; Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 17 ff.

<sup>110</sup> Martyn D Taylor, *International competition law: A new dimension for the WTO?* (Cambridge University Press 2006) 8 ff.

<sup>111</sup> For instance, Hayek perceives competition as a procedure for discovering facts, which, if the procedure did not exist, would remain unknown or, at least, would not be used. If that were not the case, competition would be nothing but a 'highly wasteful method of achieving our goals'. In other words, competition is important only when we do not know the circumstances that determine the behavior of the players and we cannot predict the outcomes. Hayek, Friedrich A. von, 'Competition as A Discovery Procedure: Translated by Marcellus S. Snow' (2002) 5(3) *The Quarterly Journal of Austrian Economics* 9, 9. See also Oles Andriychuk, 'Thinking Inside the Box: Why Competition as a Process is a sui generis Right - A Methodological Observation' in Daniel Zimmer (ed), *The Goals of Competition Law* (Elgar 2012) 95 ff; Roger Zäch and Adrian Künzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law' in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global perspectives* (Edward Elgar 2010) 76.

<sup>112</sup> Daniel Zimmer, 'On Fairness and Welfare: The Objectives of Competition Policy: A Comment on Papers by David J. Gerber and by Christian Ahlborn & A. Jorge Padilla' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 105.

significant entry barriers.<sup>113</sup> In light of the existing case law, this point is innovative. For instance, in *TeliaSonera*, the Court held that the dominant company's margin squeeze had a likely exclusionary effect, for it excluded equally efficient undertakings.<sup>114</sup> In this case, the Court used a cost-based test, in order to determine the boundaries of freedom of the market players and ensure equality of opportunity among rivals.<sup>115</sup> Yet, in *Post Danmark II*<sup>116</sup> the Court recognized the limitations of the as efficient competitor test and took a step forward.<sup>117</sup> Accordingly, the goal of EU Competition Law to protect competition as such may reflect a fundamental presumption in favour of market structures that are compatible with and conducive to a democratic polity.

### ***Balancing deontological and consequentialist goals***

Another element of the influence of the nexus idea on the application of Art. 101 and 102 TFEU is reflected in the balancing of consequentialist and deontological values as a precondition of the competitive process' input- and output-oriented legitimacy. The ordoliberal framework is based on and ensures the values of freedom and equality of opportunity, which normally also lead to the maximisation of total and/or consumer welfare. However, in the case of conflict, the ordoliberals underline the necessity of striking a balance between deontological and consequentialist goals, so as to ensure an alignment between output-oriented and input-oriented legitimacy.

This idea explains the inner rationale and the structure of Art. 101 TFEU better than does a fully-fledged welfarist approach. The wording of Art. 101(1) TFEU in its very general terms catches agreements between firms that impose restrictions of competition. This, though, does not mean that any restriction in the freedom of action of an undertaking constitutes simultaneously a restriction of competition.<sup>118</sup> Such an interpretation would be absurd since restraints of trade are the essence of any contract.<sup>119</sup> Accordingly, Art. 101(1) TFEU prohibits any *undue* restriction of the economic freedom of the parties or other market participants.<sup>120</sup> This means that what at first sight may seem as a restriction of competition is not considered as such after a closer look.<sup>121</sup> Reduction of competition between the parties

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<sup>113</sup> *Case C-23/14 Post Danmark* (n 93) para. 60.

<sup>114</sup> *Case C-52/09 TeliaSonera Sverige* (n 99) para. 31. See also *Case C-280/08 P Deutsche Telekom v Commission* ECLI:EU:C:2010:603 para. 183.

<sup>115</sup> George A Hay and Kathryn McMahon, 'The Diverging Approach to Price Squeezes in the United States and Europe' (2012) 8(2) *Journal of Competition Law & Economics* 259, 277.

<sup>116</sup> *Case C-23/14 Post Danmark* (n 93) paras. 59-60.

<sup>117</sup> It is interesting to read the Court's statement about the importance of less-efficient competitors in light of Ernst-Joachim Mestmäcker's ordoliberal critique of the as-efficient competitor test. He argues that 'in the attempt to protect competition and not competitors the Commission ends up with the protection of market-dominant undertakings against 'inefficient competition'. For this reason, Mestmäcker concludes that the 'as efficient competitor' test is incompatible with the protection of residual competition in markets of dominant undertakings and [...] violates fundamental community law rights'. Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' (n 25) 50.

<sup>118</sup> *Case 56/65 Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38 p. 250; *Case 262/81 Coditel v Ciné-Vog Films II* ECLI:EU:C:1982:334 para. 15; *Case 42/84 Remia v Commission* ECLI:EU:C:1985:327 para. 17; *T-112/99 M6 and Others v Commission* ECLI:EU:T:2001:215 para. 104.

<sup>119</sup> A contractual restriction does not necessarily result in a restriction of competition, since the latter is an economic concept calling for economic analysis to be established. See Whish and Bailey (n 13) 117.

<sup>120</sup> Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39(5) *Common Market Law Review* 1057, 1061.

<sup>121</sup> The Court has repeatedly held that under certain conditions agreements that restrict competition between undertakings may also be found not to restrict competition in the market. See *Case 56/65 Société Technique Minière v Maschinenbau Ulm* (n 118); *Case 26/76 Metro v Commission* ECLI:EU:C:1977:167; *Case 161/84 Pronuptia* ECLI:EU:C:1986:41; Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (Kluwer Law International 2009) 184.

does not necessarily have an impact on competition in the market.<sup>122</sup> This is why restrictions of competition cannot be established *in abstracto* and should always be assessed against the background of the competition that would have existed in their absence.<sup>123</sup> Therefore, the prohibition of Art. 101(1) is not incompatible with the ordoliberal understanding of competition as a process whereby equal and autonomous market actors participate in the economy without overwhelming constraints from private and public power.<sup>124</sup>

At the same time, Art. 101(3) TFEU provides the conditions under which a restriction of freedom could be justified and provides guidelines for the balancing of economic freedom and welfare. In particular, pursuant to Article 101(3) TFEU a vertical or horizontal restriction of competition qualifies for an exemption from the general prohibition of Article 101(1) TFEU as long as it satisfies two positive and two negative conditions. The two positive conditions refer to the economic benefit and the consumer benefit of the anti-competitive agreement or practice, whereas the two negative conditions include the indispensability of the agreement for the realization of the relevant objectives and the absence of a substantial elimination of competition in the relevant market.<sup>125</sup> Given that restrictions of competition could be excused in virtue of their redeeming values, it becomes apparent that Art. 101 TFEU was designed in such a way so as to allow balancing the consequentialist and deontological values of competition.

In addition, the fourth requirement of non-elimination of substantial competition is based on the idea that economic freedom and the competitive process have an inherent value that cannot be fully attributed to actual beneficial consequences. This criterion calls for an analysis of the competitive restraints imposed on the parties, the remaining competitive pressures on the market and the impact of the agreement on competition.<sup>126</sup> Consequently, certain restrictions of freedom could not be justified no matter what the utilitarian calculus of costs and benefits may say. The upshot is that a market structure based on rivalry is not only considered an essential driver of economic efficiency, but also as a procedural safeguard of a non-hierarchical coordination of the economy that is compatible with democracy.<sup>127</sup> Rivalry motivates a mechanism of checks and balances that preserves economic freedom and in this sense competition as a process has an autonomous value independent of its welfare maximizing properties. Thus, certain restrictive practices could be justified as long as they do not undermine rivalry to an extent, which eliminates the conditions of its own existence.<sup>128</sup> This echoes the

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<sup>122</sup>This explains why, when it comes to *inter-brand* competition, the Court asks whether it can be objectively determined that the parties do not have the capacity to act independently. In case, the parties would have the capacity to compete, the agreement does not restrict any competition. See in this regard Case *T-374/94 European Night Services and Others v Commission* ECLI:EU:T:1998:198 para. 137. In the case of *intra-brand* competition the Court inquires whether the parties to the agreement could have concluded a less restrictive agreement. If not, the restrictions were indispensable for the agreement (ancillary restraints) and thereby are not caught by Art 101(1) TFEU. See in this regard Case *161/84 Pronuptia* (n 121) para. 27.

<sup>123</sup> Case *56/65 Société Technique Minière v Maschinenbau Ulm* (n 118) p. 249; *T-328/03 O2 (Germany) v Commission* ECLI:EU:T:2006:116 para. 77; Case *C-67/13 P Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 para. 53.

<sup>124</sup> Monti (n 120), 1059.

<sup>125</sup> According to Kjølbye Art. 101(3) TFEU introduced a consumer welfare standard, since efficiency gains going to producers are ignored. See Lars Kjølbye, 'The New Commission Guidelines on the Application of Article 81(3): An economic Approach to Article 81' (2004) 25(9) *European Competition Law Review* 566, 575.

<sup>126</sup> Commission Decision of 15 December 1975 relating to a proceeding under Article 85 of the Treaty (IV/27.073 - Bayer/Gist-Brocades) OJ L 30, 5.2.1976, p. 13–22.

<sup>127</sup> In the Guidelines on Vertical Restraints the Commission recognizes that '*where there is no residual competition and no foreseeable threat of entry the protection of rivalry and the competitive pressure outweighs possible efficiency gains.*' See Guidelines on Vertical Restraints OJ C 130/01, 19.05.2010, p. 1-46 para. 127.

<sup>128</sup> See also Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (n 7) 140.

ordoliberal view that certain procedural characteristics of competition should not be fully eliminated regardless of any positive or negative consequences.

Article 102 TFEU reflects a similar ordoliberal concern to accommodate procedural and consequentialist goals. Abuse of dominance case law is driven by the objective to ensure the competitive process, and thereby enhances both the input- and output-oriented legitimacy of EU Competition Law. The procedural goal of economic freedom, as a central value of the competition-democracy nexus is a leitmotif of numerous Art. 102 cases.<sup>129</sup> The Court's case law reflects a two-fold understanding of economic freedom that encompasses both the freedom to compete (market access) and the freedom of choice of purchasers and consumers. The close relationship between these two forms of economic freedom is apparent in the Court's reasoning on exclusive purchasing agreements and rebates. In these cases, the Court repeatedly held that exclusive purchasing agreements and loyalty rebates granted by a dominant undertaking to its different purchasers constitute anti-competitive practices, for they are 'designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market'<sup>130</sup>

The competition-democracy nexus, moreover, materialises in the Court's concern to guarantee fairness and equality of opportunity under Art. 102 TFEU. This ordoliberal concern has long been misunderstood by the literature. Commentators ascribed the fact that, in contrast to Section 2 of the US Sherman Act, Art. 102 TFEU also prohibits exploitative abuses to ordoliberalism's excessive concern about fairness and its over-regulatory understanding of competition law.<sup>131</sup> More recent contributions, however, pointed out that ordoliberalism is mostly concerned with exclusive abuses and that it was not the German, but the French delegation, which suggested during the negotiations of the Treaty of Rome establishing a prohibition of exploitative abuses of dominance.<sup>132</sup> On the contrary, the ordoliberal understanding of fairness as equality of opportunity calls for tackling exclusionary practices under Art. 102 TFEU. Thus, the ordoliberal concern about fairness is directly intertwined with economic freedom, and aims at preserving open markets as a level playing field that provides every market player with equal opportunities to participate in the competitive process.

Equality of opportunity plays for instance a role in margin squeeze cases where the Court found the said pricing practice as abusive due to its unfair exclusionary effect.<sup>133</sup> In addition, in *Deutsche Telekom* the Court stressed 'that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators'.<sup>134</sup> The Court further established a direct link between the principle of equality of opportunity and the as-efficient competitor test by holding that 'equality of opportunity means that the appellant and its equally efficient competitors are placed on an equal footing in the retail market in end-user access services'.<sup>135</sup> In this respect, the Court is not always confined to the efficiency rationale underlying the more economic approach according to

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<sup>129</sup> For a contrary view see Akman (n 7).

<sup>130</sup> *Case 85/76 Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 para. 90. In the same sense: *Case 322/81 Michelin v Commission* ECLI:EU:C:1983:313 para. 85; *Case C-95/04P British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 para. 67; *Case T-286/09 Intel v Commission* ECLI:EU:T:2014:547 paras. 72; 92; 93. This link between the restriction of purchaser's choice and foreclosure also motivates the theory of harm in the Court's most recent decision on retroactive rebates in *Case C-23/14 Post Danmark* (n 93) para. 31.

<sup>131</sup> O'Donoghue and Padilla (n 4) 604-607; 621-628; Whish and Bailey (n 13) 718-725.

<sup>132</sup> Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (n 7) 136; Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (n 7) 22.

<sup>133</sup> *Case C-52/09 TeliaSonera Sverige* (n 99) 25.

<sup>134</sup> *Case C-280/08 P Deutsche Telekom v Commission* (n 114) para. 230.

<sup>135</sup> *ibid* para. 233. See for the concern of equality of opportunity in non-pricing abuse-cases *Case C-553/12 P Commission v DEI* ECLI:EU:C:2014:2083.

which legal institutions in general and EU Competition Law in particular should ignore fairness concerns and be exclusively guided by welfare considerations.<sup>136</sup>

Interestingly, similarly to Art. 101 TFEU, the Court has tried to balance economic freedom and fairness with efficiency considerations in abuse of dominance cases. Already in *Hoffman-La Roche* the Court recognised that the procedural goals might be restricted in case of an ‘objective economic justification’.<sup>137</sup> In *British Airways* the Court clearly recognised an efficiency-based defence akin to the test applied under Art. 101 (3) TFEU. Accordingly, the objective justification allows the dominant undertaking to rebut the presumption of illegality of its conduct by showing that its exclusionary or anti-competitive effect is outweighed by efficiency gains.<sup>138</sup> The Commission’s Guidance Paper on Art. 82 EC underlines that the same four conditions as under Art. 101 (3) TFEU must be fulfilled to allow a practice to benefit from an objective efficiency-justification.<sup>139</sup> By replicating the fourth condition according to which the conduct may ‘not eliminate effective competition, by removing all or most existing sources of actual or potential competition’,<sup>140</sup> the Guidance Paper acknowledges the ordoliberal concern of also protecting procedural aspects of competition so as to ensure an effective mix of input- and output-oriented legitimacy.

In general terms, the competition-democracy nexus which relies on a balance between outcome- and process-oriented values could explain the Court’s and Commission’s two-fold approach under both articles. First, the authority examines whether a deviation from the principle of competition has occurred (restriction of competition) and, second, whether such a restriction of competition could be justified.<sup>141</sup> By contrast, such an approach would not make any sense under a fully-fledged welfarist approach: either a business practice restricts consumer welfare and, consequently, is to be prohibited by competition rules; or its positive consequences outweigh its negative welfare-effects, and it should be allowed. In the latter case, the practice at stake did not restrict competition in the first place.

### ***A form-based approach towards competition and competition law***

The competition-democracy nexus could also be associated with the Court’s form-based approach. Under Art. 101 TFEU, the form-based approach is primarily reflected in the Court’s reliance on a dichotomy between by-object and by-effect restrictions for classifying anti-competitive agreements and practices. The by-object category includes agreements that are by their very nature liable to restrict competition.<sup>142</sup> Properly understood, this concept includes agreements that have a clear and objective purpose to restrict competition,<sup>143</sup> or that are likely to have a negative impact on competition.<sup>144</sup> This category includes a non-exhaustive list of agreements<sup>145</sup> that ‘reveal a sufficient degree of harm to

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<sup>136</sup> Padilla and Ahlborn (n 5); Kaplow and Shavell (n 108).

<sup>137</sup> *Case 85/76 Hoffmann-La Roche v Commission* (n 130) para. 90.

<sup>138</sup> *Case C-95/04P British Airways plc v Commission of the European Communities* (n 130) paras. 69, 86. See also *Case 311/84 CBEM v CLT and IPB 'Télémarketing'* ECLI:EU:C:1985:394 para. 26; *Case C-209/10 Post Danmark A/S v Konkurrencerådet* (n 102) para. 42; *Case C-23/14 Post Danmark* (n 93) paras. 47-49.

<sup>139</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20. (n 2) para. 28-31.

<sup>140</sup> *ibid* para. 31.

<sup>141</sup> David J Gerber, ‘The Future of Article 82: Dissecting the Conflict’ in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008).

<sup>142</sup> See AG Kokott in *Opinion in Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) para. 43; *Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) para. 23.

<sup>143</sup> Saskia King, ‘The Object Box: Law, Policy or Myth?’ (2011) 7(2) *European Competition Journal* 269, 273.

<sup>144</sup> See AG Trstenjak in *Opinion in C-501/06 P Commission v GlaxoSmithKline* ECLI:EU:C:2009:409 para. 90.

<sup>145</sup> *Case C-209/07 Beef Industry Development and Barry Brothers (BIDS)* ECLI:EU:C:2008:643 para. 17.

competition.<sup>146</sup> Thus, the by-object category does not contain a fixed list of practices that could be automatically typified as anticompetitive. It constitutes an open-textured concept grounded on an analytic criterion: does a business conduct reveal a sufficient degree of harm to competition? Under this criterion, the Court classifies obvious hardcore restrictions and inchoate offences under the object category.<sup>147</sup>

It is important to note, though, that in order to establish a by-object restriction the Court engages in a fairly rigorous legal and economic analysis of the agreement.<sup>148</sup> As already mentioned, the by-object category is not confined solely to certain types of agreements. It generally covers agreements where a sufficiently deleterious effect on competition may be presumed on the basis of economic analysis.<sup>149</sup> As a result, determining whether an agreement falls within the by-object category requires from the Court to take into consideration the content of its provisions, its objectives and its economic and legal context, the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.<sup>150</sup> In other words, demonstrating certain effects is part of an object assessment.<sup>151</sup> Hence, the restriction by object is not a static notion and the Court does not adhere to rigid formalism.

If a certain agreement falls within the by-object category, there is no need to establish its negative actual or potential economic effects on competitors or consumers.<sup>152</sup> It is not necessary to demonstrate actual distortions of competition or a direct link between the agreement and consumer prices.<sup>153</sup> It is sufficient to show that the agreement has the potential to incur a negative impact on competition having regard to its specific legal and economic context. On the contrary, the by-effect restriction refers to more blurry and complex violations that require an analysis of the actual and/or potential effects of the agreement on the relevant market(s) to be established.<sup>154</sup> For an agreement to be restrictive by effect it must affect appreciably actual or potential competition to such an extent that negative effects can be expected with a reasonable degree of probability on prices, output, innovation or the variety or quality of goods and services in the relevant market.<sup>155</sup>

Given that an examination of the context could be required before it can be concluded whether a particular restraint constitutes a restriction by object,<sup>156</sup> it can be asked what the bifurcation stands for. According to the Court, the difference between the two categories 'lies in the fact that, with a restriction of competition by object, the negative interference with market conditions is so clear that the agreement

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<sup>146</sup> *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 123) paras. 49; 52.

<sup>147</sup> Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97–118 (n 98) para. 23. See also AG Trstenjak in *Opinion in C-501/06 P Commission v GlaxoSmithKline* (n 144) para. 91. See also AG Kokott in *Opinion in Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) para. 47.

<sup>148</sup> *Case 56/65 Société Technique Minière v Maschinenbau Ulm* (n 118) p. 249-250.

<sup>149</sup> *ibid* p. 249.

<sup>150</sup> *Case 56/65 Société Technique Minière v Maschinenbau Ulm* (n 118) p. 249; *Case C-234/89 Delimitis v Henninger Bräu* ECLI:EU:C:1991:91 para. 20; *Case C-32/11 - Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 36; *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 123) para. 53.

<sup>151</sup> See AG Trstenjak in *Opinion in C-501/06 P Commission v GlaxoSmithKline* (n 144) paras. 85-89.

<sup>152</sup> *Case 56/64 Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41 p. 342.

<sup>153</sup> *Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) paras. 31; 39; 43; *Case C-501/06 P GlaxoSmithKline Services and Others v Commission and Others* (n 94) para. 58.

<sup>154</sup> *Case 56/65 Société Technique Minière v Maschinenbau Ulm* (n 118) p. 249; *Case C-219/95 P Ferriere Nord v Commission* ECLI:EU:C:1997:375 paras. 13-15; *T-461/07 Visa Europe and Visa International Service v Commission* ECLI:EU:T:2011:181 para. 167; *Case C-1/12 Ordem dos Técnicos Oficiais de Contas* ECLI:EU:C:2013:127 para. 70.

<sup>155</sup> Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97–118 (n 98) para. 24.

<sup>156</sup> *Case 29/83 CRAM v Commission* ECLI:EU:C:1984:130 para. 26; *Case 96/82 IAZ v Commission* ECLI:EU:C:1983:310 paras. 23-25.

can be presumed, without any detailed market analysis, to have a restrictive effect'.<sup>157</sup> Under this rationale, certain agreements are presumed to be highly capable of reducing the competitive pressures in the market, increasing prices above or reducing output below the competitive level. Absent an objective justification,<sup>158</sup> such agreements should be prohibited. If a practice does not fall within the by-object category, its anti-competitive potential is not obvious and, thereby, a careful examination of its effects should take place. In both cases, the assessment is not formulaic and involves economic analysis. Yet, how much analysis should be undertaken when determining whether a particular agreement belongs to the one category or the other remains unclear.<sup>159</sup> However, certain indeterminacy is inherent to such open textured notions and allows the Court, as will be shown below, to be responsive to lessons from economics.

Due to its indeterminacy and, correlatively, because of the legal uncertainty it creates, defendants,<sup>160</sup> national courts<sup>161</sup> and even the General Court<sup>162</sup> have repeatedly challenged the Art. 101(1) TFEU bifurcation. Nevertheless, the Court has persistently relied on the said tool so as to conduct its competition assessment. This may be explained by the fact that judicial decision-making is essentially linked to the use of presumptions to channel factual inquiries and economize the need to examine the actual circumstances.<sup>163</sup> Moreover, since an investigation of the actual effects of an agreement demands a more intensive and costly economic analysis, the by-object option saves resources, creates legal certainty and allows all market participants to adapt their conduct.<sup>164</sup>

Nonetheless, it seems that there is an additional reason supporting the Court's approach. A form-based approach towards Art. 101(1) TFEU aims to identify practices that presumptively undermine the competitive procedure. Such practices could distort competition as a non-hierarchical process, weaken its procedural values and, thereby, its input-oriented legitimacy. If the said practices have the capacity to undermine competition as a process, it is also inferred that they have the potential to undermine the output-oriented legitimacy of competition. This explains why such practices are *prima facie* prohibited and would be allowed only in virtue of their redeeming virtues.

By contrast, under the welfarist approach the analytical method adopted by the Courts and the Commission should be abandoned and replaced by an in-depth investigation of the welfare-effects of the practice at stake. Pursuant to such an approach an undertaking's conduct would be deemed 'pro-' or 'anti-' competitive solely due to its actual consequences on welfare.<sup>165</sup> From that perspective, the abovementioned bifurcation would be redundant and excessively formalistic since the essential criterion should be whether the restraint increases or reduces welfare. Put differently, given that the weighing of

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<sup>157</sup> AG Trstenjak in *Opinion in C-501/06 P Commission v GlaxoSmithKline* (n 144) para. 92.

<sup>158</sup> Case T-17/93 *Matra Hachette v Commission* ECLI:EU:T:1994:89 para. 85.

<sup>159</sup> Whish and Bailey (n 13) 124–125.

<sup>160</sup> Case T-168/01 *GlaxoSmithKline Services v Commission* (n 94).

<sup>161</sup> Case C-8/08 *T-Mobile Netherlands BV and Others* (n 96).

<sup>162</sup> Case T-168/01 *GlaxoSmithKline Services v Commission* (n 94) para. 112.

<sup>163</sup> Barak Orbach, 'The Durability of Formalism in Antitrust' (2015) 100 *Iowa Law Review* 2197, 2203.

<sup>164</sup> AG Kokott in *Opinion in Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) para. 43; King (n 143), 273; Matthew Bennett and A. J Padilla, 'Article 81 EC Revisited: Deciphering European Commission Antitrust Goals and Rules' in Xavier Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 62–65.

<sup>165</sup> For instance, Williamson explains that if the objective of competition policy is to promote efficiency, then a monopolizing merger should be allowed if it generates sufficiently large savings from gains in economies of scale so as to 'compensate' for any losses suffered by consumers. Oliver E Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58(1) *The American Economic Review* 18. All adepts of the welfarist approach do however, not accept this method of antitrust analysis. Daniel A Crane, 'The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy' (2014) 79 *Antitrust Law Journal* 835, 850.

pro- and anti-competitive effects is left for 101(3) TFEU the welfarist approach cannot make sense of the Art. 101(1) bifurcation.<sup>166</sup> In this case, a fully-fledged welfarist approach would reduce competition law to pure economic analysis and eliminate any necessity of striking a balance between the outcome- and the process-oriented goals of competition.<sup>167</sup> Such a development would transform EU Competition Law into an unprincipled area of law totally dependent on empirical analysis.<sup>168</sup>

The idea of a ‘competition-democracy nexus’ might also contribute to a better understanding of the Court’s form-based approach under Art. 102 TFEU. In particular, this idea could be used to make sense of persistent concepts such as ‘normal competition’ or ‘competition on the merits’, as well as the principle of ‘special responsibility’ of dominant undertakings.

The category of ‘competition on the merits’ or ‘normal competition’ is a key concept of the Court’s reasoning under Art. 102. Indeed, the Court defines ‘abuse’ by contrasting it with ‘economic performance’,<sup>169</sup> which complies with ‘competition on the merits’. Put differently, the Court utilizes form-based concepts to distinguish illegitimate business practices ‘from those, which condition normal competition in products or services on the basis of the transactions of commercial operators’.<sup>170</sup> Both the concept of ‘normal competition’ and ‘competition on the merits’ embody the emphasis put by the *Freiburger Schule* on the specific procedural form of competition as a non-hierarchical coordination process, which is compatible with democratic values. Such an approach could reflect the ordoliberal distinction between the categories of ‘performance competition’ and ‘impediment competition’. Consequently, the Court relies on form-based legal presumptions regarding the anti-competitive character of certain categories of business practices such as predatory pricing, loyalty rebates, or price-discrimination in order to articulate its analytical framework. Thus, based on existing economic ‘experience’, this approach creates presumptions according to which certain practices constitute phenomena of normal economic interaction, whereas others must be regarded as having an anti-competitive purpose.<sup>171</sup>

Along the same lines, the ordoliberal competition-democracy nexus could explain the principle of ‘special responsibility’ of dominant undertakings. In this regard, the Court continuously held that the dominant position of an undertaking as such is unproblematic under Art. 102 TFEU. However, by having substantial market power a dominant undertaking can act independently from certain competitive constraints.<sup>172</sup> Thus, it bears ‘a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’.<sup>173</sup> The ‘special responsibility’ doctrine presupposes that the mere existence of dominance necessarily implies that ‘the structure of competition has already been weakened, and any further weakening of the structure of competition may constitute an abuse of a

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<sup>166</sup> Petros Nicolaides, ‘The Balancing Myth: The Economics of Article 81(1) and (3)’ (2005) 32(2) *Legal Issues of Economic Intergration* 123, 131.

<sup>167</sup> Fox and Sullivan (n 88), 944-945; 956-957; Gerber, ‘Comparative Antitrust Law’ (n 88) 1202–1203.

<sup>168</sup> Oles Andriychuk, ‘Dialectical antitrust: an alternative insight into the methodology of EC competition law analysis in a period of economic downturn’ (2010) 31(4) *European Competition Law Review* 155, 163.

<sup>169</sup> *Case 322/81 Michelin v Commission* (n 130) para. 70. See also *Case C-95/04P British Airways plc v Commission of the European Communities* (n 130) para. 66.

<sup>170</sup> *Case 85/76 Hoffmann-La Roche v Commission* (n 130) para. 91.

<sup>171</sup> Colomo provides a similar description of Court’s approach based on the rules versus standards distinction and elaborates the role of economic analysis for fleshing out such rules and standards. See Colomo (n 92) 9.

<sup>172</sup> *Case C-333/94 P Tetra Pak v Commission* ECLI:EU:C:1996:436 para. 21.

<sup>173</sup> *Case 322/81 Michelin v Commission* (n 130) para. 57. The concept of special responsibility is the ‘cactus firmus’ that also guides the Court’s reasoning in its recent *Post Danmark II* ruling. See *Case C-23/14 Post Danmark* (n 93) para. 71-72.

dominant position'.<sup>174</sup> Even though such a doctrine could be justified under a welfarist reasoning,<sup>175</sup> in the European context it was triggered by the ordoliberal concern that the excessive concentration and abuse of economic power does not only bear the risk of undermining competition, but might also have detrimental political and social consequences.

At this point it becomes apparent that 'special responsibility' is closely related to 'competition on the merits'.<sup>176</sup> Dominant undertakings bear certain obligations limiting their forms of participation in the competitive process. Thus, where the competitive process has already been weakened by the existence of dominance, the relevant firm should not further undermine the structure of competition. Otherwise, the dominant firm would be able to unilaterally change the 'rules of the game' by determining the number of competitors and the conditions of competition on the market.

Often in the literature,<sup>177</sup> ordoliberalism is associated with the concept of 'as-if competition' coined by Eucken<sup>178</sup> and Miksch<sup>179</sup>. This standard implies that the bearers of economic power should behave as if complete competition prevailed.<sup>180</sup> Thus, the task of the competition authority is to regulate unavoidable monopolies and break up avoidable ones.<sup>181</sup> Recent contributions have, however, underlined that the ordoliberal paradigm is not necessarily linked to the regulatory 'as-if' standard. Several ordoliberals and disciples of the *Freiburger Schule* have even criticized the said standard.<sup>182</sup> In a certain way, the 'as-if' standard still resonates in the EU sector regulation of public utilities.<sup>183</sup> Nonetheless, the principle of special responsibility restrains dominant players' opportunity to have recourse to practices, which are not available under competitive conditions. In this non-regulatory sense, an (updated) ordoliberal 'as-if' standard still influences EU Competition Law.<sup>184</sup>

This form-based understanding clearly contrasts with the welfarist approach according to which the appropriate benchmark for the existence of effective competition is independent of the form of the competitive process or the structure of the market. Under the welfarist approach, a practice qualifies as abusive only if it inflicts actual or potential consumer harm.<sup>185</sup> However, in this case the risk of false

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<sup>174</sup> *Case T-286/09 Intel v Commission* (n 130) para. 116.

<sup>175</sup> For example, Posner argues that the economic theory of monopoly, namely the insight that monopoly in most occasions reduces economic efficiency, provides the only sound basis for antitrust policy. Posner (n 4) 29.

<sup>176</sup> *Case C-202/07 P France Télécom v Commission* ECLI:EU:C:2009:214 paras. 105-106.

<sup>177</sup> Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (n 7) 52; Gerber, *Law and Competition in Twentieth Century Europe* (n 7) 252-254. Padilla and Ahlborn (n 5) 67-68; Akman (n 6) 10.

<sup>178</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 12) 293 ff.

<sup>179</sup> Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 147-149; 211-212; Leonhard Miksch, 'Die Wirtschaftspolitik des Als-Ob' (1948) 105(2) *Zeitschrift für die gesamte Staatswissenschaft* 310; Miksch, 'Versuch eines liberalen Programms [1949]' (n 32) 166.

<sup>180</sup> Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (n 32) 222.

<sup>181</sup> Eucken, *Grundsätze der Wirtschaftspolitik* (n 12) 294; Eucken, 'The Competitive Order and its Implementation [1949]' (n 57) 243.

<sup>182</sup> Mestmäcker and Behrens critically review Gerber's and Akman's accounts which link ordoliberalism with the 'as-if' standard and point out that ordoliberals have also distanced themselves from the said standard. See Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' (n 25) 42-44; Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (n 7) 10; 20. See also Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (n 7) 133-134.

<sup>183</sup> Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (n 7) 22.

<sup>184</sup> Padilla and Ahlborn (n 5) 72.

<sup>185</sup> Bishop and Walker (n 13) 20-21.

negatives would be increased, since certain exclusionary practices that lessen competition and indirectly harm the consumers would be allowed.

### *The adaptive nature of ordoliberalism*

As already mentioned, one of the main objections to ordoliberalism refers to its allegedly static and formalistic understanding of competition and competition law which goes in tandem with its neglect of economic thinking and welfare considerations.<sup>186</sup> However, the competition-democracy nexus idea shows that the paradigm is not necessarily condemned to economically un-informed formalism. On the contrary, this form- and structure-based approach could be informed by economics. More importantly, by balancing outcome oriented and procedural goals, the said approach takes seriously efficiency considerations without falling into the trap of only protecting the ‘right to be efficient.’ In this regard, it enhances the democratic legitimacy of competition as an institution.

For instance, in the area of Art. 101 TFEU the Court has articulated a form-based yet economically informed framework for protecting competition. As we saw, first, the Court investigates whether the agreement reveals a sufficient degree of harm to competition and, thereby, has as its object to restrict competition. In this case, the anticompetitive effects are presumed and the analysis moves to the balancing exercise of Art. 101(3) TFEU. If the agreement does not have an anticompetitive object, the Commission should establish its potential or actual anticompetitive effects. In this case, also the defendant can excuse her behavior by invoking agreement’s redeeming virtues under Art. 101(3) TFEU.

The analytical categories of anticompetitive behaviour under Art. 101 TFEU are less fixed than most literature makes them appear.<sup>187</sup> The Court in several cases has blurred the distinction between by-object and by-effect.<sup>188</sup> Thus, the said bifurcation has not discouraged the Court from developing an analytical approach and forging a *continuum*. This function of the bifurcation is often ignored by the literature. Usually the object vs. effects debate is approached solely as a disagreement about substantive concepts.<sup>189</sup> Yet, the main function of the bifurcation is procedural. It induces a burden-shifting framework for the evaluation of restrictions of competition. According to this framework, the plaintiff has the initial burden of demonstrating that the alleged restraint constitutes a restriction by-object by arguing that it has obviously produced or intends to produce substantial adverse effects on competition in the relevant market. If the plaintiff does not succeed, she may show that the restraint restricts competition by its effects. If the plaintiff succeeds in establishing either anticompetitive object or effect, then the burden shifts to the defendant, who must show that the redeeming virtues of the agreement outweigh its actual or potential negative impact on competition. If the defendant meets this burden, the plaintiff has to demonstrate that the anti-competitive effects of the agreement outweigh its pro-competitive effects.<sup>190</sup>

This exercise allows the Court to develop the best possible understanding of the case at hand.<sup>191</sup> These rebuttable presumptions constitute a way for reasonably allocating the burden of proof in accordance

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<sup>186</sup> Padilla and Ahlborn (n 5) 81.

<sup>187</sup> Okeoghene Odudu, ‘Interpreting Article 81(1): Object as Subjective Intention’ (2001) 26(1) *European Law Review* 60; Alison Jones, ‘Left Behind by Modernisation? Restrictions by Object under Article 101(1)’ (2010) 6(3) *European Competition Journal* 649.

<sup>188</sup> Along the same lines, King advocates in favor of the Court’s more analytic approach regarding by-object restrictions King (n 143), 276–291.

<sup>189</sup> *ibid* 270.

<sup>190</sup> Nicolaides describes this stage of analysis as a process of successive filters that aim to weed out anticompetitive agreements. Nicolaides (n 166), 134–145.

<sup>191</sup> Bennett and Padilla (n 164) 62–65. For an analysis of the issue on the other side of the Atlantic see Michael A Carrier, ‘The Real Rule of Reason: Bridging the Disconnect’ [1999] *Brigham Young University Law Review* 1265; Michael A Carrier,

with categories of practices that are more or less likely to bear anti-competitive effects. In this context, the burden of proof is assigned to the stakeholder with a comparative advantage at each stage and imposes different evidentiary requirements on the parties. Such an approach uses economics as a tool to (a) determine the optimal degree of differentiation of competition rules and standards,<sup>192</sup> and (b) inform competition analysis in specific cases.<sup>193</sup> In this respect, modern economic thinking is not at odds with the case law on Art. 101 TFEU pursuant to which there is no bright line between by-object and by-effect restrictions, but rather a continuum. The bifurcation represents different degrees of judicial discretion.<sup>194</sup> This differentiated judicial discretion is continuously informed by economics. The latter effectively indicates what information may be excluded from the Court's analysis, since it is impossible for the Court to consider all circumstances in each case.<sup>195</sup>

The above shows that the Court, by interpreting an ordoliberal provision and without abandoning a form-based approach, was able to advance and modify forms without being confined to unworkable formalism.<sup>196</sup> The Court has also remained apt to modify its forms, when they were found unable to capture the complexities of economic reality.<sup>197</sup> It achieved this development by relying on the said bifurcation and drawing an economically sensitive continuum from by-object restrictions to restrictions by-effect coupled with a balancing exercise. This continuum, additionally, enabled the Court to avoid informality that would significantly expand its discretion and lead to arbitrary outcomes.<sup>198</sup> Consequently, economic analysis is not an exogenous force to Court's form-based approach. It has been used by the Court in order to flesh out assumptions and presumptions and allocate the burden of proof.

Another example of the adaptive nature of the said paradigm could be found in its compatibility with the EU Competition Law's modernized approach towards vertical agreements. Vertical restraints have ambiguous effects on competition: on the one hand, they restrict (*intra-brand*) competition, competitive freedom and autonomy; on the other hand, they are in many cases welfare enhancing. Accordingly, it is

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'Rule of Reason: An Empirical Update for the 21st Century' (2008) 16(4) *George Mason Law Review*, 827; Orbach (n 163).

<sup>192</sup> A 'rule' captures those instances in which a practice is prohibited irrespective of the context in which it is implemented, while a 'standard' requires a multi-factored case-specific inquiry to be implemented. Between these two extremes ECJ's jurisprudence can be described as a mix between a completely rule-based and standard-based approaches. See Daniel A Crane, 'Rules versus Standards in Antitrust Adjudication' (2007) 64 *Wash. & Lee L. Rev.* 49, 55-56; 71-79.

<sup>193</sup> Arndt Christiansen and Wolfgang Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of per se Rules vs. Rule of Reason' (2006) 2(2) *Journal of Competition Law and Economics* 215, 215.

<sup>194</sup> Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42(3) *Duke Law Journal* 557, 610.

<sup>195</sup> Orbach (n 163), 2199-2200.

<sup>196</sup> For Instance, in *Woodpulp II* the Court held that evidence of parallel behavior is, alone, insufficient to show that an agreement within the meaning of Article 101 TFEU has been concluded. Such a finding is in line with modern economic thinking on collusion according to which collusion is one among others possible explanation of parallelism. See *Joint Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission 'Woodpulp II'* ECLI:EU:C:1993:120 para. 21.

<sup>197</sup> The Court recognized in *Beef Industry* that the said concept cannot be reduced to an exhaustive list and should not be limited just to the examples. See *Case C-209/07 Beef Industry Development and Barry Brothers (BIDS)* (n 145) para. 23. Therefore, it is always an open question for the Court which agreements should be classified under what category. In *T-Mobile* the Court adopted a very broad test, which was repeated in *Allianz*. See *Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) para. 31; *Case C-32/11 - Allianz Hungária Biztosító and Others* (n 150) para. 38. However, in *Cartes Bancaires* the Court narrowed it down. Specifically, in accordance with current economic thinking the Court recognized that the agreement under scrutiny looked like a plausible means to fight free riding and, thereby, it did not constitute a restriction by object See *Case C-67/13 P Groupement des cartes bancaires v Commission* (n 123) para- 75. In general, when it attempts to define the limits of the by-object restriction, the Court follows an analytical approach and tries neither to give an unduly broad interpretation, nor to interpret it so narrowly as to be deprived of its practical effectiveness. See AG Kokott in *Opinion in Case C-8/08 T-Mobile Netherlands BV and Others* (n 96) para. 47.

<sup>198</sup> Daniel A Farber, 'The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law' (1992) 45 *Vanderbilt Law Review* 533.

very difficult to say *a priori* which type of restraints is anti-competitive.<sup>199</sup> However, ‘equal freedom for all imposes an inherent limit upon the freedom of each and every one and to this extent implies a kind of coercion for each and every person concerned’.<sup>200</sup> This means that certain restraints of freedom of trade are not restrictions of competition, and also that it is necessary to distinguish benign from anti-competitive freedom.<sup>201</sup>

In this context, the modernized approach towards vertical restraints as reflected in the Block Exemption Regulation (‘BERs’)<sup>202</sup> and the Guidelines<sup>203</sup> rejects the claim that vertical restraints are *per se* anti-competitive and calls for focusing on the impact on competition and efficiency before any definite conclusion. This approach, thus, provides guidance on how to balance outcome-oriented and procedural goals where these goals are in conflict.<sup>204</sup> From this perspective, certain efficient restrictions of competition are acceptable, as long as they do not lead to an excessive concentration of market power or to coercion in the market. The latter should be avoided, as it could eliminate the procedural characteristics, which are indispensable for the democratic legitimacy of the competitive process. In other words, excessive concentration and coercion in the market, if not caught, would undermine competition as an institution of freedom. In this sense, the modern economically informed approach towards vertical restraints is not at odds with ordoliberal thinking.

In the same vein, an updated understanding of the ordoliberal paradigm shows that the Court’s form-based approach under Art. 102 is informed by economic reasoning. This is evident, for instance, if we look at the evolving understanding of the concept of dominance. The Court has not been satisfied with a static definition according to which dominance is identified by an established market share threshold that may allow for possible situation-specific deviations. Instead, it uses a comprehensive set of criteria indicating that a firm has appreciable freedom from competitive constraints and is able to act in ways that a competitively constrained firm could not.<sup>205</sup>

In addition, the Court recently specified that the principles of special responsibility and competition on the merits are not aimed at protecting less efficient competitors<sup>206</sup> and that not every exclusionary effect is detrimental to competition.<sup>207</sup> On the contrary, the Court clarified that ‘competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice,

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<sup>199</sup> For instance, certain territorial restriction could generate efficiencies and be pro-competitive. See William S Comanor, ‘Vertical Arrangements and Antitrust Analysis’ (1987) 62 N.Y.U. L. Rev. 1153; Robert L Steiner, ‘The Nature of Vertical Restraints’ (1985) 30(143-197) Antitrust Bulletin.

<sup>200</sup> Böhm, ‘Rule of Law in a Market Economy [1966]’ (n 60) 54.

<sup>201</sup> Amato (n 37) 2–3.

<sup>202</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 23.4.2010, p. 1-7.

<sup>203</sup> Guidelines on Vertical Restraints OJ C 130/01, 19.05.2010, p. 1-46 (n 127).

<sup>204</sup> In particular, the Block Exemption Regulation provides a general presumption of legality for vertical restraints as long as the market share held by each of the parties to the agreement on the relevant market does not exceed 30% and the said agreements do not contain certain types of hard-core restrictions of competition. See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 23.4.2010, p. 1-7 (n 202) Art. 2, 3 and 4.

<sup>205</sup> *Case 27/76 United Brands v Commission* ECLI:EU:C:1978:22 paras. 58-129; International Competition Network, ‘Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies’ (2007) 40–43.

<sup>206</sup> *Case C-209/10 Post Danmark A/S v Konkurrencerådet* (n 102) para. 21.

<sup>207</sup> *ibid* para. 22.

quality or innovation'.<sup>208</sup> However, the General Court and the Court recognized the limitation of the more economic approach in *Intel* and *Post Danmark II*.<sup>209</sup>

Specifically, in *Intel* the General Court concluded that contractual or *de facto* exclusive or quasi-exclusive rebates, even if only applicable to certain market segments, infringe Article 102. Thus, the Commission was not required to employ a cost-based test and to demonstrate actual foreclosure or consumer harm.<sup>210</sup> In this respect, the General Court rejected the relevance of the as efficient competitor test in cases of both exclusive and loyalty-inducing discounts.<sup>211</sup> Given that such conduct had no objective justification other than to exclude a rival, it was prohibited under Article 102.<sup>212</sup> Even though this holding has been starkly criticized as a step backwards towards a form-based approach,<sup>213</sup> it could be argued that it is grounded on an economically apt, form-based approach. In particular, it sets a clear rule according to which quantity rebates are presumptively lawful; exclusivity rebates presumptively unlawful in the absence of an objective justification; and the 'third category' rebates require detailed analysis.<sup>214</sup> In addition, the presumption of illegality of loyalty rebates could be economically justified.<sup>215</sup>

This judgment does not sit uncomfortably with an ordoliberal understanding of competition. It shows that, contrary to what is often adduced by the literature,<sup>216</sup> the ordoliberal categories of exclusionary abuses are not devoid of any economic reasoning or theory of harm. The question that ordoliberals are interested in is not whether loyalty rebates have positive or negative welfare effects. Instead, they choose a game-theoretic perspective, looking at the potential effect of a business practice by a dominant firm, in this case loyalty rebates, on the available strategies (i.e. choices) of its clients and competitors and, eventually, on the process of competition.<sup>217</sup>

From this angle, the presumption of *per se* illegality relies on the observation that a dominant firm's loyalty rebates – as opposed to quantity rebates – are not motivated by any underlying economic service in return. On the contrary, such practices have a loyalty enhancing 'suction effect'<sup>218</sup> and rearrange purchaser's incentives and strategies. By increasing purchasers' switching cost the dominant

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<sup>208</sup> *ibid.*

<sup>209</sup> Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law' (2014) 5(8) *Journal of European Competition Law & Practice* 1.

<sup>210</sup> *Case T-286/09 Intel v Commission* (n 130) paras. 76-77; 86; 103.

<sup>211</sup> *ibid* paras. 143-166. Noticeably, in para 150 the Court highlights that an as-efficient competitor test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult.

<sup>212</sup> *ibid* paras. 202-205.

<sup>213</sup> Rey and Venit (n 5); James S Venit, 'Case T-286/09 *Intel v Commission* —The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10(2) *European Competition Journal* 202; Damien Geradin, 'Loyalty Rebates after *Intel*: Time for the European Court of Justice to overrule *Hoffman-La Roche*' (2015) 11(3) *Journal of Competition Law & Economics* 579.

<sup>214</sup> Richard Whish, '*Intel v Commission*: Keep Calm and Carry On' (2015) 6(1) *Journal of European Competition Law & Practice* 1.

<sup>215</sup> Einer Elhauge and Abraham L Wickelgren, 'Robust Exclusion and Market Division through Loyalty Discounts' (2015) 43 *International Journal of Industrial Organization* 111. For a contrary view see Colomo (n 92).

<sup>216</sup> Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (n 42) 1158; Rey and Venit (n 5), 23; Padilla and Ahlborn (n 5) 80.

<sup>217</sup> For a game-theoretical analysis of the ordoliberal understanding of dominance see Massimiliano Vatiere, 'Dominant market position and ordoliberalism' (2015) 62(4) *International Review of Economics* 291, 296 ff.

<sup>218</sup> See in this regard the analysis of the suction effect by AG Kokott in *Opinion in Case C-23/14 Post Danmark* ECLI:EU:C:2015:343 paras. 36-54.

undertaking also raises its rivals' cost and, thereby, might exclude them from the market.<sup>219</sup> Being concerned about competitors does not automatically mean not being concerned about competition.<sup>220</sup> This becomes apparent, especially, in cases where the dominant undertaking by excluding its competitors significantly reduces the competitive constraints in the market.<sup>221</sup> This underlines that the real challenge is not to replace established categories or forms by a case-by-case balancing of welfare-effects, but to inform these categories with new economic content.<sup>222</sup>

## Conclusion

In this article, we have argued that the welfarist approach to EU Competition Law fails to fully explain the Court's reasoning in competition law cases and its reluctance to abandon its form-based approach. Based on an analysis of the fundamental ideas and principles of the ordoliberal school of thought in its historical context, this paper illustrated in what sense the ordoliberals perceived a direct link between competition and democracy. This competition-democracy nexus materializes in the ordoliberal idea of competition as institutional legal framework setting limits to private and public economic power in order to guarantee freedom, equality of opportunity and welfare. The concept of the competition-democracy nexus as the underlying rationale of the said paradigm constitutes a powerful explanation for the continuous influence of the ordoliberal school of thought on the Court's case law.

Although the Court never explicitly referred to democracy in its case law, its reasoning could be explained by an account of competition as a democratic institution. The Court's approach clearly suggests that competition as a specific organizational form of the market economy is not to be protected only to the extent that it enhances welfare. On the contrary, the protection of competition for the sake of its intrinsic value indicates that the Court also recognizes its social and political importance. However, competition is by nature a fragile institution that must be protected against companies with market power sufficient to defy or even modify the rules of the game. This may be the rationale under which the Court protects the competitive process as relying on and being conducive to a democratic polity.

Protecting competition as such, besides its welfare maximizing properties, entails certain social costs in terms of efficiency.<sup>223</sup> This is seen as a 'perverse' outcome within a framework that only values outcomes in terms of efficiency.<sup>224</sup> Competitive markets like democratic institutions are imperfect; yet they are the best tools we have so far for producing the greatest diversity and highest quality of goods and services. In this sense, the competitive process has an intrinsic value. From this perspective, the ordoliberal paradigm may shed some light on how the Court's reasoning enhances the input- and output-oriented legitimacy of the institution of competition. In this respect, certain welfare losses could be deemed as the sacrifice for a democratic and pluralistic economic system.

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<sup>219</sup> See in this sense Frank Maier-Rigaud, 'Article 82 Rebates: Four Common Fallacies' (2006) 2 *European Competition Journal* 85, 87; Thomas G Krattenmaker and Steven C Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96(3) *The Yale Law Journal* 209.

<sup>220</sup> Eleanor M. Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 (2) *World Competition* 149–165.

<sup>221</sup> See in this sense *Case C-23/14 Post Danmark* (n 93) paras. 59-60; 72.

<sup>222</sup> Maier-Rigaud, 'Article 82 Rebates: Four Common Fallacies' (n 219) 100.

<sup>223</sup> *Case C-280/08 P Deutsche Telekom v Commission* (n 114) para 183.

<sup>224</sup> Akman (n 7), 212.



