Article 102 TFEU, Aimed at Serving the Ordoliberal Agenda or European Consumers?

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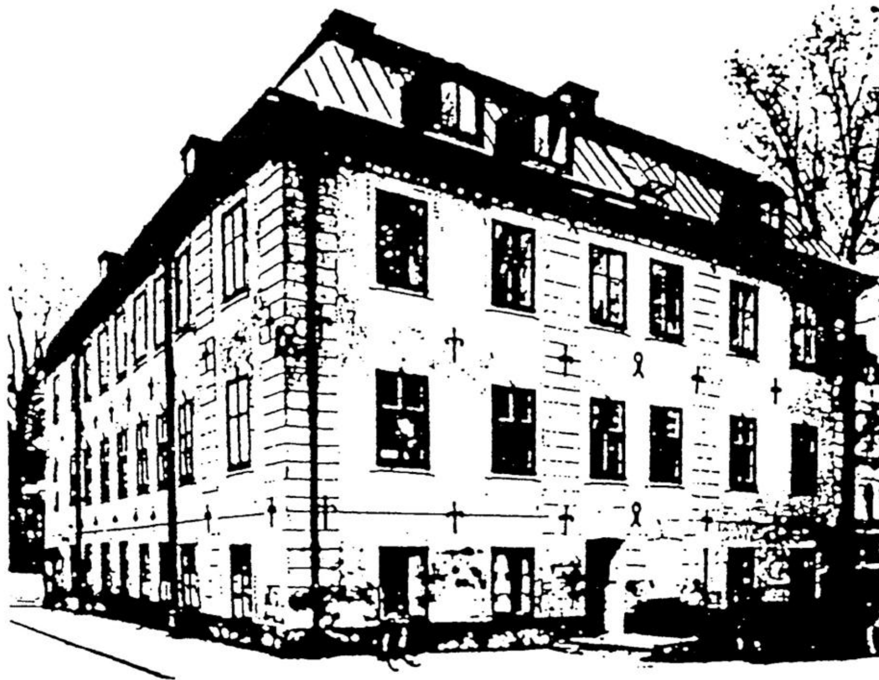

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Summary

Article 102 TFEU has been called the last steam-powered train of the European competition system. However, in the end of 2008 the Commission issued a "Guidance Paper" on the application of Article 102 to modernise the provision and thus allow for more economic thinking in its application.

Although the step taken by the Commission has been generally applauded, the Guidance Paper has been criticised. For example, it has been claimed that it unlawfully reassesses the objectives of Article 102 and that it adopts a method incapable of giving undertakings the certainty they need to be able to carry out commercial policies in the knowledge that they are legal. Furthermore, the ECJ has joined the critics in recent cases and proclaimed that the objectives assessed in the "Guidance Paper" (consumer welfare and economic efficiency) cannot be accepted. Instead, the ECJ has referred to its earlier case law and concluded that Article 102 prohibits conducts which distort a competitive structure.

Since the Guidance Paper has been long awaited, its "rejection" by the ECJ seems inconceivable. Therefore, this thesis offers an explanation to why the GP, in its current form, meets opposition. To do this, the two opposing views on what the EU competition law should strive for are analysed. The first view is the ordoliberal, where harm to the structure of the market should be avoided. The second view is the one advocated by the Guidance Paper, where actual or likely harm to consumers should be avoided.

When the two different views have been clarified, a test is carried out, where the first view (which is settled case law) is hypothetically replaced by the second view, in order to identify any unwanted characteristics. As it turns out, the approach suggested by the GP, although perhaps generally desirable according to a utility calculus, tends to rise enforcement costs and is to a greater extent running a risk of failing to achieve what it sets out to achieve – consumer welfare.

This is perhaps more troublesome in the eye of the EU Courts, than in the eye of the Commission, because the Courts must observe general principles of law in the interpretation and application of the Treaty (Article 19(1) TEU). The observance of one such principle – "the presumption of innocence" – becomes jeopardised since the EU Courts must also respect the discretionary powers of the Commission. This is troublesome because if the approach suggested by the GP is more uncertain, the importance of observing this principle grows. Therefore, the EU Courts tends to favour the ordoliberal view for its simplicity.

Sammanfattning

Artikel 102 TFEU har kallats för det Europeiska konkurrenssystemets sista maskindrivna tåg. I slutet av 2008 gav emellertid kommissionen ut ett vägledande dokument i syfte att modernisera artikeln and därigenom låta ekonomiska hänsyn få genomslagskraft i dess tillämpning.

Trots att kommissionens förnyelsearbete har bemötts positivt så har dokumentet fått uthärda skarp kritik. Till exempel har det hävdats att kommissionen förbiser gällande praxis genom att omvärdera målen med artikel 102 och att den föreslagna metoden gör det svårare för företag att fatta kommersiella beslut med visshet om att de är lagenliga. Dessutom har EG-domstolen anslutit sig till kritikerna i senare rättsfall och klargjort att de mål som kommissionens dokument uppställer (konsumentvälfärd och ekonomisk effektivitet) inte kan accepteras. Istället har EG-domstolen hänvisat till sin tidigare praxis och betonat att artikel 102, då som nu, förbjuder beteenden som snedvrider en konkurrensmässig struktur.

Eftersom kommissionens dokument är ett resultat av ett längre förnyelsearbete med brett stöd kan EG-domstolens ståndpunkt vara svårbegriplig. Ett syfte med denna uppsats är därför att erbjuda en förklaring till varför dokumentet i sin nuvarande form stöter på patrull. För att ge en sådan förklaring är det nödvändigt att analysera två vitt skilda åskådningar inom den EG-rättsliga konkurrensrätten. Den första åskådningen är det ordoliberala synsättet, där den främsta målsättningen är att skydda marknaders struktur. Den andra är det synsätt som föreslås av dokumentet, där behovet av konsumentskydd sätts i centrum.

När de olika synsätten analyserats genomförs ett test, där den första åskådningen (som är befäst i praxis) hypotetiskt byts ut mot den andra, i syfte att hitta oönskade effekter. Även om synsättet som föreslås av kommissionen kan antas vara önskvärt (i en ekonomisk bemärkelse) visar det sig att kostnaderna för att upprätthålla artikel 102 ökar och att metoden löper en större risk att misslyckas med att uppnå sitt mål – konsumentvälfärd.

Detta är möjligen besvärligare ur EU-domstolarnas perspektiv, än ur kommissionens, eftersom domstolarna är ålagda att beakta allmänna rättsprinciper i deras dömande verksamhet (artikel 19(1) TEU). Beaktandet av *en* sådan princip – ”presumtionen om den anklagades oskuld” – äventyras eftersom domstolarna även måste respektera kommissionens makt. Detta är bekymmersamt eftersom efterlevandet av denna princip blir (om möjligt) än viktigare om metoden som föreslås av kommissionen medför att Artikel 102 löper en större risk att misslyckas med att uppnå sitt mål. Därför tenderar EU-domstolarna att istället föredra det ordoliberala synsättet.

Abbreviations

CDU	Christian Democratic Union of Germany (Christlich Demokratische Union Deutschlands)
CFI	General Court (formerly Court of First Instance)
DG	Directorate-General
EAGCP	Economic Advisory Group for Competition Policy
EC	European Community
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union (formerly Court of Justice of the European Communities)
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
GP	Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Competition Law system)
IP	Intellectual property
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei (National Socialist German Workers' Party)
R&D	Research and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States (of America)
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization

Note on citation

The Treaty of Lisbon, which entered into force the first of December 2009, amends the Treaty establishing the European Community - EC. The EC Treaty has now been renamed the Treaty on the Functioning of the European Union (TFEU). Article 82 EC have become Article 102 TFEU and what used to be “EC competition law” is now “EU competition law”.

This thesis will *not* entirely make use of the new Article numbers in the TFEU. The reason for this is that this thesis is partly concerned with the past (the EEC and the EC treaties) and even though Articles 81 EC (now 101 TFEU) and 82 EC (now 102 TFEU) have been left unchanged by the TFEU some articles in the EC Treaty, which are of interest in this thesis, have been changed by the TFEU. For example, Article 3(1)(g) EC had been amended and what appears to be its counterpart in the TFEU – Article 3(1)(b) TFEU – has therefore been given a different wording.

For this reason, this thesis makes use of a citation that is complicated but nevertheless necessary: Articles 85 EEC/81 EC/101 TFEU and 86 EEC/82 EC/102 TFEU will be referred to as Articles 101 and 102 repectively (and in general these articles will not be followed by “TFEU” since they are so frequently used). When other Articles are referred to (which possibly have been amended by the TFEU), the article numbers of the EC Treaty or the TFEU will be used depending on whether the past or the present is being analysed.

1 Introduction

1.1 Background

Article 102 TFEU has been the target of vast criticism the recent years.[1] Simplified, this criticism is made up by the thought that the application of Article 102 should be based on solid economics. In contrast, Article 101 has in many respects undergone a change to allow for economical considerations in its application.[2] The Commission has recently issued a "Guidance Paper"[3] (GP) to create consistency between the application of Article 102 and the application of the other competition law provisions of the EC Treaty. In order to achieve this the Commission has reassessed the objectives of Article 102. This becomes apparent if the GP, which focuses on consumer welfare, is compared with the early case law of Article 102, which in general neglected consumers.[4]

This implies that the goal for one decade can be another goal for the next decade (at least from the Commission's perspectiv) and important to stress, the questions asked to achieve the former goal might be useless, or even counter-productive, to ask in order to achieve the latter goal. If the questions of importance within the EU competition law are not asked in a way that get its objectives fulfilled, the EU competition law makes the same mistake as Alice did when she was lost in Wonderland and met the Cheshire Cat.

Alice: Would you tell me, please, which way I ought to go from here?
The Cat: That depends a good deal on where you want to get to.
Alice: I don't much care where.
The Cat: Then it doesn't much matter which way you go.[5]

If Alice just would had asked the Cat how to get out of the rabbit hole, then maybe the Cat would have been kind enough to show her the way. Similarly, *if* we have the view that EU competition law should strive for economic efficiency and promote consumer welfare, questions of

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[1] See amongst others Sher, B., *The Last of Steam-Powered Trains: Modernising Article 82*; Jebsen, P. and Stevens, R., *Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*; Fox, E. M., *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*.
[2] Gölstam, C. M., *Licensavtalet och konkurrensrätten* (2007).
[3] "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", OJ C45/17. This thesis refers to the paragraphs in the consolidated version of February 2009.
[4] This will be analysed in detail in chapters 3 and 4.
[5] Carroll, p. 45.

importance would for example be i) what conducts impose dead-weight losses on the economy or impede innovation? or, ii) what conducts exploit consumers or make them worse off in the long run? A question about how a conduct affects for example employment is *at best* irrelevant if asking this question cannot help answering question i) or ii) above. Put differently, the question about how a market behaviour affects employment is indeed very relevant if the EU competition law have socio-political objectives. But if we do not believe that EU competition rules should achieve socio-political aims (anymore) then asking this question (now) will not help at all or even be counter-productive. It will be counter-productive if competition authorities ban a conduct on the grounds that it causes unemployment, when in fact this conduct promotes economic efficiency and consumer welfare, which could be in accordance with the "real" objectives of the competition rules.

Alice in Wonderland learned two simple but very important lessons. The first one was the lesson of assessing underlying objectives; in order to achieve something, the least you need to know is what you want to achieve. The second lesson was the lesson of assessing methodology; when you know what you want to achieve, act in a way so you achieve it (for example, ask relevant questions). These lessons apply to the EU competition law as well, and as shown in this thesis, it is questionable if they have been learnt.[6]

1.2 Purpose

This thesis has two interrelated purposes closely tracking the two lessons above. The first purpose is about finding the objectives of Article 102. The ECJ, well aware of the change of course suggested by the GP mentioned above, has recently stated that the objectives laid down in its early case law still apply.[7] Therefore, the "old" (but still valid) objectives will be identified, analysed and compered with the objectives suggested by the GP. Finding the objectives of Article 102 (from the ECJ's or the Commission's point of view) may sound simple but as shown in this thesis, it is not. The reason for this is that no formal Community document or decision has ever articulated its precise objectives.[8] This is unfortunate because it leaves room for speculations and

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[6] The EU competition law can be considered as a tool. This tool has been created in order to achieve something. However, to achieve this "something", the tool needs to be used correctly. In this respect, the EU competition is just like a screwdriver. Before you use a screwdriver you need to know if you want to screw in a screw, or if you want to screw one out. Secondly, you need to screw clockwise or counter-clockwise in order to achieve your goal. It is also important to keep another trivial statement in mind: screwing in the wrong direction is worse then not screwing at all.

[7] See section 4.3.

[8] O'Donoghue and Padilla, p. 4. Also see n. 97.

what is and what is not an objective becomes hard to tell for sure.[9]

The second purpose is about the assessment of methodology. The methodology relied upon in the early cases of Article 102 (the formalistic approach) will be compared with the methodology suggested by the GP (the effects-based approach). What will be of interest in this thesis is whether the adoption of the latter methodology will increase the incidence of false positives (Type I errors). The conception "false positive" has been accepted within the field of competition law.[10] Simplified, a false positive occurs when Article 102 is enforced when in fact it should not be enforced according to the objectives. Consequently, in order to investigate the incidence of false positives, the objectives needs to be identified thoroughly.

1.3 Delimitation

To fulfil these purposes, a strict delimitation is needed. The EU competition law has had many different objectives during the years.[11] Far from all of these will be investigated in this thesis. The entire focus will be on the objective of maintaining a competitive structure, which is settled in the early cases of Article 102, and on the objective of enhancing consumer welfare, which is suggested by the GP. In other words, what is of interest is how the Commission assesses the objectives today, and how the ECJ have assessed them in its early case law. From this follows that the general movement towards economic thinking in the application of the competition law provisions will not be discussed in this thesis.

Furthermore, the EU competition law can rightfully be said to have been influenced by many different views and philosophies. The most influential schools in the US – Harvard, Chicago and post-Chicago – have most likely left prints in the application of Article 102. Likewise, Austria and the German city Freiburg were important outposts for competition law thinking in Europe. This thesis investigates the Freiburg School (ordoliberalism) and its implications for the EU competition law. The reason for this is that the thoughts from Freiburg were of crucial importance for the development of the EU competition law.[12] The objective of maintaining a

[9] It could be argued that since no authority has extensively explained the objectives, this thesis will do exactly what it here calls "unfortunate" – it will speculate. This is true. Although the thesis will analyse cases from ECJ, Commission decisions, books and articles there will undeniably remain a degree of speculation about what the objectives are. It is therefore worth pointing out that speculating is not necessarily "unfortunate" but the fact that speculating has to be done is.

[10] For example, see Monti, pp. 17 – 18. False negatives (Type II errors), which are created if Article 102 is not enforced in cases when it should have been, will not be analysed in this thesis. One reason for this is that false negatives are not as blameworthy as false positives. The latter errors are actually actively making things worse! Another reason is that an analysis of false negatives would make this thesis lenghtier than it already is. It should be kept in mind though, that the results of this thesis are not entirely complete since false negatives are neglected.

[11] See section 4.2.4.

[12] See chapter 3.

competitive structure to protect the economic freedom of undertakings is an ordoliberal contribution and if the ECJ still protects this objective, which it recently has, it is likely that there are certain characteristics of the ordoliberal philosophy that the ECJ considers as valuable even today. It could be argued that the Harvard School, which also strongly emphasised the need to uphold competitive structures, rather than ordoliberalism influenced the early cases of Article 102. Therefore, this thesis will shortly analyse this school of thought and dismiss its importance for the early case law of Article 102.

Finally, it should be noted that this thesis will only discuss Article 102. However, this does not imply that references to Article 101 are out of the question because the objectives of Articles 101 and 102 coincide as they have pursued a common general objective set out in Article 3(1)(g) EC.[13]

1.4 Method and material

The thesis adopts a method of jurisprudence. Like most jurisprudential works it aims to obtain a deeper understanding of the law. It will mainly be devoted to finding an answer to the question "what *is* the law?".[14] This is very meaningful because Article 102 has since its enactment been a versatile provision and given its evolution it can be hard to tell what we want from it today.[15] The conflict that can be observed between the Commission and the ECJ seems to confirm this.

To answer this question, any legal act, document or work which aims to clarify the meaning of Article 102 will be of interest. In other words, relevant case law from the EU Courts, decisions from the Commission, guidelines and a number of books and articles will be used.

1.5 Disposition

Chapter 2, 3 and 4 is devoted to the first purpose. Ordoliberalism, what it strived for and how it aroused enthusiasm in West-Germany, will be analysed in chapter 2. Chapter 3 sets out to investigate whether ordoliberalism was an influential ideology during the earlier years of European integration. As will be shown, it is disputed if ordoliberalism was influential by the time the EEC Treaty was signed, but the ECJ and the Commission eventually came to accept its

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[13] Cases 6 and 7/73 Istituto Chemioterapico Spa and Commercial Solvents Corp v Commission [1974] ECR 223, [1974] CMLR 309, para. 32.

[14] The thesis is less devoted to another question of jurisprudential character – "what should the law *be*?". However, a clear-cut line can not always be drawn between the two questions. For example, the GP, which serves as guidelines, is supposed to give an answer the the question "what is the law", but as will be shown in this thesis, the GP rather seeks an answer to the the question "what should the law be".

[15] The evolution of Article 102 is analysed in chapters 3 and 4.

agenda. Chapter 4 takes a closer look at the objectives of the GP and compares these with the ordoliberal objectives. It will also be made clear here that the ECJ has recently rejected central proposals of the GP.

Chapter 5 and 6 covers the second purpose. A framework for identifying false positives is presented in chapter 5. In chapter 6, this framework is used to argue that the methodology of the GP is flawed in one important aspect: it is uncertain.

Chapter 7 concludes.

1.6 Definitions

Allocative efficiency	An optimal distribution of goods or services in a static or short run situation.
Dynamic efficiency	An optimal equilibrium in the long run by the promotion of R&D, innovation, technical progress, etc.
Economic efficiency	In this thesis "economic efficiency" denotes an appropriate balance between allocative efficiency and dynamic efficiency (i.e. it is equated with what is economically desirable, not only today, but also tomorrow).[16]
Market power	The ability of a seller (or a buyer) to affect the price of a good.
Perfect competition	A state in which no market participant has any market power. This is a theoretical state since many conditions needs to be satisfied before it emerges.[17]

[16] Economic efficiency can refer to a number of related concepts. For example, it could be equated with productive efficiency, pareto efficiency (in which efficiency arises if everyone stands to gain from a change) or Kaldor-Hicks efficiency (in which efficiency arises if pareto efficiency can be created through compensation). However, for the purposes of this thesis, economic efficiency will be treated as a fairly uncomplicated conception by denoting what makes the society, as a whole, wealthier.

[17] For example, the number of buyers and sellers must approach infinity, barriers to entry and exit must be "zero", products

Consumer welfare	The aggregated difference between what consumers are willing to pay for a good and the amount actually paid (i.e. total consumer surplus).[18]
Effects-based approach	An approach to Article 102, based on sound economics and grounded on facts, where a conduct's likely or actual effects on consumer welfare are investigated.[19]
Formalistic approach	An approach to Article 102 where an entire class of conducts is allowed or disallowed on the basis of formal characteristics.[20]
False positives (Type I-errors)	An enforcement of Article 102 in a particular case when the provision, according to its objectives, should not be enforced.

2 Ordoliberal philosophy in Germany

2.1 The rise of ordoliberalism

When the Second World War ended and Germany was defeated in 1945, there was an enormous need for economic revival in Europe. Many European governments turned to competition law to ensure sustainable growth. So did Germany but Germany did not have a real choice. In order to regain full sovereignty, the German state had to prove to the American occupiers that the heavily cartelized pre-war industry would never resurrect as this industry was blamed for aiding Adolf Hitler in his military conquests.[21] Germany, not enjoying the same degree of voluntariness in this

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must be homogenous, information must be perfect and transaction costs must be zero.

[18] Although this definition is used in this thesis, "consumer welfare" as a guiding principle for competition law, can be understood differently. For example, the Chicago School treated "consumer welfare" as a much broader concept and almost equated it with "allocative efficiency", see Rosch, p. 2; Bork, pp. 50 – 89.

[19] Report by the EAGCP p. 2.

[20] Ibid, p. 5.

[21] Jones and Sufrin, p. 36.

matter as other European states, was forced to adopt not only competition statutes but a whole new competition law system. A first important step was taken in 1947 when anti-cartelization statutes were put into force. The work was finalized in 1958 when the German Competition Law system, *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), was adopted.

The coercion from the occupants did not play a crucial role in this lawmaking process because there was also a domestic impetus to reform the economy.[22] A framework for the reformation was actually drawn up secretly in the University of Freiburg as early as during the 30s when Hitler was in office. By the time the war ended, and during the early post-war period, the thoughts from Freiburg had became a well-defined political and economic philosophy referred to as *ordoliberalism*.

2.2 The ordoliberal objectives

What is of interest here is not the implications ordoliberalism entailed for the political and economical life in post-war Germany but what came to be its implications for the EU competition law. Thus, a key element of ordoliberalism that needs to be pointed out is that economic freedom was believed to be the source not only of prosperity but also of political freedom.[23] If the economy was allowed to operate without governmental interference, growth would be ensured. Economic freedom in this sense could also safeguard political freedom and possibly prevent a government or a dictator to take control of the industry.

However, an economy left free from governmental intervention will eventually give raise to cartels and the creation of market powers. This result would not be in accordance with the ordoliberalistic norm "economic freedom" because, according to ordoliberalism, the conception of "economic freedom" was to be understood as having the character of a positive liberty; all citizens should be able to enter and compete on markets.[24] This liberty would be lost due to cartelization and the creation of market powers. Thus, a dilemma can be identified in the ordoliberal thoughts; the vision was to uphold economic freedom and to let the economy operate without governmental interference in order to achieve political freedom, but economic freedom

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[22] Even if there was a general impetus towards reformations, there was also considerable political reluctance to do so, see Monti p. 1.

[23] Cseres, pp. 83-85

[24] A negative liberty implies that an individual is protected from the arbitrary exercise of authority and a positive liberty refers to individuals' means or opportunities to do things. The distinction between "positive" and "negative" liberties was created by Isaiah Berlin in *Four Essays on* Liberty 1969. Therefore, the ordoliberals, who shaped their philosophy during the 30s, did not think of "economic freedom" as a "positive" liberty. However, they understood the liberty "economic freedom" similar to the way Berlin would understand its positive side.

(understood as giving individuals the right to enter and compete on markets) could never triumph without the help of governmental interference due to the risk of cartelization and the creation of market powers. So, in order to give freedom, some freedom had to be taken away. Furthermore, regardless of the negative effects of cartels and market power on economic efficiency and growth, it is plausible that the ordoliberals considered a cartelized economy as something evil only on the ground that this was the way the economy was shaped during the Nazi era.

For these reasons, a hands-off strategy could not be accepted. A utopia with "economic freedom" (in the ordoliberalistic sense) could never prevail without rules that governed competition. Instead, the ordoliberals tried to find a "third way" between socialism and democracy.[25] Put differently, the ordoliberals tried to find a balance between (economic) freedom and governmental intervention. The balance was "simply" struck this way: the government should be the guarantor of fair competition. This objective - the protection of the competitive process (or more specific, the protection of smaller competitors) - was given priority over all other possible objectives, such as economic efficiency or distributive goals.

In order to understand how *competition* could be considered to be a more desirable goal than for example *economic efficiency,* it is important to understand in what political context the ordoliberalistic thoughts aroused enthusiasm. Surely, it was not because price wars in themselves could be exiting to observe. Instead, it was because what competition was believed to entail (other than that) that it was given priority. First, and most important, "competition" was believed to lead to dispersal of economic power and to preservation of liberty. As mentioned above, the ordoliberals thought that economic freedom would lead to political freedom. This implies that the competition rules should not only promote growth, they should also decentralize private economic power in order to protect individual freedom. With this in mind, it is easy to understand that the creation of market power was not only considered terrible from an economic point of view. Above all it was considered as something evil because it would jeopardize the political freedom in the society and ultimately threaten democracy (i.e. it was also terrible from a political point of view). Secondly, a high degree of competition was also believed to lead to economic efficiency. When it was mentioned above that "the state should be the guarantor of fair

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[25] After all, Germany was literally in the middle of the Cold War, and with this borne in mind, it is not very surprising that serious attempts of finding a "third way" was done in Germany. The economist John M. Clark accurately put it this way: "The world is in the grip of a mighty struggle. On one side are forces driving toward chaos and anarchy […]. On the other side are forces of centralized control. Between them stand the forces and men who are trying desperately to salvage a workable basis for a human and ordered community in which some effective degree of freedom and democracy may be kept alive, without wrecking society by their undisciplined exercise and disruptive excesses.", Clark, pp. 6-7. The "force" he refers to is ordoliberalism.

competition", this was a simplification for economic efficiency was also a goal in the ordoliberal view (at least an intermediate goal or an expected result of "fair competition"). If "fair competition" would have been the only goal, the ordoliberals would not have been concerned with the monopoly or oligopoly markets that somehow could prevail even though smaller firms were "effectively" protected.[26] But the ordoliberals were in fact concerned about these markets and demanded that dominant firms should behave "as if" there was effective competition.[27] Dominant firms were also allowed to compete on the merits.[28] Regardless of this, the main wellsprings of ordoliberal thought were humanist values – economic and political freedom – rather than economic efficiency.[29]

In other words, the ordoliberals had one main objective; to protect economic freedom. This freedom was to be protected from both governmental and private economic powers. If individuals were protected from arbitrary state interference, maximum participation in public decision making would be ensured. However, governmental powers were not the only threat to individual freedom, the most apparent threat came from private powers. Between 1919 and 1933 the German economy was chaotic. Heavly reparation obligations and the disruption of socialist experimentation in the postwar period led to uncontrollable inflation.[30] When the worldwide depression broke out in 1929, Germany experienced hyperinflation.[31] Firms tried to cooperate rather than competing and most industries became heavily cartelized by the end of the decade.[32] The economic instability led to the takeover by Hitler and his Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) 1933.[33] The very same year, thoughts from Freiburg began to flourish. Two lawyers and one economist agreed that the lack of an effective legal framwork led to, or at least failed to prevent, the misuse of private economic power.[34]

This implies that it was private economic power that destroyed political and social

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[26] Although a "fair" competitive process was maintained, some undertakings would most likely get market powers and become dominants just because their products were superior in the eye of the consumers. The ordoliberals did not give up on these markets (i.e. prohibiting cartels was not enough), see O'Donoghue and Padilla, p. 9.
[27] Ibid.
[28] This is analysed in detail in section 6.2.1.
[29] Gerber (1998), p. 239.
[30] Gerber (1994), p. 28.
[31] The German inflation was highest in October 1923 when the *monthly* inflation rate was 29,500 % (prices were doubled every fourth day), see Hanke and Kwok, p. 356.
[32] Gerber (1994), p. 28.
[33] "National socialist promises of economic improvement, social solidarity and a return to political stability proved irresistible after almost two decades of turbulence", Ibid, p. 28.
[34] The two lawyers were Franz Böhm and Hanns Grossmann-Doerth and the economist was Walter Eucken. After the Second World War, Böhm explained that "the issue on which we focused together was [...] the issue of private power and a free society", Ibid, p. 30. He also claimed that "competition is not only an incentive mechanism but, first of all, an instrument for the deprivation of power", Giocoli, p. 770.

institutions when the “Weimar Republic” fell and the NSDAP claimed power in 1933.[35] Thus, it was of crucial importance to hinder situations like this from ever occurring again. The scholars from Freiburg must secretly have given Franklin D. Roosevelt loud applauses when he warned the Congress five years later that the growth of private power could lead to fascism.[36] To achieve economic freedom, “fair competition” was absolutely necessary and a value in itself.[37] Fair competition meant that smaller competitors should be protected and that private economic powers should be scattered. Other than that, there was a secondary interest – economic efficiency. Given the economic situation in post-war Europe, few would have heeded the ordoliberals if they had not also promised a sound economy with sustainable growth.[38]

2.3 The role of ordoliberalism in West-German politics

Given the special circumstances of the post-war period in Germany, the need for fundamental change was widespread. The Nazi regime had been crushed and this generated a philosophical discussion throughout the world, which perhaps was strongest in Germany. The political climate gave the ordoliberal ideas exceptional opportunities to be considered as the superior ideology. Besides, the US occupants were convinced that the ordoliberal ideas were in alignment with their own. First, ordoliberalism were definitely not Nazi-friendly. Secondly, ordoliberalism emphasized that government economic planning should be minimized.[39] Given the political conflict and the economic competition between the Soviet Union and the other occupation authorities (i.e. the Cold War), the US occupants thought that the ordoliberals presented an ideology that was capable of demonstrating the inferiority of a planned economy. Thus, they voted in favour of ordoliberalism.

However, this was not how the ordoliberal ideas would meet solid support within the German population. Throughout Europe, and also in Germany, liberalism was more or less blamed for the outbreak of the war. This was indeed a main view not only within the ordoliberal

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[35] The name “Weimar Republic” refers to the parliamentary republic in Germany between 1919 and 1933. The period started with the adoption of a new constitution for the German Reich 1919 and ended 1933 when the Nazi government proclaimed that it could legislate contrary to the constitution. The very same year, thoughts from Freiburg began to flourish. The Weimar period is associated with the rampant German inflation and the Great Depression. Nicholls, p. 15-32, describes the period in detail.

[36] To quote Roosevelt exactly: "Liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is fascism - ownership of government by an individual, by a group, or by any other controlling private power”, Roosevelt, p. 305.

[37] From this follows that the ordoliberal objectives went beyond considerations of efficiency or welfare, see Sauter, p. 28.

[38] Gerber (1998), p. 241.

[39] Even if the governmental interference should be minimized, there was still a pressing need to eliminate cartels, as shown above.

philosophy but also within all “socialist” alignments. The ordoliberal ideas would instead meet support as part of the economic plan “social market economy” which came to be a very influential model in West Germany. In short, the main elements of the social market economy were to keep central fundamentals of the free market (such as private property, free exchange of goods, foreign trade etc.) but nevertheless cure the usual problems associated with it.[40] In order to do this, a social security system should be constructed, which would guarantee health care, pension and unemployment insurance, etc. In addition to this, and important to stress, provisions to restrain the free market were needed (and this was how the ordoliberal thoughts on competition came to be incorporated in politics in a concrete way).

In 1949, the newly founded Christian Democratic Union (CDU) became the governing party.[41] The success of the CDU can in many aspects be credited the highest official in the German self-government, CDU member and ordoliberal sympathizer Ludwig Erhard. Exceeding his authority, 1948 Erhard abolished price-fixing and production controls enacted by the military administration.[42] A period of inflation followed and the step taken by Erhard was considered being as foolish as it was bold. By the end of the year however, prices had stabilized and macroeconomic aggregates, such as employment and investment, had risen. This led to a widespread support for the CDU and when the party, under strong influence of Erhard, formulated its economic and social policy (the Düsseldorf Theses or Düsseldorfer Leitsätze) Erhard saw to it that the policy was greatly influenced by the idea of the social market economy. When most parties in post-war Germany did clung onto the concept of the social market economy, the CDU, in the Düsseldorf Theses, developed the idea of the social market economy with strong liberal connotations, the promise of social justice for everyone and limited state interventionism.[43] Victory for the CDU in the election was ensured and the ordoliberal thoughts were placed in the heart of German politics for the years to come.[44] However, as shown in the next chapter, the ordoliberal philosophy would not only have vast implications inside the borders of Germany.

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[40] For example, see Friedrich p. 510.
[41] The post-war period was indeed an era for Christian democracy, not only in Germany, but in many parts of Western Europe, Kaiser, p. 163.
[42] Gerber (1998), s. 260.
[43] Kaiser and Pridham p. 177.
[44] Former US Chairman of the Federal Reserve Bank Alan Greenspan claims that the contributions of Erhard were of higher importance to post-war economic revival in Western Europe than the Marshall Plan, Greenspan, p. 281.

3. Ordoliberalism and the earlier years of European integration

3.1 The ECSC Treaty

In 1951, the Treaty of Paris was signed and the European Coal and Steel Community (ECSC) was established. Although Article 2 ECSC states that "[t]he mission of the European Coal and Steel Community is to contribute to economic expansion […]" another important objective of ECSC Treaty was to secure peace in Western Europe. In the preamble, the contracting states "[considered] that world peace may be safeguarded only by creative efforts equal to the dangers which menace it". Quite obvious, the ECSC Treaty contained legal and economic provisions organising the trade of coal and steel. However, besides these, the Treaty also contained competition law provisions. These provisions were threefold: a prohibition of cartels, a ban of the "misuse" of economic power and a system of controlling mergers.[45]

3.2 The EEC Treaty

3.2.1 Integration at a deeper level

The ECSC became a success, perhaps most apparent because there was a movement to integrate Europe further. The French administrator and President of the high authority Jean Monnet, who was a key figure in the drafting of the ECSC Treaty, proposed cooperation on a higher economic and political level.[46] In 1955, a conference in Messina was held to examine the possibility to extend the cooperation. The conference resulted in the appointment of a committee led by Belgian foreign minister Paul-Henri Spaak. The committee's report – the Spaak Report – later became the blue print to the Treaty of Rome which established the European Economic Community (EEC) 1958. The objectives of the Treaty were set out in Article 2 EEC:

"It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States."

These objectives coincided with the objectives of the ECSC Treaty because there were economic objectives (development of economic activities, raising of the standard of living) as well as

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[45] Elhauge and Geradin, p. 36.
[46] Goyder and Albors-LLorens, pp. 26-31.

political objectives (increased stability, closer relations).[47] To achieve these objectives, an intermediate objective was to create a system ensuring undistorted competition, Article 3(f) EEC (Article 3(1)(g) EC). This system was mainly Articles 101 and 102.

3.2.2 The EEC Treaty and ordoliberal influence

One question that arises is whether the competition law provisions in the EEC Treaty were set out to fulfil the Treaty's economic objectives (economic expansion, raising of the standard of living, etc.), its political objectives (peace, closer relations, etc.) or both of these objectives. Until recently, it has been quite undisputed that ordoliberal thought greatly influenced European integration. Thus, according to the common understanding, the competition law provisions in the EEC Treaty were mainly designed in the same manner ordoliberals designed competition law in Germany; above all to ensure “fair competition” and individual and political freedom.[48] If this is true, both the economical and the political objectives justified the provisions. It is remembered from above, that in the ordoliberal social outlook, dominant firms should not exclude competitors from the market only partly because the effect on the economy, but mainly because individual and political freedom could be threatened. The political objective was superior, and if the first European competition law provisions greatly were influenced by ordoliberalism, the provisions can be said to serve mainly the treaties political objectives. If so, the main objective of the competition law provisions in the EEC treaties was to uphold competitive markets rather than to promote economic efficiency.

However, new light has been shed on this matter that suggests that ordoliberal philosophy did not have a significant impact on the process of European integration, at least not to the extent that it was believed to have had.[49] Therefore, it is necessary to consider the two different main views about whether ordoliberalism actually were influential during the early years of European integration.

One leading commentator, Gerber, argues in short that Article 102 is an ordoliberal provision. Firstly, he emphasizes that some of the “founders” and early advocators of the Freiburg school worked as teachers outside Germany and that this greatly helped the philosophy

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[47] The distinction between economical and political objectives is not subtle. For example, “closer relations” could be an economic objective referring to an increase of trade between the contracting states and “raising of the standard of living” could be a political one, for example by reducing the fear of war or to proclaim that human rights should not be violated.
[48] For example, see Gerber (1994), pp. 69-83; Gormsen (2005), p. 10; Cseres, p. 82.
[49] Akman, pp. 267-303.

to spread throughout Europe.[50] Besides, the German GWB was the most modern competition statute in Europe and its enactment in 1957 had been preceded by a decade-long debate about competition. When the EEC Treaty was signed the same year, the other contracting states could not have neglected the golden era of competition law thinking in Germany that the ordoliberals ignited.[51] Gerber also argues that most of the leading German representatives in the founding of the EEC were supporters of ordoliberalism.[52] For these reasons, the structure of the competition law provisions in the EEC Treaty - Article 101 prohibiting cartels and Article 102 prohibiting the abuse of a dominant position - came to closely track the structure of the GWB.[53]

Consequently, Gerber seems to take for granted (although he is aware of the fact that he is only "[scetching] the outlines of ordoliberal influence outside Germany") that the ordoliberal thoughts about competition law were naturally relied upon when Europe was to become integrated. Although he presents plausible arguments for ordoliberal influence, Akman goes further, analyses the legislative intent of Article 102 and challenges this view. To analyse this intent, she turns to the *travaux préparatoires* (preporatory works) of the EEC Treaty (i.e. the Spaak Report) and presents arguments to prove that drafters of Article 102 did *not* design it as an ordoliberal provision.

One argument is that the considerations in the Spaak Report show little resemblance to ordoliberal objectives such as "fair competition" and "economic freedom". Instead, the Spaak Report focused on avoiding wasteful use of resources and production at uneconomic cost.[54] Dynamic efficiency was also taken into consideration.[55] Akman concludes that the Spaak Report was mainly concerned with increasing *efficiency* in order to make sure that Europe's economy would not fall behind the economies of the US and the USSR.[56] So on top of the agenda were to make Europe richer and to maintain competitiveness abroad.

Another argument is that the EEC Treaty, unlike the ECSC Treaty, lacked merger control provisions.[57] Since the control of mergers was envisaged in the Spaak Report, the absence of

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[50] Gerber (1994), p. 70.
[51] Ibid, p. 73.
[52] Ibid, pp. 71-72. For example, Gerber argues that Walter Hallstein, Hans von der Groeben and Alfred Müller-Armack all had strong ties to ordoliberalism. Hallstein was one of the founders of the European Communities and the first president of the Commission. Von der Groeben was one of the two principal drafters of the Spaak Report. Müller-Armack, who coined the term "social market economy", was a German government official responsible for influencing the development of European Community economic policy for some years.
[53] Ibid p. 73.
[54] Akman, p. 279.
[55] Ibid, p. 280.
[56] Ibid, p. 278.
[57] Article 66 ECSC.

merger control provisions in the EEC Treaty could demonstrate an explicit rejection of the ordoliberal objective of protecting competitors.[58] The fierce negotiations that the drafting was subject to can be seen as another rejection of ordoliberal influence. Akman identifies two extreme camps in these negotiations – France and Germany – and the other four states more or less in the cross-fire between them.[59] During this negotiation, Germany did not, as one might have expected, demand that the competition rules above all should safeguard "economic freedom" or competition that was "fair". Instead, surprisingly enough, it was France that presented this demand. For example, the representatives of France made quite an ordoliberal demand when they insisted that monopolies should be banned *per se*. On the other hand, Germany made a-seemingly-ordoliberal demand when claiming that "merely" abusive behaviour should be prohibited.[60] The France delegation was not ready to consider the German proposal before the notion of "abuse" was explained in detail. Eventually, so must have been successfully done because when the Treaty was signed, Article 102 "merely" prohibited abuses and not dominant positions *per se*. Akman concludes that the lack of merger control provisions and the fact that Article 102 "merely" prohibits abuses demonstrates that the intent of the drafters was to prohibit *exploitative* abuses, and not *exclusionary* abuses.[61] Indeed, the prevention of exploitative abuses means little according to the ordoliberal social outlook.

The results of Akman make ordoliberal influence questionable. However, it is possible that she overlooks the meaning of the fact that both the preamble to the EEC Treaty and the Spaak Report contain the notion "fair competition".[62] She seems to treats the words "fair competition" more or less as words without meaning and weight since they hardly can be combined with the context in which they are mentioned, i.e. with the efficiency considerations of the Spaak Report.

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[58] Akman, p. 294.
[59] Ibid p. 283.
[60] Ibid, p. 285. Akman finds it puzzling that Alfred Müller-Armack pushed for a more "pro-business" shaping of (what came to be) Article 102 and that the French delegation advocated a more ordoliberal provision, protecting economic freedom. However, it must be kept in mind that even if ordoliberals treated monopolies as something evil, they could accept their existence. For example, Gerber (1998), pp. 251-252, argues that ordoliberals could not accept the mere existence of monopolies. However, Walter Eucken, who was one of the founders of ordoliberalism, made an distinction between "avoidable" and "unavoidable" monopolies, thus confirming the view that ordoliberals tolerated (some) monopolies, Eucken, p. 241. Eucken seems to have identified "unavoidable" monopolies as natural monopolies (i.e. when economies of scale are so predominant that a whole market is best served by only one undertaking), ibid p. 238. This implies that the suggestion by Müller-Armack, can be seen as ordoliberal.
[61] Exclusionary behaviours occurs when a dominant undertaking seeks to exclude one or more competitors from the market by means other than normal business performance. Exploitative behaviours occurs when a dominant undertaking makes use of its market power and reaps monopoly (or close-monopoly) profits to the detriment of consumers. It should be mentioned that the distinction has not been passed down in any legal act.
[62] In the preamble the contracting states claim that they are "[r]ecognising that the removal of existing obstacles calls for concerted action in order to guarantee a steady expansion, a balanced trade and *fair competition*". The statement that the Spaak Report mentions "fair competition" is made by Akman, p. 282.

Furthermore, it is interesting that both Gerber and Akman rest on the same argument to derive opposing conclusions. Akman claims that since Article 102 only prohibit abuses, and not dominant positions *per se*, ordoliberal ideas were not relied upon during the draft. The reason for this is that Article 102 was initially supposed to cover only exploitative behaviours, which ordoliberals were less concerned with.[63] Gerber, on the other hand, claims that the design of Article 102, which in contrast to its counterpart in the American Sherman Act, did not prohibit a dominant position *per se*, can only be explained by the fact that ordoliberalism was influential. The reason for this is that the contribution to the design of Article 102, which could not have been American, must have been European as no other philosophy or school of thought was capable of suggesting the prohibition of "abuse" than ordoliberalism.[64]

Needless to say, it is questionable if ordoliberalism did influence Article 102 by the time the EEC Treaty was signed. Even so, it is important to keep something in mind. Preparatory works are excellent sources of law when finding objectives, but they are not necessarily binding. On the other hand, court decisions are. Even if the drafters of the EEC Treaty actually cared little about ordoliberalism (although this is disputed by Gerber) the ECJ did not. This will be shown in the next section.

3.3 Ordoliberalism and the ECJ

Before turning to some cases, it is important to stress that none of the decisions below will be questioned here. Common for the cases below is that the ECJ adopted a formalistic approach to Article 102 (i.e. the abuses were prohibited with a reference to its form, not to its effects). This approach was brilliant given the finding of the ordoliberal objective of protecting the competitive structure.[65] The view taken here is that the formalistic approach cannot be criticized for not taking welfare considerations into account because welfare consequences were not an objective (at least not a superior objective). The approach has nevertheless often been accused of being incapable of taking "welfare" into consideration, but such criticism can only be raised if the

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[63] René Joliet, later a judge at the ECJ, seems to confirm this by arguing that the prohibition of conducts that have certain structural effects (exclusionary conducts) would be tantamount to the prohibition of a dominant position itself, which was not the purpose of Article 102, Joliet, p. 250. Furthermore, the German and French text state that Article 102 only covers exploitative conducts. The German text (EC Treaty) stats that "mißbräuchliche Ausnutzung" (abusive utilisation) is prohibited, and the French text (EC Treaty) states that it is prohibited "pour une ou plusieurs entreprises d'exploiter de façon abusive" (for one or more companies to exploit in an abusive way).

[64] The other important school of competition thought in Europe – the Austrian School – would never have suggested this design. In the social outlook of the Austrian School, competition laws should not interfere with the competitive process, not even by disallowing cartels, Jones and Sufrin, p. 33.

[65] This will be elaborated in chapter 5.

objective of Article 102 truly is "welfare". If, however, "welfare" is not an objective, or a superior objective, the formalistic approach is immune against such criticism.

3.3.1 *Continental Can*

In Continental Can, the ECJ stretched the meaning of a crucial element of Article 102 – "abuse". The American undertaking Continental Can acquired (through its European subsidiary Europemballage) approximately four firths of two rival companies - the German SLW and the Dutch TDV. The Commission argued that the acquisition was an abuse under Article 102. Continental Can, on the other hand, objected and claimed that the Commission was exceeding its powers because structural changes on a market, that just strengthens a dominant position, could not constitute an abuse.[66] When asked by Continental Can to annul the decision, the ECJ ruled that:

"[Article 102] states a certain number of abusive practices which it prohibits. This list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) […] the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 [(1)(g) EC] of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depend on the dominant one."[67]

The ECJ, which upheld the decision by the Commission, arrived at this conclusion after going "back to the spirit, general scheme and wording of [Article 102], as well as to the system and objectives of the Treaty".[68] This means that the ECJ rejected the Opinion of Advocate General Roemer, who claimed that Article 102 did not cover exclusionary behaviours.[69] This also means that the ECJ assessed the objectives of Article 102 and that it assessed them as ordoliberal.

The reason that ordoliberal views can be seen in this judgement is that the protection of the "effective competition structure" was identified as an objective by the ECJ. It is important to note that the ECJ did *not* do so when stating that Article 102 is "aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them [indirectly]". It did so, however, when assuming that the acquisition automatically would be detrimental to the

[66] Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, [1973] CMLR 199, para. 19.
[67] Ibid, para. 26.
[68] Ibid, para. 22.
[69] Jones and Sufrin, p. 317.

consumers regardless of the actual effects in this particular case. So, the ECJ concluded that practices *which are* detrimental to consumers through their impact on an effective competition structure are prohibited by Article 102, but the ECJ was not interested whether Continental Can's behaviour *actually* was detrimental to consumers. Instead, the ECJ was content with the fact that the acquisition fettered competition and therefore *could* cause consumers indirect harm. But, the effects from distorted competition on consumers is indeed ambiguous, so there is a possibility that consumers were actually worse off by the decision.[70] The ECJ did not investigate the likely or actual effects of Continental Can's acquisition and from this follows that the consumer collective was not the real ward under the wings of Article 102. Instead, the upholding of an "effective competition structure" was the objective. This is very similar to the ordoliberal view; to protect competitors and the competitive structure, in order to ensure economic freedom. The effects on the economy or on the consumers were in the judgement, as well as by ordoliberals, considered to be of secondary importance. Furthermore, since the ECJ concluded that "the strengthening of the position of an undertaking may be an abuse and prohibited under Article [102]", the court condemned *exclusionary* abuses.[71] This fact makes ordoliberal influence even more apparent because the central ordoliberal concern was what exclusion always brings about - the creation of market powers.

3.3.2 Commercial Solvents

Commercial Solvents (CSC) informed its customer, the undertaking Zoja, that it could no longer suppy Zoja with *aminobutanol* (which Zoja needed as a raw material for the production of *ethambutol* – an important constituent of tuberculosis drugs). Instead of selling aminobutanol to Zoja, CSC decided to integrate vertically and produce ethambutol itself through its subsidiary, Istituto. Zoja, which could not purchase aminobutanol elsewhere and was driven out of the market, claimed that the refusal infringed Article 102. The ECJ held that:

"[A]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw materials for manufacturing own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article [102]."[72]

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[70] This will be elaborated in section 4.2.1.
[71] Ibid, para. 27.
[72] Cases 6 and 7/73 Istituto Chemioterapico Spa and Commercial Solvents Corp v Commission [1974] ECR 223, [1974] CMLR 309, para. 25.

It is apparent that the ECJ was concerned about the potential misgiving that Zoja was getting driven out of the market. However, the ECJ did not consider whether the refusal gave rise to inefficiencies or harmed consumers. The lack of these considerations has made some authors suspicious and almost inclined to compare the process between Zoja and CSC with the fight between David and Goliath, where the small undertaking was given protection just because it was small.[73] This comparison is actually accurate in the light of the speech by Judge Pescatore, then president of the ECJ. He said that the judgement was intended to protect a small firm, rather than free competition for the benefit of consumers.[74] The speech, which certainly should be approached carefully since it was held outside the courtroom, clearly indicates that the intent of the ECJ was to accept ordoliberal objectives.

It could be argued that the ECJ should have annulled the Commission decision because if CSC, through Istituto, chose to enter the market of ethambutol (the after-market) it did so because Zoja was reaping monopoly profits. Besides, total or consumer welfare might very well have increased if Istituto met demand for ethambutol instead of Zoja since Istituto most likely could buy the input aminobutanol at a lower price (from its parent company CSC). So, it is questionable if the decision by the ECJ actually promoted total or consumer welfare. However, the ECJ must be defended. It neglected these considerations, not out of carelessness, but because it identified ordoliberal objectives as the superior ones.

3.3.3 Hoffmann – La Roche

In Hoffmann - La Roche, the ECJ further elaborated on the concept of "exclusion". In this case, a definition of the concept was laid down although the ECJ did not employ the wording "exclusion". In short, the background to the case was that the undertaking Hoffmann - La Roche (HLR) was the largest manufacturer of bulk vitamins within the EEC. HLR had bound its customers (not final consumers) by means of exclusive purchasing rebates. In practise, the customers would only get the rebate if they bought all or almost all of their stock of vitamins from HLR, i.e. the rebates were customised to fit the demand of every customer and not objectively fixed which could have reflected an efficiency gain for HLR. The ECJ ruled that:

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[73] For example, Jones and Sufrin, p. 532, claims that the judgement "appears to be an instance of competition authorities protecting the situation of the "small" competitor and it may even have been significant that Zoja was a small *Italian* competitor suffering at the hands of an American multinational".
[74] Korah, p. 808.

"The Concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[75]

Just like the cases above, the ECJ protected the competitive process, rather than promoted consumer welfare or efficiency.[76] One reason for this is that the competitors of HLR could perhaps offer rebates as well, thus engaging in a price was against HLR, instead of exiting the market. The ECJ was not concerned about considerations like this. Instead it noted, similar to the finding in Continental Can, that effective competition must be maintained on the market.[77] Maintaining competition, without any reference to efficiency considerations, is exactly what ordoliberal philosophy advocated and if this is the objective, most would probably agree that conduct by a dominator that hinders the production of competitors is abusive.

3.3.4 AKZO

The dominant undertaking AKZO tried to eliminate one of its competitors – ECS – by offering ECS's customers price reductions.[78] The prices offered were so low that the Commission claimed that the intent of AKZO was to secure ECS's withdrawal from the market. The ECJ confirmed that the prices were too low and that AKZO had been guilty of "predatory pricing". Although the ECJ set out a cost-based test for identifying predatory pricing, and thus took a small step towards an effects-based approach, the ECJ nevertheless noted that it was sufficient that the intent of AKZO was to exclude ECS.[79] Thus, the actual effects were of less importance. For example, if

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[75] Case 85/76 Hoffmann-La Roche AG v Commission [1979] ECR 461, [1979] 3 CMLR 211, para. 91.
[76] Gormsen (2007), p. 340, states that "[p]erhaps the Court was pursuing economic freedom only to promote consumer welfare. However, there was no serious analysis of consumer welfare loss [...]. If the Court pursued economic freedom as a means to an end of consumer welfare, then it ought to have adressed whether the conduct in question would likely have led to a decrease or an increase in consumer welfare. For example, would the alteration of the market structure likely have resulted in consumer welfare loss in the form of less choice, and increas in price and/or lowering of quality?".
[77] Ibid, 38. The concept "effective competition" was also used in Case 27/76 United Brands Company v Commission [1978] ECR 207, [1978] 1 CMLR 429, para. 65. Furthermore, United Brands was allowed to protect its own commercial interests by taking reasonable steps, para. 189. Although, steps that interfered with the independence of "small and medium-sized firms" were not allowed. In GlaxoSmithKline (see n. 125), the CFI ruled that "effective competition" implied "the degree of competition necessary to ensure the attainment of the objectives of the Treaty", para. 109. In Case 26/76, Metro-SB-Grossmärkte GmbH v Commission (No. 1) [1977] ECR 1875, [1978] 2 CMLR 1, para. 20, the ECJ referred to the theory of "workable competition" and equated it with "the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty. From these decisions follows that "workable competition" and "effective competition" is the same thing.
[78] Case C-62/86, AKZO Chemie BV v Commission [1991] ECR I-3359, [1993] 5 CMLR 215.
[79] Ibid, para. 115.

AKZO had been unsuccessful in its exclusionary intent, the customers of ECS (which received the price reductions) would have benefitted. This gain would *ceteris paribus* have been passed on to final consumers. Furthermore, there might sometimes be rational, non-predatory, reasons for pricing under costs. Most would agree that even dominant firms, although having a special responsibility towards the competitive process, must be allowed to clear superfluous or obsolete stock and thus be allowed to sell at a temporary loss to make some return. Finally, the ECJ did not consider whether predation was a plausible strategy for AKZO because the only way selling below costs could be rational for AKZO was if AKZO could reap monopoly profits after the exclusion, i.e. recoup.[80] AKZO's possibilities of recouping were not considered by the ECJ.

AKZO, like the other dominant undertakings above, was in the act of threatening competitive structures and the ECJ, not concerned with "welfare" considerations, made once again clear that competition would not be distorted on their ordoliberal watch.

3.3.5 Was the ECJ influenced by the Harvard School, rather than ordoliberalism?

The Harvard School is a school of competition analysis which shows similarities with ordoliberalism. Just like ordoliberalism, the Harvard School emphasises the need to maintain competitive structures on markets.[81] Both of the schools are concerned with structural remedies, rather than behavioural remedies and they both emerged and were influential during the same time.[82] However, they should be separeted because the objectives of ordoliberalism were not economical. On the other hand, the objectives of the Harvard School were strictly economical. At heart of the Harvard School was the belief in the famous paradigm S→C→P. The structure of markets (S), determines firms' conducts (C), which in turn determines the market performance (P).[83] The performance of the market was of economic value (profitability, technical progress, efficiency and growth).[84]

Since the ECJ has held that Article 102 prohibits practises which influence the structure of markets (with or without referance to Article 3(1)(g) EC), a question that might arise is whether the ECJ, by arriving at this conclusion, was influenced by ordoliberalism or by the Harvard School. It could be argued that, since the ECJ in none of the above cases made any economical

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[80] Recoupment was not investigated in AKZO. However, the Commission investigated the possibility of recoupment in Case C-333/94 P, Tetra Pak International SA v Commission [1996] ECR I-5951, [1997] 4 CMLR 662, although the ECJ ultimately ruled that this was not necessary, para. 44.
[81] Jones and Sufrin, p. 22.
[82] Between the 30s and the 70s, Giocoli, p. 755.
[83] Jones and Sufrin, p. 22.
[84] Ibid.

appraisals, the ECJ was influenced by ordoliberalsim. On the other hand, it could be argued that the Harvard School was the guiding star since no direct reference to “economic freedom” was made by the ECJ.

Some authors stress that the US influences on the EU competition law should not be exaggerated, and that the EU competition law is (or was) a distinct product of European competition law thinking.[85] This is the view taken here and especially in the light of Commercial Solvents, this becomes very clear. The ECJ cannot have expected any favourable effects, in the economical sense, by prohibiting the refusal to supply (see section 3.3.2). In other words, the judgement did not give rise to a positive (P)-value in the Harvard paradigm, and the ECJ was probably aware of this. However, the judgement decentralised economic power.

3.4 Ordoliberalism and the Commission

It is also appropriate to shed some light on the Commission's policy. Since 1971, the Commission has published annual reports on its competition policy. Two ordoliberal aims can be recognized in these reports – economic freedom and fairness through the protection of small and medium-sized firms.

3.4.1 Economic freedom

The reports identify “economic freedom” as an objective. In the first report, the Commission stated that “[c]ompetition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all”[86]. The following year, the Commission summarised its enforcement of Article 102 and claimed that “[u]nder Article [102], the practices attacked were improper practices by undertakings in dominant positions designed either to curtail commercial freedom of dealers or to cut off supplies to a competitor.”[87] A couple of years later, the Commission claimed that its “administrative practice, supported by the Court of Justice in its judgements, has made it possible to gradually introduce a body of rules governing fair conduct which give market operators an idea of how they must behave if equality of opportunity, freedom

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[85] Giocoli, p. 747, claims that American antitrust tradition has had less influence than what is commonly claimed over EEC competition policy and that ordoliberalism played a crucial role in the birth of EEC competition policy. Cseres, pp. 96-100, claims that a departure from ordoliberalism can be observed from the mid-1980s when more detailed economic theories, as Harvard School, aroused enthusiasm.
[86] First Report on Competition Policy, p. 11.
[87] Second Report on Competition Policy, p. 15.

of access to business and freedom of choice are to be guaranteed within the common market.[88] This clearly indicates that the Commission placed "economic freedom" in the centre of their competition policy.

The Commission has also put emphasis on the competition policy's essential role "to help bring about essential structural changes".[89] The aim of these structural changes was to achieve a decentralized structure of the market economy.[90] This approach is very similar to ordoliberal thought since ordoliberals also relied on a decentralized structure to achieve economic freedom.

3.4.2 Fairness by protecting small and medium-sized firms

Ordoliberal influences are further supported by the fact that a new trend can be observed in the policy in the end of the 1970s. Small and medium-sized firms were now explicitly identified as worthy of protection. The Commission stated that it "[shared] the view expressed by the European Parliament […] when it stated that the existence of a healthy and strong developed sector of small and medium-sized firms is a condition for the smooth functioning of a modern economy".[91] The Commission ensured that it would "[continue] its work to expand and add to measures already taken with the aim of assisting small and medium-sized undertakings to overcome their difficulties and to profit from the advantages which the single market of the EEC can offer".[92]

Hardly surprising, it would not be long until Commission decisions were laid down in accordance with the new policy of protecting small and medium-sized firms. In 1977, the Commission held that British Petroleum (BP) had infringed Article 102 by cutting supplies of petrol to the Dutch undertaking ABG during the 1973 oil crisis. The Commission stated that "[t]his unfair behaviour of BP could have jeopardized ABG's continued existence; AGB was, moreover, a competitor of BP in the motor spirit distribution market".[93] The Commission did not consider whether the competitive process was threatened. This process could be threatened if few undertakings were active on the motor spirit distribution market. However, the Commission noted in its decision that AGB was a small firm among petrol giants such as BP, Esso, Shell, Standard Oil, Texaco, Gulf Oil and Mobil Oil. So, *if* AGB would have been excluded from the

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[88] Eighth Report on Competition Policy, p. 9.
[89] Fifth Report on Competition Policy, p. 13.
[90] Ibid, p. 13.
[91] Seventh Report on Competition Policy, pp. 10-11.
[92] Ibid, p. 26.
[93] ABG Oil [1977] OJ L117/1, [1977] 2 CMLR D1. The decision was set aside by the ECJ in Case 77/77 Benzine en Petroleum Handelsmaatschappij BV v Commission [1978] ECR 1513, [1978] 3 CMLR 174. The reasons seems to have been times of shortage and that ABG was an occasional customer, para. 32.

market, the effects on the competitive structure could have been left more or less unchanged. Instead, the Commission opposed the "unfairness" of BP's behaviour and it came to the conclusion that the smaller undertaking AGB needed protection.

The following year, the Commission set out on the same mission again. This time the Swedish undertaking Hugin Kassaregister, which manufactured cash registers, was found to have abused its dominant position in the market for spare parts for its cash registers.[94] The UK firm Liptons, which had serviced and repaired Hugin registers for 12 years, was suddenly denied further purchases. Just like Commercial Solvents above, Hugin had decided to integrate vertically by exclusively supplying spare parts to its newly founded subsidiary Hugin UK. In the decision the Commission stated that "[refusing] without objective justification to supply those products to existing substantial customers for and users of the products, and the refusal to supply seriously injures the latter in their business by interfering with and ultimately preventing them from continuing to offer a service or to carry on a line of business [...]".[95]

This decision is also a prime example of how competitors, rather than the competitive process, were protected. When Hugin decided to integrate vertically, Liptons was the only firm in the UK which supplied spare parts for Hugin machinery. Thus, the competition in the market for spare parts was perhaps not working satisfactory before Hugin denied Liptons further deliveries. After Hugin had integrated, competition was probably left unchanged since Liptons had just been replaced by Hugin UK. So, what constituted Hugin's abuse was the fact that it harmed a smaller firm, not that it harmed competition. This implies that there is only one reasonable answer to the question why Hugin was not entitled to integrate: the Commission intervened because the conduct of Hugin centralised economic power to Hugin. Ultimately, the ECJ set aside the decision. However, the ECJ did not rule on whether Hugin's behaviour was abusive since the ECJ found that it did not affect the trade between the Member States.[96]

The Commission actually enumerated three objectives of the competition policy in 1979.[97] The first objective was to keep the common market open and unified. The second objective was to ensure that, at all stages of the common market's development, there existed the right amount of competition in order for the Treaty's requirements to be met and its aims attained. The third objective, which is of interest here, was that the conditions, under which competition takes place,

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[94] Liptons Cash Registers/Hugin [1978] OJ L22/23, [1978] 1 CMLR D19.
[95] Ibid.
[96] Case 22/78, Hugin Kassaregister AB and Hugin Cash Registers Ltd. v Commission [1979] ECR 1869, [1979] 3 CMLR 345, paras. 15-26.
[97] Ninth Report on Competition Policy, pp. 9 and 10.

remain subject to the principle of *fairness* in the market place. In the Commission's view, this principle was of prime importance in the present economic circumstances at the time. “Fairness” could mean a lot of things and it should not be taken for granted that the Commission interpreted the notion “fairness” the same way as ordoliberals did. However, the Commission did define “fairness in the market place” and stated that three main aspects emerge in its application. One aspect was that opportunity must be preserved for all commercial operators in the common market. This implied for example that Member States should refrain from granting state aids and that firms from outside the Community, which operated within it, should be subject to the same rules as firms of Community origin. Another aspect was to make sure that workers, users and consumers would be allowed a fair share of the benefits from firms. The last aspect however, was ordoliberal. The Commission stated that “the principle of fairness in the market place is the need to have regard to the great variety of situations in which firms carry on business. So far, as competition policy is concerned, this factor makes it necessary to adapt the Community competition rules so as to pay special regard in particular to small and medium-sized firms that lack market strength”.[98]

4 New objectives and the fall of ordoliberalism?

In December 2008, the Commission issued the GP which covered the application of Article 102 to exclusionary abuses.[99] The GP, which was issued after 3 years of consideration, was preceded by the 2005 DG Competition discussion paper.[100] The DG Competition discussion paper was in turn proceded by a report by the EAGCP.[101] The GP brings about two important changes for Article 102. Firstly, it opposes ordoliberal philosophy by reassessing the objectives of Article 102. Secondly, it advocates an enforcement that is based on “effect”, rather than on “form” in order to achieve the “new” objectives. The first change will be treated in this chapter, and the second in chapters 5 and 6.

[98] Ibid, p. 10.
[99] See n. 3.
[100] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.
[101] Report by the EAGCP, *An Economic Approach to Article 82*.

4.1 The objectives of the GP

4.1.1 Effective competition as an objective

Effective competition has been an objective since the early judgements by the ECJ.[102] It is still an objective of Article 102 according to para. 6 of the GP but the Commission explicitly stated that "what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market". This certainly implies that the Commission does not believe that the political aim of Article 102 of decentralising private economic powers has any bearing today. Thus, the Commission has decided to reject ordoliberalism. Instead, the objective of achieving a competitive process should be interpreted in the light of what passes on to consumers. In para. 19 the Commission stated that "[t]he aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.". So, the Commission seems to treat effective competition as an end in itself, but only insofar it is beneficial to consumers.[103]

4.1.2 Consumer welfare as an objective

In para. 5, the GP states that the Commission "will focus on those types of conduct that are most harmful to consumers". The "harm" to consumers is best understood as adverse impacts on consumer welfare.[104] It should be noted here that consumer welfare, as an objective worth striving for, is not a new aim of Article 102. Article 102(b) has prohibited "the limitation of production, markets or technical development to the prejudice of consumers" since 1957. In addition, Article 101(3) states that restrictive agreements can be lawful if "allowing consumers a fair share of the resulting benefit". The need to protect consumers has also been laid down by the ECJ for example in Continental Can. However, as shown above, consumer harm was not the ultimate test of Article 102, instead, harm to the competitive process was. What is a new contribution by the Commission in the GP is that consumer harm should be the ultimate test of Article 102.

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[102] See section 3.3.
[103] Also, see DG Competition discussion paper, paras. 54-56.
[104] GP, para. 19.

The GP did not initiate this transformation process of Article 102. Instead, this was done by the public. For example, it has been argued that Article 102 is the last unmodernised piece of European competition law.[105] It has also been argued, just like the Commission argued in the GP, that the protection of effective competition can only be a goal because of the benefits that it delivers to European consumers.[106]

4.1.3 Economic efficiency as an objective

The Commission also stressed that economic efficiency is an objective. In para. 30 it stated that "[r]ivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovations". Just like "consumer welfare", the objective of promoting economic efficiency is not a new objective of Article 102. Economic prosperity was perhaps the greatest spur for integrating Europe, as shown in section 3.2.1. International trade would lead to a free exchange of goods and services. This, in turn, would lead to an effective allocation of resources that would benefit all parties. A change benefitting all parties is indeed a move towards a more economic efficient equilibrium. This implies that, although this thesis so far has been quite silent about economic efficiency as an objective, efficiency considerations were a drive from the start.

However, in relation to Article 102, economic efficiency is rarely mentioned. The same cannot be said about Article 101 because this provision explicitly allows for efficiency considerations. For example, Article 101(3) states that agreements which distort competition but improve production or distribution, or promote technical or economical progress, could be declared legal.

The steps taken by the Commission can be seen as pioneering although the GP, far from the first time, identifies economic efficiency as an object. What is a new contribution in the GP is that it expresses a will to let Article 102 tolerate behaviours that distorts competition if they give raise to efficiency gains.[107] This means that "effective competition" is suggested to be of lesser importance and that efficiency consideration is given the character of a superior objective. This also implies that the Commission is willing to "free" Article 102 from ordoliberal thinking.

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[105] Sher, pp. 243-246.
[106] Bishop and Walker, p. 16.
[107] GP, paras. 28-31.

4.2 Some remarks on the objectives of the GP

4.2.1 Effective competition looses in importance

Ordoliberals thought that competition law provisions could help to achieve and sustain economic freedom by protecting the competitive process (upholding of fair or effective competition). If the protection of this process is seen as a means to achieve economic freedom, or if it is seen as an end in itself, is perhaps of less importance. Secondary objectives, or expected results were consumer welfare and economic efficiency.

"Economic freedom" and "protection of the competitive process" are intimately connected and the latter is designed to achieve the former. When the superior objective "economic freedom" is taken away, or at least when it is not given priority, the same thing happens to the protection of the competitive process. It cannot be taken for granted that protecting competition, which upholds the economic freedom of competitors, always achieves the new objectives set out in the GP. Put differently, "economic freedom" has fallen in EU competition law hierarchy according to the GP, and enhancing consumer welfare and economic efficiency have ascended. Given this change, protecting the competitive process becomes a mediocre "crib sheet" (i.e. a list of instructions to refer to if you get lost) to achieve the new objectives.

To protect the competitive process is often in full accordance with the objectives of promoting consumer welfare and economic efficiency. Dominant undertakings need to distort competition before exploiting and, if they successfully exclude competitors, economic theory holds that they will exploit.[108] Furthermore, in dynamic markets, a competitive process brings about a value in itself – innovation. Innovation, which makes the economy grow and gives consumers variety and choice, certainly implies that "effective competition" must still have a value in itself.

While this is true, the protection of effective competition can still be labeled as a "mediocre crib sheet" since there are situations where the economy and consumers would be better off if the competitive process actually was harmed. The incidence of "economies of scale" is one reason for this. Economies of scale occur when the average cost of producing a commodity falls if more is produced. Thus, efficiency gains can be made if a dominant undertaking could exclude competitors and raise production, and these could, at least in theory, be transformed to consumers.[109]

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[108] Perhaps this goes without saying (undertakings are profit maximisers).

[109] In practice however, it may be harder to make sure that an undertaking enjoying a monopoly position raises the production (once again, undertakings are profit maximisers).

Furthermore, “network effects” can make it more valuable for consumers if they are served by only one undertaking. The textbook example of network effects is that one single fax machine is not very usable, but a network made up by a million machines surely is. Thus, if three undertakings, respectively producing faxes, “gaxes” and “haxes” (machines which cannot communicate with each other) consumers and the economy might be better off if the undertaking manufacturing fax machines successfully excluded its competitors.

As a last argument, although the creation of market power can be looked at with suspicious eyes, it is nevertheless necessary for innovation. Therefore, it has been argued that a monopolist may be more capable and willing to engage in R&D.[110] If competition in innovation is more important than price competition, the concept “perfect competition” is not utopian in the long run. This implies that consumers and the economy actually can benefit in the long run from a dominant undertaking which is strengthening its market power. For example, a dominant undertaking might refrain from refining its products if its competitors, which can not keep up with the dominant, are protected to maintain economic freedom. Besides, smaller firms might have less incentive to be innovative if they are protected, i.e. they might turn to competition authorities rather then trying to improve their effectiveness.

With these arguments in mind, it is clear that upholding “effective competition” is not always the right way to achieve the new objectives.[111] Often, of course, it will be but not always. This was not the case during earlier years, when “economic freedom” was a sharply defined objective. Then, protecting the competitive process always brought about the objective. But since the objectives have changed, into enhancing consumer welfare and efficiency, protecting the competitive process can go either way. This means that the three objectives that the Commission elaborated upon should be seen as two objectives, i.e. “effective competition” is not an end anymore, but very often a means.

4.2.2 The relationship between the two objectives

Some authors seem to consider that there exist a hierarchy between economic efficiency and consumer welfare, where the latter is superior.[112] Such a conclusion can be drawn after

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[110] This was argument was presented by the Austrian economist Joseph Schumpeter in his book *Capitalism, Socialism and Democracy*.

[111] This was also made clear by European Commissioner for Competition, Neelie Kroes, who at a speech in November 2006 claimed that “consumer[s] is at the heart of competition enforcement. We want to make markets better, not for an abstract notion of “free competition”, but because better functioning markets provide consumers with better goods and better services, at better prices.”, see Kroes, p. 2.

[112] Jones and Sufrin argues at p. 48 that “EC competition law is concerned not with the welfare effects on the whole

investigating Article 101(3), which holds that agreements that restrict competition can only be allowed if a "fair share" of the efficiency gains are passed on to consumers. The efficient allocation of resources must work for the benefit of consumers, or at least not make them worse off.[113]

Unlike Article 101, Article 102 lack an "efficiency defence-provision". To solve this, the GP suggests that efficiency gains should be taken into consideration when Article 102 is enforced. However, whether these efficiencies must work to the benefit of consumers (like in Article 101(3)) or not is very ambiguous. Para. 30 GP states that efficiencies must be sufficient to guarantee that no net harm for consumers is likely to arise. But, para. 30 sets also out four cumulative conditions that need to be fulfilled before a foreclosure is justified. One of these conditions is that likely efficiencies brought about by the conduct must outweigh any likely negative effects on consumer welfare, thus indicating that consumer harm can be tolerated if efficiencies are sufficient enough. In other words, it is quite blurred whether the GP considers that consumer welfare is a more desirable objective than economic efficiency.[114]

This is unfortunate because there could be cases where a conduct is beneficial seen to economic efficiency, but detrimental for consumers.[115] For example, a merger that leads to cost savings of €20 but unfortunately also leads to higher prices in the output market of €10 (due to a weakened competitive structure after the merger) is prohibited under a consumer surplus standard, but not under a total welfare standard. In the same way, an exclusive buying arrangement that lowers the price of goods to the consumers by €10 but raises a rival's cost by €20 is illegal under a total welfare standard, but not under a consumer surplus standard. These exampels are simple but nevertheless indicate that there could be meaningful to crown a

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economy but with the impact on consumers. The efficient allocation of resources must work to the benefit of consumers, or at the very least not make them worse off".

[113] Ibid.

[114] The DG Competition discussion paper also states that efficiencies can out-trump consumer welfare. Para. 79 states that "[i]n relation to the efficiency defence the dominant company must be able to show that the efficiencies brought about by the conduct concerned outweigh the likely negative effects on competition resulting from the conduct and therewith the likely harm to consumers that the conduct might otherwise have".

[115] For example, discrimination in price can have this effect. In its pure form, price discrimination of the first degree, the output is raised to the "utopian" levels of perfect competition. However, the producer captures all of the consumer surplus. Would the Commission take a doubtful attitude to such conducts? It is indeed hard to tell, see Perrot, pp. 176-183. In general, there seems to be a lot of confusions about the relationship between the two objectives. The fact that the GP remains silent about it might contribute to this. For example, in the light of the recent changes to Article 102, consumer welfare has been described as a form of utilitarianism, Gormsen (2007), pp. 1-2. However, utilitarian ideology despises equality. A competition policy that prevents a dominant undertaking from engaging in price discrimination close to the first degree is indeed a policy promoting equality. Furthermore, it has been suggested that a move towards a consumer welfare standard is quite unproblematic since the preparatory works of the EEC Treaty emphasises economic efficiency (Akman p. 1). However, if a clear wedge was driven between the two objectives, which would be desirable and correct, the move could be problematic. What has been said here should also be compared with n. 118.

"superior" objective among the two. In most cases however, promoting consumer welfare will improve economic efficiency, and vice versa.[116] Therefore, economic efficiency (total welfare) and consumer welfare will be treated as the same thing in chapters 5 and 6.

4.2.3 Fewer objectives?

Although the two objectives, economic efficiency and consumer welfare, can be seen as one in this thesis, it is troublesome to keep this view in a larger perspective. So was done in 2001 by Mario Monti, then Commissioner responsible for competition. He said that "the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market".[117] He also held that competition is "all in the interest of the consumer". If this is true, that competition policy is concerned with consumer welfare, and not at all with total welfare (economic efficiency), the competition policy is trying to achieve equality rather than making the common market richer. The reason for this is that promoting total welfare is about making the "pie" bigger, and promoting consumer welfare, without taking economic efficiency into consideration, is about slicing it. In order to make the common market richer, it is necessary to promote total welfare and not just consumer welfare.[118]

Despite this, it is possible to argue like Monti, but then, what field of law is supposed to achieve economic efficiency? It could be argued that contract law shoulders the burden of promoting efficiency by lowering transaction costs with clear and foreseeable rules, or that tort law does this by pointing out the cheapest cost avoider as responsible.[119] Besides, intellectual property (IP) law has a very clear and indisputable aim of increasing economic efficiency in the long run by rewarding innovation.[120] However, the Spaak Report clearly shows that economic

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[116] Rosch, p. 2, where it is stated that "the consuer welfare and total welfare standards can diverge, although I think it is a rare case in practise".

[117] Jones and Sufrin p. 45.

[118] However, the Chicago School has perhaps a different view on this. Rosch, p. 3, summerises this view and concludes that "[t]o date, the Court's position has been opaque. It has been almost thirty years since the Supreme Court described the antitrust laws as a "consumer welfare prescription" [Reiter v Sonotone Corp., 442 U.S. 330, 343 (1979)]. The Court borrowed the phrase from Judge Bork, a preeminent Chicago School scholar. But it is unclear whether the Court also adopted the philosophy behind Judge Bork's use of the phrase. Judge Bork, like other Chicago School adherents, believed that consumer welfare could only be maximized when total (societal) surplus is maximized. In his view, antitrust policy and rules should guard against all practises and transactions creating allocative inefficiencies; in that way, the antitrust laws could and would facilitate the maximization of consumer wealth in the aggregate without regard for its distribution".

[119] Cooter and Ulen, pp. 207-212; ibid, pp. 313-316.

[120] If patent law is said to have two objectives, 1) innovation which leads to economic efficiency in the long run and 2) ensuring that the inventor will get a fair reward, and objective 1) is disregarded, objective 2) alone will hardly justify patent law. Similarly, if we disregard the objective of promoting economic efficiency in the field of competition law, it will be hard to justify competition law provisions on the ground that it should ensure that consumers get a fair reward for entering agreements with undertakings (i.e. promoting consumer welfare).

efficiency is an objective within the field of EU competition law.[121]

4.2.4 More objectives?

It has also been argued that the EU competition law should achieve other objectives than promoting economic efficiency and consumer welfare. For example, it has been argued that EU competition law should fight inflation.[122] Without analysing the reasons for such arguments there is one good reason not to rely on competition law to achieve too much: the current objectives alone, as identified by the Commission, could be hard enough to achieve. By promoting both consumer welfare and economic efficiency, the Commission is convinced that it can achieve both equality and a richer common market. Reference can be made to any political debate in a fairly democratised state to see that the achievement of the political, economical and sought after goals equality and efficiency often leads to a compromise, where some equality is given up in order to get higher efficiency or vice versa. In other words, to expect that competition policy should achieve both these goals is to place a heavy burden on its shoulders, and it could be unwise to make the burden even heavier. If Articles 101 and 102 are seen as tools, they are more like screwdrivers than magic wands.

Jürgen Basedow, chairman of the German Monopolies Commission, seems to be one of those who argue that EU competition law should strive for more than the two objectives. In 2007, he said that consumer surplus and economic efficiency cannot be the only objectives of competition law, since regards must be paid to the freedom within the business world.[123] Thus, Basedow tried to remind us that the EU competition law provisions are ordoliberal. Although the Commission has turned its back to this understanding, the EU Courts, as shown below, seems to confirm the view of Basedow.

4.3 The objectives of the GP and the EU Courts

While the Commission has heeded the public impetus to reform Article 102, the EU Courts have so far been quite reluctant to accept a consumer welfare approach. However, in 2006 the CFI identified consumer welfare as an objective (of Article 101) in the two judgements *Österreichische Postsparkasse* and *GlaxoSmithKline*. In the first of these, Österreichische Postsparkasse, the CFI held: "It should be pointed out in this respect that the ultimate purpose of

[121] See section 3.3.2.
[122] The Commission have once stressed the need to fight inflation, see First Report on Competition Policy, p. 12.
[123] Basedow p. 712.

the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers".[124] In the second case, the CFI did not only refer to the "well-being" but to the welfare of consumers: "the objective of the Community competition rules is to prevent undertakings […] from reducing the welfare of the final consumer of the products in question".[125] While these two judgements agree with the GP (although the GP only covers Article 102) the ECJ recently took the opportunity to reprimand the CFI for its findings in GlaxoSmithKline. When appealed, the ECJ held that the CFI committed an error of law:

"there is nothing in [Article 101(1)] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, [Article 101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price".[126]

Thus, a more effects-based approach proposed by the CFI was rejected by the ECJ.

In the light of Article 102, the ECJ has also recently opposed the use of a consumer welfare test. In *British Airways*, the ECJ repeated its statement in Continental Can that Article 102 is not only aimed at practices which may cause prejudice to consumers directly but also at those which have a restrictive effect on competition.[127]

In short, the circumstances of the case were as follows. Virgin Atlantic Airways, a competitor to British Airways (BA), complained to the Commission that BA had abused its dominant position on the United Kingdom market for air travel agency services. The ground for Virgin's claim was that BA had entered certain agreements with travel agents. These agreements

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[124] Cases T-213/01 and T-214/01, Österreichische Postsparkasse AG v. Commission and Bank fur Arbeit und Wirtschaft AG v. Commission [2006] ECR II-1601, para. 115.

[125] Case T-168/01, GlaxoSmithKline Unlimited v. Commission, [2006] 5 CMLR 1623, para. 118. In the light of Article 102, the CFI arrived at another conclusion in T-203/01, Manufacture Française Des Pneumatiques Michelin v Commission [2004] 4 CMLR 923, when the CFI stated that for the purposes of establishing an infringement of Article 102, it is sufficient to show that the conduct is *capable* of restricting competition, para. 239.

[126] Cases C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P, GlaxoSmithKline Services Unlimited v Commission, 6 October 2009, para. 63.

[127] Case C-95/04 P, British Airways plc v Commission, [2007] ECR I-2331, para. 106. Also, see Case C-202/07 P, France Télécom SA. v Commission, 2 April 2009, para. 104, where the ECJ reitrated its statement in British Airways. The judgement in British Airways was laid down in March 2007, almost two years before the Commission issued the final version of the GP. It is argued in this thesis that the ECJ, in British Airways, rejected parts of the GP and a question that might arise is whether this actaully could have happened since the GP was not issued when the ECJ ruled in British Airways. However, it is remebered from the beginning of this chapter that the GP was proceeded by the DG Competition discussion paper and the Report by EAGCP (both issued 2005). The GP was greatly influenced by these two documents. Therefore, the ECJ indirectly rejected parts of the GP before it was even issued.

entitled the agents to various types of reward schemes for pushing BA tickets. The reward schemes were made up by a basic commission for the sale of BA tickets and a performance bonus calculated by reference to the increase in sales of BA tickets compared to the previous year. The Commission and the CFI found that the conduct of BA was abusive.

Eventually, the ECJ arrived at this conclusion as well. BA's main argument, that the reward schemes did not harm consumers, was quashed by the ECJ. The Court did so by refering to the ordoliberal spirit of Article 102. In para. 107, the Court held it is not necessary to examine whether that conduct has caused prejudice to consumers, instead it is sufficient to examine whether it had a restrictive effect on competition.

Ordoliberal thoughts are also apparent in para. 66, where the ECJ stressed that "competition" is still an end in itself:

"[Article 102] refers to conduct which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

This statement seems influenced by the Advocate General Kokott's Opinion. She advised (or reminded) the ECJ that Article 102 is designed to protect competition as an institution, para. 68:

"[Article 102], like the other competition rules of the Treaty, is not designed only or primarily to protect [...] consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared."[128]

Hence, it seems like the ECJ has felt a pressing need lately to emphasise that nothing has changed in the field of EU competition law. Perhaps, this need has been triggered by the Commission's willingness to turn its back on ordoliberalism. The Commission and the ECJ now represent two different views on what Article 102 should achieve. The Commission, the attentive listener, has given legal and economic scholars what they have been longing for, the GP which

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[128] Opinion of Advocate General Kokott in Case C-95/04P British Airways plc v Commission, delivered on 23 February 2006.

focuses on efficiency and consumer harm. On the other hand, the ECJ, seemingly immune to new contributions that do not fit neatly into the Treaty, has recently claimed that old ordoliberal ideas do linger on.[129] Such a standpoint can be hard to understand, since the Commission appears to be motivated by good intentions submitting Article 102 to a reformation. Therefore, the next two chapters set out to offer an explanation to why the ECJ still defends the ordoliberal spirit of Article 102.

5 A framework for identifying false positives

In 1984, Judge Easterbrook argued that a properly designed antitrust enforcement system must select legal rules to minimize the total cost of i) anticompetitive practices that escape condemnation (false negatives); ii) competitive practices that are condemned or deterred (false positives); and iii) the system itself.[130] Only legal rules that comply with these criteria would help maximize the long-run welfare generated by the competitive process.

The use of error-cost framework approaches, like the one proposed by Judge Easterbrook, have been widespread in evaluating antitrust and competition law.[131] It is especially worth noticing that the Report by the EAGCP (which was the main drive for the publishing of the GP) argues that the likelihood of false positives and false negatives and the magnitudes of their costs should be balanced by the competition authority.[132]

An error-cost analysis will be used in the following in order to find an explanation to why the ECJ have rejected the good-intended change suggested by the Commission in the GP.

5.1 The risk of false positives under the pure ordoliberal era

It is first appropriate to shortly investigate error-costs under the "pure" ordoliberal era. It should be pointed out though, that the main objective in ordoliberal philosophy – economic freedom – was (or is) political and not economical. It is remembered from above that ordoliberals thought that economic freedom would lead to political freedom which could preserve democracy and ultimately peace. Thus, an error-cost analysis which relies on economical considerations can be seen as a macabre way of putting a price on democracy or peace. Furthermore, ordoliberals considered that by protecting freedom of competition, individual freedom would be guaranteed as

[129] "Seemingly" because some elements, that cannot be derived out of the text of Article 102, have made their way into case law. For example, the ECJ allowed (what seems to be) an "efficiency defence" in British Airways (n. 127), para. 86.
[130] Easterbrook, p. 16. False negatives will not be analysed in this thesis.
[131] For example, see Beckner III and Salop, pp. 41-76; Evans and Padilla, pp. 97-122.
[132] Report by the EAGCP, p. 7.

a human *right.*[133] Therefore, it could also be argued that the mere reason we have rights is because we do not want them to be part of a utility calculus.[134] In other words, economic freedom always out-trumps utilitarian considerations. For these reasons it could for example be inconvenient to analyse whether the cost of false positives is "too" high, because in order to do so, it is necessary to assess an economic value for the objective. This, if even possible, could be "wrong". Regardless of this, this thesis puts a price on economic freedom for the mere purpose of showing that the ordoliberal approach was less likely to give rise to false positives.

The following expression, **(1)**, constitutes a false positive if the competition rules are enforced.

$$\textbf{(1)} \qquad (C_e + p(F_h + L_h)) > ((1 - p)(F_g + L_g)) \qquad \textit{enforcing the rules}$$

The left side is total costs. First of all, total costs are made up by the cost of enforcing the rules – C_e. C_e equals the cost to the Commission of investigating if Article 102 has been infringed, the procedural costs in the EU Courts, costs for legal counselling, etc. Regardless of the procedural outcome and regardless of what party that ultimately has to bear C_e, this cost is a burden to society which always needs to be paid. Secondly, total costs is a function of the probability, p, that the enforcement fails in achieving the objectives. If so, first of all, the outcome will be harmful to economic freedom in the individual case, F_h. If the enforcement fails in the individual case, there will also be a connected effect by giving harmful legal certainty, L_h, to other dominant firms (perhaps in all sectors of the economy).

An example can explain F_h and L_h in greater detail. A dominant undertaking lowers its price vis-á-vis customers of a competitor. The competitor, which cannot sell at the same price and thus fears that it has to leave the market, claims that Article 102 has been infringed. The Commission is summoned at the scene and finds that Article 102 has not been infringed. Shortly thereafter, the competitor leaves the market. If the objective of Article 102 is protecting small and medium-sized firms (which it indeed once was), the Commission has failed and this leads to a harmful effect on the economic freedom of the competitor, F_h. The harmful effect however, does not only appear on one market. The decision not to intervene gives the dominant firms on other markets legal certainty that the Commission gives a green light to exclusion by predatory pricing. This legal certainty, L_h, is harmful because it tells dominant firms that it is legal to behave in

[133] See section 2.2 and Gormsen (2005), p 15.
[134] Although disputed, rights can, or should, be seen as "trumps", Dworkin, pp 153-167.

opposition to the objective of economic freedom. However, this legal certainty only makes such conducts seemingly legal. They should be prohibited, but the Commission and the EU Courts might find it hard to overrule its own previous ill-settled case law in doing so. The size of L_h depends of course, on the denomination of the legal act. A decision by the Commission may provide less legal certainty than a judgement from the ECJ.

The right side of **(1)** is made up by total gains. Total gains equal the probability that the enforcement successfully achieves the objective, $(1 - p)$, times the benefits derived from upholding economic freedom in the individual case – F_g – and the benefits from giving other firms legal certainty that acting in opposition to the objective is illegal, L_g. As with L_h, the size of L_g depends on the value of the legal act. If total costs are higher than total gains, and the competition rules are enforced, a false positive is created.

5.2 The risk of false positives under the scheme of the GP

Expression **(2)** below denotes a false positive under the scheme of the GP.

(2) $$(C_e + p(W_h + L_h)) > ((1 - p)(W_g + L_g)) \qquad \textit{enforcing the rules}$$

As shown in chapter 4, economic freedom is not an objective according to the GP.[135] Instead, economic efficiency and consumer welfare are. It is also remembered from chapter 4 that the relationship, and whether there exists a hierarchy between these two objectives, is quite blurred. Often, however, promoting consumer welfare will promote economic efficiency and vice versa (see section 4.2.2) and therefore *W* and *L* in **(2)** denote consumer welfare, and thus captures both of the objectives according to the GP in a simplified, but satisfactory way. W_h and W_g stand for the consumer welfare that is lost or gained in the individual case at hand, depending on whether the enforcement is successful. Consequently, L_h and L_g denotes the consumer welfare that is lost or gained on other markets depending on whether the enforcement is successful. Like in **(1)**, this legal certainty can be harmful (L_h) if dominant undertakings on other markets are given the impression that it is legal to harm consumers, or gainful (L_g) if dominant undertakings on other markets refrain from harming consumers.

[135] It is worth stressing that in para. 6 GP, the Commission strives for a more “survival of the fittest” approach. The Commission notes that competitors should not be protected on account of their economical freedom by stating that competitors who deliver less to consumers in terms of price, choice, quality and innovation will not enjoy protection under Article 102.

The problem for competition authorities is to enforce the rules only when the benefits from doing so outweigh the costs. Put differently, competition authorities need to avoid false positives.[136] In the next chapter, a hypothetical change from the objective economic freedom to the objective consumer welfare is analysed, and how this change affects the different factors of expression **(2)**. However, before turning to this analysis something should be said about what perhaps seems like a flaw of the framework presented here.

As shown in chapter 4, the ECJ rejected the consumer welfare standard in British Airways. However, that does not mean that it rejected an effects-based approach in general. The use of a formalistic or effects-based approach by the ECJ today cannot be seen in terms of blacks and whites like the expressions **(1)** and **(2)** do. For example, in para. 86 the ECJ held that it has to be demonstrated whether the exclusionary effect arising from a system of discounts may be counterbalanced by advantages in terms of efficiency. This indicates that the ECJ has embraced an effects-based approach, i.e. that it is concerned with welfare effects. However, at para. 107 the ECJ also held that it is not necessary to investigate harmful or gainful welfare effects if it is shown that the competitive structure is harmed. Thus, the actual approach adopted by the ECJ appears to be a combination of a formalistic and an effects-based approach. This implies that it could be inaccruate to analyse a change from a pure formalistic approach – **(1)**.

However, it is meaingful to compare the two extremes – **(1)** and **(2)**. If the battle of methodology fought in British Airways is best described as a battle between an effects-based approach and a combination between a formalistic/effects-based approach, where the latter won, it is meaningful to analyse the pure formalistic approach since such an analysis will most likely carry the answer to why a pure effects-based approach (as suggested by the GP) was rejected. In other words, there has to be something favourable with the formalistic approach that makes the ECJ reluctant to accept the consumer welfare standard, and the next chapter sets out to find it.

6 A hypothetical change from ordoliberal objectives to GP-objectives

This chapter analyses a hypothetical change from the ordoliberal objectives to the objectives of the GP in order to identify any unwanted characteristics of the effects-based approach. Thus, it is assumed that the GP is the "law" or that the ECJ has not opposed the consumer welfare standard. The focus will not be on what the GP achieves, but rather what it leaves behind.

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[136] Of course, competition authorities should also avoid false negatives. If total costs are lower than total gains in **(1)** or **(2)**, and the rules are not enforced, a false negative is created.

6.1 Enforcement costs - C_e

6.1.1 Enforcement costs under the pure ordoliberal era

There is a reason why three week-long trails about parking tickets are not held. It is just not worth it. Similarly, within the field of EU competition law, it is seldom worth chasing smaller undertakings, which the "de minimis" rules (soft law in the light of Article 101(1)) clearly states.[137] It can also be meaningless to go after dominant undertakings on small markets. The legal standard "affect trade between Member States", which appears in both Article 101 and 102, can be seen as a landing net to sort out small fish. For example, it was used this way by the ECJ in *Hugin*.[138] This means that Article 102 should not be used if enforcement costs are too high. It also implies that there is a need to keep enforcement costs down because it makes Article 102 a more sharp weapon in the battle versus abusive undertakings.

Under the ordoliberal era, the Commission and the EU Courts applied a formalistic approach to Article 102. Simply put, there was no reason to base their decisions on solid economics. Instead, it was sufficient to establish that a certain conduct had the shape or form that appeared to impede the economic freedom of other market participants.[139] In order to investigate whether smaller competitors were likely to suffer any harm, likely structural changes on the market naturally were relied upon. Such changes are quite "easy" to identify (at least in comparison with effects on consumer welfare). For example, if an undertaking complains to the Commission that it faces exclusion, structural changes on the market will take place as long as the undertaking is telling the truth.[140]

6.1.2 Enforcement costs under the scheme of the GP

At a first glance, a change in the objectives, from economic freedom to consumer welfare, seems to have no or little effect on enforcement cost. After all, the methodology suggested in the GP is not revolutionary. Just like under the ordoliberal era, the relevant market needs to be defined and

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[137] Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition Under Article 81(1) [2001] OJ C368/13, [2002] 4 CMLR 699.

[138] The market which Hugin was found to dominate was indeed very small. It was identified as the market for spare parts for Hugin's cash registers. Hugin had quite a small share of the market for cash registers. The ECJ claimed that Article 102 is not supposed to cover these cases, perhaps because the cost of enforcing Article 102 in cases like these generally outweighs the benefits, (n. 96).

[139] However, dominant firms were given the right to compete on the merits. This right will be treated in the next section when the probability of failing is analysed.

[140] Given that there are barriers to entry high enough to prevent another undertaking from taking the excluded competitor's place.

dominance needs to be established by assessing market powers.[141] However, the method of finding that a certain conduct is abusive is new.

In the approach suggested by the GP, the simplicity of the formalistic approach is lost and that means that the cost of enforcing the rules will rise. Of interest is not only whether a competitor is harmed, but if a collective of consumers is. That implies that it is necessary to rely on economic models and assumptions when enforcing Article 102. To clarify this, a dominant undertaking that refuses to supply can be considered. Para. 75 GP, states that a dominant undertaking generally should have the right to choose its trading partners and to dispose freely of its property. The Commission notes that an intervention on competition law grounds requires *careful* consideration since it may undermine undertakings' incentives to invest and innovate and thereby, possibly harm consumers. These possibly negative effects are to be weighted against the negative effects that might arise if a dominant undertaking *is* allowed to refuse to supply, para. 86. Balance acts like these are costly because at both ends of the scale a delicate analysis must be carried out. Questions of importance in such analyses are for example if prices or innovation are likely to increase or decrease and a lot of data needs to be processed before satisfactory answers are found. On top of this, para. 89 states that a dominant undertaking has the right to file an efficiency defence which, of course, needs to be considered.

In addition, an approach based on effect, rather than on form, raises enforcement costs in another way. The Commission and the EU Courts cannot, to the same extent as before, rely on earlier case law when investigating suspected infringements of Article 102 according to the GP. For example, if the ECJ tussles with a case regarding predatory pricing, the ECJ will naturally rely on its earlier case law, and perhaps turn to the judgement in *AKZO*. So was done in *Tetra Pak II*, and also recently in *France Télécom*.[142] If the ECJ, after turning to the judgement in *AKZO*, finds that pricing below AVC (average variable costs) is presumed to be abusive, the ECJ will rule accordingly because pricing below AVC can only be a rational strategy if the intention is to distort competition.[143]

However, if harm to consumer welfare was the ultimate test of Article 102, it would mean less that the dominant undertaking has priced below AVC and thus tries to exclude. Exclusion can have a negative effect on consumer welfare, but not necessarily so. In para. 67 GP, the

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[141] Paras. 9-18 GP. However, the Commission introduced some new elements in assessing market power. For example, para. 11 states that an undertaking that is capable of increasing prices over competitive level for a period of two years is generally regarded as dominant.

[142] Tetra Pak II (n. 80) paras. 41-42 and France Télécom, (n. 127) para. 109.

[143] However, perhaps sometimes, it could be a rational strategy for pricing below AVC, see section 3.3.4.

Commission notes that what really matters is whether below-cost prices are capable of harming consumers. If the dominant undertaking excludes an "inefficient" competitor, harm to consumers cannot be taken for granted. Instead, what matters is whether an equally efficient competitor would be excluded.[144] *Generally*, such harm is likely to arise if the dominant undertaking stands to benefit from sacrificing (i.e. engage in predatory pricing), para. 70. However, that is just generally speaking and the effects need to be investigated further. Well aware of this, the Commission states in para. 71 that other factors needs to be considered, such as entry barriers and the possibilities to re-enter the market.[145] Furthermore, in para. 74, the Commission states that predation will be allowed if the dominant undertaking can show that its price strategy enables it to achieve economies of scale or efficiencies related to expanding the market.

Turning to earlier case law, for example by finding a AVC-rule, helps to bring enforcement cost down and makes the application of Article 102 more predictable. However, in the effects-based approach proposed in the GP, earlier case law will not offer the whole answer to the question at hand. If a dominant undertaking on the market for widgets has been found to have infringed Article 102, it cannot be taken for certain that a dominant undertaking on the market for blodgets, which has copied the conduct of the first undertaking, harms the consumers of blodgets. Furthermore, it will be more costly for undertakings to decide whether the adoption of a certain commercial policy is legal or not.

To conclude, enforcement cost will raise in the approach suggested by the GP. First of all, an effects-based analysis is more expensive, for the Commission, undertakings and the EU Courts (altough the courts will not carry out a full review). Secondly, such an analysis needs to be carried out in every individual case, i.e. the Commission, undertakings and the EU Courts can not, to the same extent as before, find reliable footing on earlier case law. C_e in **(2)** is higher than C_e in **(1)**.

6.2 The probability of failing - p

6.2.1 The probability of failing under the pure ordoliberal era

Law is not an accurate science. "Innocent" persons are found guilty and "guilty" persons walk on

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[144] The Commission will employ an "equally efficient competitor analysis" when determining whether predation is capable of harming consumers, GP, paras. 67, 25-27. Of importance in that analysis is not whether predation has the potential to foreclose competitors, but whether it has the potential to foreclose *equally efficient* competitors. An equally efficient competitor, is a hypothetical undertaking, created after investigating economic data relating to cost and sales prices of the dominant undertaking, para. 25.

[145] In GP, para. 73, the Commission also notes that if the conduct concerns a low price applied generally for a long period of time, it is less likely that the dominant undertaking engages in predatory conduct, i.e. harms consumers.

our streets. One might expect that a competition law system, which relies on economic considerations and therefore figures, is more of an "exact" field of law. However, as it shall be argued here, it is quite the opposite. Economic models, like the one used in this thesis, can be quashed. Just like the expression **(1)** above can be criticised for disregarding welfare considerations (which indeed was an expected result of promoting economic freedom), a market definition can be blamed for being too narrow or too wide. When enforcing the competition law provisions, the Commission often has to settle with likely, rather than actual, effects.

As will be argued below, the accuracy of the ordoliberal, formalistic approach was high. However, just as in the approach suggested by the GP, things could go wrong when identifying the relevant market or assessing market powers. Apart from this, there was in principle only one critical balance that could go "wrong". Even dominant undertakings were allowed to compete on the merits, even if this led to the exclusion of one or more competitors. Therefore, the main problem in applying the formalistic approach was to decide which conducts that should be considered as legitimate means of competition and thus to serve as safe harbours. Put differently, ordoliberals wanted to scatter economic powers to achieve economic freedom but scattering the economic power of a dominant undertaking will naturally impede *its* economic freedom. Besides, too much intervention in the private sphere is perhaps rejected by the very nature of liberalism.

From this follows that deciding whether a dominant undertaking is competing on the merits or not can be seen as a balance act between the need to uphold the economic freedom of all undertakings (including the economic freedom of dominant undertakings), which is a cornerstone in all liberal alignments, and the need to uphold the economic freedom of smaller undertakings. Ordoliberalism suggests that this balance act is solved by protecting the economic freedom of smaller undertakings, rather than the freedom of larger ones, to ensure maximum participation in the political decision making (and in this respect ordoliberal philosophy is a "special" liberal alignment).[146] If the economic freedom of dominant firms was protected too intensively, private economic powers would become more centralised, and political freedom could be harmed.

The case law seems to confirm this view. In Commercial Solvents, the ECJ left very little room for defensive arguments. In para. 23 the dominant undertaking (CSC) claimed that its conduct was legitimate. CSC stated that it was "inspired by a legitimate consideration of the advantage that would accrue to it of expanding its production [...]". The ECJ concluded that the refusal to supply could not be seen as "competition on the merits" simply because the conduct

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[146] See section 2.2.

harmed the economic freedom of the smaller undertaking Zoja, para. 25. In United Brands, the ECJ noted that a dominant undertaking is entitled to take reasonable steps to protect its economic interests, para. 189. Such steps, however, could not be countenanced if the actual purpose was to strengthen a dominant position and to abuse it. In AKZO, the balance between unlawful conducts and competition on the merits was drawn slightly different. In para. 70 the ECJ stated that "[a]rticle [102] prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality.[147]

Although the crucial balance in the formalistic approach has been given different meanings by the EU Courts, the case law seems uniform in one aspect: "competition on the merits" was given a narrow meaning. In the light of the objective – political freedom through economical freedom – this seems right, i.e. not accepting dominants' claims that conducts are "justified", is an excellent and accurate way to achieve the objective. This implies that p in expression **(1)** is "low", or at least, as it shall be argued below, that p in **(1)** is lower than p in **(2)**.

6.2.2 The probability of failing under the scheme of the GP

The approach suggested by the GP is far more complicated. Para. 21 GP states that, when pursuing a case, the Commission will develop a general analysis and a more "specific" analysis depending on the type of the conduct.

The general analysis is set out to determine if the conduct is likely to lead to anticompetitive foreclosure, para 20. According to the Commission, 7 factors are generally relevant to such an assessment.[148] The general analysis is comprehensive and is indeed a move towards a rule of reason approach which gives raise to numerous uncertainties. For example, let us assume that factor 6 in para. 20 is fulfilled, i.e. that there is evidence of actual foreclosure. Under the effects-based approach, this alone does not suggest that the conduct is illegal because the competitor could have left the market (mainly) for other reasons (times of recession or it was "inefficient" and thus unworthy of protection). Uncertainties like these applies to all factors of para. 20. The formalistic approach was not burdened with such uncertainties because if an undertaking left the market, there were very good reasons to blame the dominant undertaking on that market, i.e. to

[147] AKZO, n. 78. With this "definition" of competition on the merits, it is possible that Commercial Solvents (CSC) would have escaped infringement. After all, there were good reasons to believe that CSC decided to integrate vertically because it thought that it better could serve the market, i.e. that it was competing "on the basis of quality", see section 3.3.2.

[148] These 7 factors are: the position of the dominant undertaking; the conditions on the relevant market; the position of the dominant undertaking's competitors; the position of customers and input suppliers; the extent of the allegedly abusive conduct; possible evidence of actual foreclosure; and direct evidence of any exclusionary strategy.

rule that the conduct of the dominant undertaking was capable of distorting competition and that it was not competing on the merits.

The “specific” analysis depends on the type of conduct examined. The GP has four different conduct-specific sections which cover exclusive dealing, tying and bundling, predatory pricing and refusal to supply and margin squeeze. Regardless of what section that will be applicable, the specific analysis will be carried out by creating a hypothetical competitor which is “as efficient” as the dominant undertaking.[149] If such a hypothetical undertaking would not be excluded, the conduct of the dominant undertaking is generally not prohibited, para. 27. Investigating whether an equally efficient competitor would be excluded is a clever way to achieve an important aim of the GP as stated in para. 6: to make sure that inefficient undertakings are not protected to the detriment of consumers, or put differently, to liberate Article 102 from ordoliberal influence. Another advantage is that not only the Commission, but also dominant undertakings, can assess the lawfulness of future conducts by investigating whether an equally efficient competitor would be forced out of the market.

However, the test, analysing an equally efficient competitor, is uncertain. In paras. 24 and 25, the Commission indicates that it will sometimes prohibit conducts which harm competitors that are “not yet as efficient as” the dominant undertaking without stating why or when.[150] The Commission will most likely do so when the dominant undertaking's costs are “unavailable” or not reliable. If so, the Commission might resort to the cost structures of the competitors, which the Commission in this respect explicitly considers “reliable”, para. 25. It is questionable if these costs should be labeled and treated as “reliable”, since they might be the costs of “inefficient” undertakings and, if so, consumers could be harmed through the protection of such undertakings.

Finally, the four different conduct-specific sections all allow for an “efficiency defence”, i.e. a dominant undertaking can successfully claim that its conduct is justified on efficiency grounds, paras. 28-31.[151] This justification can be seen as the effects-based equivalent to “competing on the merits”. While the “efficiency defence” is a necessary contribution in order to achieve the new objectives, it is problematic. The efficiency defence, which in para. 30 sets forth four cumulative conditions, is almost analogous to Article 101(3) and that implies that possible

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[149] Paras. 41, 59, 67 and 80 all refer to an “equally efficient competitor-test”. It should be pointed out that the test in paras. 23-27 only applies to price-based exclusionary conduct, para. 23. Therefore, only paras. 41 and 67 refer directly to the “equally efficient competitor-test”. However, paras. 59 and 80, which respectively covers tying and bundling, and refusal to supply and margin squeeze, also relies on a comparison with an equally efficient competitor but perhaps not the test laid down in paras. 23-27.

[150] Temple Lang, p. 9.

[151] GP, paras. 46, 62, 74 and 90 all refer to the “efficiency defence”.

benefits for consumers (or efficiency gains) are not identified in the same comprehensive way that possible harm is.[152] Regardless of what party that has the burden of proof, it is as equally important to investigate possible benefits as possible harm to consumers. If it would not be, the objectives could never be satisfactorily fulfilled. In order words, the GP relies on a comprehensive analysis when identifying negative effects, but not when identifying favourable effects and this means that the net effects on consumer welfare become more uncertain. For example, just like Article 101(3) does not allow competition to be eliminated by agreement, the efficiency defence in the GP does not allow a dominant undertaking to eliminate all or most competition. This could deprive consumers of the benefits of an efficiency when it is important enough, it prevents the emergence of natural monopolies and interferces with the motive force "competition for the market".[153]

To conclude, the GP makes it harder to determine whether Article 102, in the individual case, should be enforced or if it should not be enforced since its methodology is more uncertain. Thus, the probability of failing, *p,* can be expected to be higher in **(2)** than in **(1)**.[154] Consequently, the probability of succeeding, *(1 - p)*, is lower in **(2)** than in **(1)**.

6.3 Harm and gains on economic freedom and consumer welfare – $F_{h,b}$ & $W_{h,b}$

So far, it has been argued that in the effects-based approach, it will be more costly to enforce Article 102 and the method will more likely fail to achieve the new objectives. Even so, these are not necessarily solid arguments against the suitability of the GP because if the values achieved by the effects-based approach are sufficiently higher than those during the ordoliberal era, the negative effects on C_e and p can be more than offset. It is likely that the Commission believes so, i.e. that "welfare" is more desirable than "economic freedom", (W is sufficiently higher than F), and that the law therefore should be changed to achieve the former. However, the Commission have remained silent about if or why previous law was unsatisfactory. This is quite understandable since if the previous law was unsatisfactory, the Commission would be largely responsible for it. Furthermore, if the Commission believes that previous case law was unsatisfactory, and wants to work for a change, it is perhaps best to conceal the new thinking by

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152 Katsoulacos, p. 6.
153 Temple Lang, pp. 7-8.
154 There could be a relationship between enforcement costs and the probability of failing that is not investigated here. For example, in some cases, the Commission might be able to carry out a more extensive analysis to make the method more accurate, i.e. pay a high enforcement cost to allow for a lower probability of failing.

suggesting that it is in accordance with settled case law, rather than in opposition to it.[155]

For the reasons explained in chapter 5, it could be "wrong" or even impossible to determine if the value of W is higher than F. Even so, it is possible to argue that protecting economic freedom is less important today than it was during the Second World War or during the postwar era.[156] Ordoliberals focused on the potential harms of economic power, and international competition tends to diminish such power. After all, much has happened since the EEC Treaty was signed. The Community transformed into the Union, and 6 Member States became 27. Further, competition is not only international within the EU today, but global (partly because of the efforts of the WTO).

The legislator appears to agree. According to the EC Treaty, an objective was to achieve solidarity among the Member States (Article 2 EC) and Article 3(1)(g) EC was a means to achieve this solidarity (competition should not be distorted). In other words, the legislator seemed to belive that the value of undistorted competition lead to economic freedom, to political freedom, to preserved democracies and ultimately to solidarity.[157] However, Article 3(1)(g) EC has been amended and its counterpart Article 3(1)(b) TFEU does not hold that competition must be left undistorted. This could indicate that the legislator is ready to accept distorted competition in some cases and if so, economic freedom is indeed less important today (since December 2009).

On the other hand, promoting economic freedom often promotes consumer welfare, but not always, as described in section 4.2.1 above. This means that a shift to a consumer welfare standard will at best "only" capture the situations where consumers are better off if "effective competition" is weakened. These situations could constitute a fraction of all possible abuses which would imply that a shift to a consumer welfare standard could actually be of marginal importance to consumers.

However, the reversed argument can be used in favour of the approach suggested by the GP. In most cases, upholding "effective competition" will bring about consumer welfare. This naturally implies that exclusion will often be prohibited and thus, the economic freedom of threatened competitors will often be indirectly protected.

This being said, it could be argued that the objectives during the ordoliberal era, and the objectives suggested by the GP, do not fundamentally differ. During the ordoliberal era,

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[155] See Temple Lang, p. 29, who notes that the GP tries to extend the existing case law and perhaps disguises this by making frequent references to it.
[156] See Gerber (1994), pp. 75-76.
[157] Undistorted competition can also be assumed to have been a means to achieve the strictly economical aims of Article 2 EC.

economic freedom was the superior objective and increased welfare was an expected result from promoting this objective. In the order suggested by the GP, the expected result during the ordoliberal era is the objective, and the objective during the ordoliberal era is the expected result. Thus, what is achieved by the GP, if it was assumed to be current law, and not "soft-law", is that the enforcement of Article 102 is capable of promoting consumer welfare in those cases where the ordoliberal approach would have failed. However, it must be borne in mind that this has a price – the effects-based method is more costly to enforce and will more often fail (and thus create negative welfare effects, W_h), as shown above and the crucial question is whether these costs outweigh by chasing the marginal consumer welfare that the formalistic approach cannot capture. It would be beyond the scope of this thesis to investigate if this would, or would not, be the case. However, the GP has been preceded by the EAGCP, the DC Competition discussion paper and a large numbers of lawyers and economists have emphasised that a consumer welfare standard is more desirable, i.e. the GP is based on very solid deliberation.

6.4 Harmful and gainful legal certainty - $L_{h,b}$

An argument against the GP is that an effects-based approach fails to give dominant undertakings the legal certainty they need to be able to carry out commercial policies in the knowledge that they are legal.[158] If so, dominant undertakings might refrain from taking certain decisions that enhances efficiency or consumer welfare just because it is ambiguous if they are legal. This is indeed troublesome, for it implies that the very nature of the effects-based approach, in which a conduct is prohibited or found legal on the basis of its effects and not its form, can be blamed to fail what it sets out to achieve – welfare.

Such criticism can be met with the argument that the legal certainty that the formalistic approach offers, which certainly is higher than in the effects-based approach, is perhaps not high enough to give dominant undertakings "sufficient" certainty anyway. There are mainly two reasons for this. Firstly, because Article 102 is applied in a different manner today than it was during the ordoliberal era, the EU competition law is not a static field of law. As shown in chapters 3 and 4, the Commission once relied upon competition law provisions in the battle against inflation, later to protect small undertakings, and today to promote consumer welfare. This implies that every field of law changes because we think it is to the better and even if legal certainty sometimes is lost during this process, this is a price we willingly pay. Secondly, the EU

[158] See Katsoulacos, pp. 6-7 and GP para. 21, which states that the Commission may consider "any other factors which it may consider to be appropriate".

Courts are not bound by their previous decisions and this implies that the ECJ can rule against its own (ill-shaped) case law at any time it may see fit.[159] For example, dominant undertakings on smaller markets might rest on the legal certainty that can be derived out of the judgement Hugin, that a conduct must to a certain degree "affect trade between Member States". However, the "limit" in Hugin can change at any time if the ECJ should find strong reasons therefor (the limit could be 1 euro according to a semantic interpretation of "affect trade between Member States"[160]). So, even if the effects-based approach can be blamed for giving raise to legal uncertainty, the negative effects this might create shall not be overrated, since some legal uncertainty exists in the formalistic approach as well.

It must also be pointed out that in the expressions **(1)** and **(2)** above, there are two sides of legal certainty, harmful and beneficial. Harmful legal certainty, which should not be confused with legal uncertainty, arises if the enforcement fails to achieve what it is supposed to achieve. Such failures do not necessarily make way for legal uncertainty, rather, it gives dominant undertakings legal certainty that it is permissible to act in conflict with the objectives. Harmful legal certainty could thus be far worse than legal uncertainty. On the other hand, gainful legal certainty is created, or maintained, if dominant firms are rightfully told to refrain from conducts which do not get the objectives fulfilled.

A shift from the formalistic approach to the one suggested by the GP would imply that legal certainty is drastically reduced. Due to the negative and positive sides of legal certainty in **(2)**, both L_h and L_b will approach zero. This implies, for good and for bad, that a dominant undertaking on the market for blodgets cannot with certainty base its commercial policies on a decision where the dominant undertaking on the market for widgets was found, or not found, to have infringed Article 102. In other words, the GP will not give dominant undertakings beneficial legal certainty if the enforcement succeeds (which is bad) and it will not give dominant undertakings harmful legal certainty if the enforcement fails (which is good). From this follows that legal uncertainty, which the GP gives rise to, does not necessarily have to be seen as something evil because L_h and L_b in expression **(2)** will approach zero, the effects-based approach does not have to take these uncertain factors into consideration when enforcing the rules.

[159] Arnull, p. 248, states that "the Court is not bound by its previous decisions but in practice it does not often depart from them".
[160] And in Commcercial Solvents, n. 72, there was no change at all in the flow of goods or services between Member States.

6.5 Closing comments

Para. 21 GP illuminates the crucial difference between the formalistic and the effects-based approach since the Commission states that it will look into "any other factors which it may consider to be appropriate" when pursuing a case.[161] This wording (which hardly guides undertakings although the purpose of the GP is to give guidance) suggests that the Commission either believes that it is omnipotent or that the effects-based approach is so inaccurate, that it is not possible on forehand to regulate all the factors that could be of interest when condemning the conducts of dominant undertakings. In this thesis, the wording of para. 21 is assumed to be a consequence of the latter and not the former.[162] It is indeed remarkable that the Commission will not always know where to look when pursuing a case but the noteworthy characteristics of the effects-based approach do not end there. Para. 21 also states that likely future situations, with the dominant undertaking's conduct in place, must be compared with likely future situations in the absence of the conduct in question. This means that the Commission will have to look through a crystal ball and to carry out forecasts, which by their very nature, are uncertain.[163]

In this uncertainty lies the explanation to why the effects-based approach will more likely give rise to false positives. As argued above, the cost of enforcing the rules will rise, and so will the probability (risk) that the enforcement will fail to achieve its objectives. Legal uncertainty will also rise, not because the effects-based approach is uncertain but because it abandons illegality *per se*. This implies that the legal value of decisions will almost be limited to the conduct investigated and welfare values, L_h and L_b, in **(2)** will approach zero. This could be a good thing since an enforcing authority will not, to the same extent as under the formalistic approach, have to consider the potentially huge negative effects (L_h) when pursuing a case. These possible effects will more or less be contained on the market in question (W_h). However, if the formalistic method was very accurate, which it has been argued that it was, harmful legal

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[161] This suitability of this wording can be illuminated with the case Maestri v. Italy, (39748/98) [2004] ECHR 76 (17 February 2004) where an Italian national and judge was reprimanded for being a member of the freemasons. The national statute, on which the disciplinary measure was based, did not satisfy the conditions of foreseeability and accessibility. Therefore, Article 11 ECHR was violated. The case has no direct bearing on the GP (the GP is "soft-law" and not a national statute). However, the case should appear as a guiding star for the formulation of all legal acts.

[162] However, Mestmacker, pp. 401-444, seems to be of a different view. He who opposes the majoritarian objective of consumer welfare since it would violate the Community's constitutional order.

[163] Looking trough a crystal ball might seem hopeless, but it is not suggested here that the Commission cannot, with the help of economic models and assumptions, act as a fortune teller. However, the answers to the questions of importance in such forecasts are uncertain. For example, will prices increase in the future if a conduct is tolerated? If so, would prices have increased anyway, and perhaps even more if the conduct was prohibited? Will innovation be stifled if a conduct is tolerated? If so, would innovation have been stifled even more if the conduct was prohibited? Considering what has been said in section 4.2.1 above, for example the possible existence of economies of scale and market power as a prerequisite for innovation, the answers to these questions are uncertain.

certainty, L_h, was not likely to arise in expression **(1)**. Giving up legal certainty by adopting an effects-based approach can consequently be a bad thing.

This being said, the change in course suggested by the GP might seem foolish. However, if the value W in **(2)** is sufficiently higher than F in **(1)** the benefits from an effects-based approach may well weigh out the drawbacks. The Commission seems fully convinced that this is the case, but it should be kept in mind that the advantage in the effects-based approach can "only" be assumed to be the capture of welfare in those cases where the formalistic approach fails to do this (for example in cases like Commercial Solvents). It should also be pointed out that the literature pushing for an effects-based approach is vast which certainly confirms that the Commission is acting on careful deliberation, i.e. W is sufficiently higher than F.

If the change suggested by the GP is desirable (which it is assumed to be here, resting on the same strong arguments that the Commission is) it might be hard to understand why the EU Courts have refused to accept consumer welfare as the new ultimate test of Article 102. For example, why did the ECJ reject such arguments in British Airways? Possible explanations for the rejection have been put forward by some authors, for example that the ECJ believes that a consumer welfare standard is a violation against the EU's constitutional order or that it is leads to too much legal uncertainty. Another explanation will be offered below (in fact it has already been put forward, but it needs to be discussed in detail).

Even if the effects-based approach generally can be expected to correct the shortcomings of the formalistic approach, i.e. create welfare gains in those cases where the formalistic approach fails to do this, the risk of false positives rises. The Commission, which is responsible for the implementation and orientation of the competition policy, has identified that it is desirable to reassess the objectives of the EU competition law as strictly economical. Since they should be strictly economical, the risk of false positives is not, from an economic point of view, of great concern to the Commission as long as an effects-based approach is generally favourable. In other words, if the standard was set higher, the Commission might be tempted to (and perhaps should) overlook the fact that it will not be met as often.

The EU Courts, on the other hand, have been far less tempted to accept the new, higher, standard. Although economically appealing, the effects-based approach carries properties that are unwanted from an juridical point of view.[164]

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[164] However, the ECJ have taken a step towards an effects-based approach. In para. 86, British Airways (n. 127), the ECJ stated that "[a]ssessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the cases (see, to that effect,

When the risk of false positives increases, more dominant undertakings are wrongly found to infringe Article 102. This is troublesome because the EU Courts do not only strive for something generally desirable, but also, in their capacity as courts, for what is *right* in each individual case.

A clarifying comparison can be made with criminal law, although there are many reasons for not comparing the EU competition law with criminal law (the most obvious reason is that it is not a crime to abuse a dominant position in Europe). If the burden of proof would be marginally lowered in proceedings of economic crime, more criminals would be locked up and the crime rate would drop in a marginal way. Such a change could be suggested by a utility calculus, i.e. it could very well be desirable from an economic point of view. However, even if such a change would be generally appealing, more innocent individuals will undeniably be found guilty. These particular cases constitute false positives because the objectives are not fulfilled (the real criminals are still on the loose and can commit further crimes and innocent citizens are imprisoned). Even if the overall benefits from lowering the burden of proof outweigh the disadvantages that can arise in some cases (in an economic sense) it could be *wrong* (in a juridical sense) to make the change.

Something analogous is true about competition law. Unlike the Commission, the EU Courts are in charge of creating law. From this follows that if the EU Courts prohibit a conduct which actually have favourable effects on consumer welfare, erroneous law is created (if the GP is assumed to be "law"). Needless to say, such a law is unwanted and perhaps best avoided by giving the party which does not carry the burden of proof the benefit of the doubt.

In practice, however, the EU Courts could face great problems when avoiding the creation of erroneous law, i.e. to make sure that no false positives are created. This is illustrated in *Microsoft*, which was a case involving complex technical and economic assessments.[165] The CFI stated that although the EU Courts, as a general rule, undertake comprehensive reviews, the review of complex economic appraisals made by the Commission is necessarily limited.[166] The CFI remaind silent on why such limitations are necessary, but it is plausible that a complete review tends to limit the Commission's discretionary powers, which is given to it in Articles 105 TFEU

Michelin, paragraph 73). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse."

[165] Case T-201/04, Microsoft v Commission [2007] 5 CMLR 11.

[166] Ibid, para. 87. Also, see para. 89 where the CFI stated that a shorter review must be carried out. For example, are the economic appraisals accurate, reliable, consistent or relevant?

and 17 TEU.[167]

However, the argument for relying on economic appraisals made by the Commission should not be driven *ad absurdum*. If the Commission reassesses the fundamental objectives, which has been done in the GP, it could be argued that it misuses its powers. However, it would not misuse its powers if the ECJ would accept the new objectives. Why, then, cannot the ECJ accept them (especially since it could be generally desirable to chase the new objectives)? As shown in this chapter, the change brought about by the GP could lead to more false positives and this in turn implies that the ECJ will not fulfill its obligations according to Article 19(1) TFEU, which holds that the "law" must be observed when the Treaty is applied. The word "law" indicates that not only the treaties must be observed, but also general principles of law. For examle, in the case Hüls[168], the ECJ held in para. 149:

"The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act [...], are protected in the Community legal order [...]"

This implies that the Commission, to establish a breach, must produce "sufficiently precise and coherent proof".[169] It also implies that the presumption of innocence is a general principle of law which, according to Article 19(1) TFEU, must be observed.

Consequently, the ECJ could face great difficulties if it would fully embrace the effects-based approach, because it would open the gates to the realm of economic appraisals, to which it would be denied full entrance according to Article 105 TFEU and 17 TEU. Nevertheless, the ECJ would still have to review whether the Commission has produced "sufficiently precise and coherent proof" (according to Article 19(1) TFEU), and the pressing need to do so when the frequency of false positives rises should not be underestimated. This would lead to a problem of territoriality that the formalistic approach, to a much greater extent, eludes since (as it has been argued in this thesis) it is far more simpler to identify harm to a competitive structure than harm to consumers. [170]

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[167] There might also be practical reasons for not carrying out a complete review. It could increase the court costs immensely. Furthermore, the Commission possesses, to a greater degree, the economic expertise.
[168] Case C-199/92 P, Hüls AG v Commission [1999] ECR I-4287, [1999] 5 CMLR 1016, para. 149.
[169] This was also laid down by the ECJ in Cases 29 and 30/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission [1984] ECR 1679, [1985] 1 CMLR 688, para. 20.
[170] Tiili and Vanhamme, p. 898, states that "the Courts must not redo the Commission's work, but must nevertheless do something, so they solely check for manifest mistakes in the Commission's assessments, thereby cutting the separation of powers knot nicely trhough the middle".

Instead, it would be far more legitimate to keep the older objectives to regain (or to maintain) the full control over the creation of accurate (case) law. The outcome of juridical procedures would perhaps not be as "good", but at least *right*, and this is their main purpose (at least when they carry punishments). This explains the statement in British Airways – that a competitive structure is an end in itself – although the value of consumer welfare is possibly immensely higher today than the value of protecting a competitive structure (or economic freedom) is. As long as the GP is troubled with the uncertainties mentioned in this chapter, it is unlikely that the consumer welfare test will be accepted as "law".[171]

7 Conclusions

Ordoliberalism expanded the meaning of liberalism. Not only should individuals be protected from the power of the government, as in all liberal alignments, the government should also be protected from the misuse of private economic power. According to ordoliberal philosophy, the latter was achieved by protecting economic freedom, and from this follows that a competitive structure was an end in itself.

It is disputed whether ordoliberalism was influential during the drafting of the EEC Treaty. However, the early cases of Article 102 show that the EU Courts and the Commission were interested in maintaining a competitive structure, often without any reference to efficiency or welfare considerations. Concepts like fair, workable and effective competition were laid down by the ECJ and they were all treated as objectives (or closely equated as objectives) rather than as means, just like ordoliberal philosophy advocated.

Recently, the Commission has made an attempt to reassess the objectives. According to the GP, the purpose of Article 102 is to enhance consumer welfare and increase efficiency. That implies that the upholding of a competitive structure is given the character of a means. However, it will not always be a means since the fulfilment of the new objectives might require that the competitive structure is harmed. In other words, there is a latent hostility between settled (ordoliberal) case law and the GP.

The ECJ has recently dismissed the new objectives by referring to its earlier case law. The

[171] Parts of the GP, which the ECJ so far has been reluctant to accept, will only be a troublesome adjunction to Article 102. It is outside the purposes of this thesis to suggest any change of the GP. However, such changes could be aimed at reducing the uncertainties of the GP. For example, the "efficiency defence" and the "as efficient competitor test" need to be developed further and general clauses, like para. 21, should be avoided. Furthermore, the GP should cover exploitative conducts, which matter more when ordoliberalism matters less. For a more radical suggestion, see Gormsen (2010), pp. 45-51, who argues that the GP should be withdrawn.

reasons for this are not obvious. It is possible that the consumer welfare standard leads to "too much" legal uncertainty. It is also possbile that Article 3(1)(g) EC, which stated that Article 102 should achieve undistorted competition, made the adoption of the GP impossible. If so, the ECJ will perhaps be more permissive today since Article 3(1)(g) EC has been amended.

However, this thesis have focused on an alternative explanation. The GP leads to too many false positives. The reasons for this is first that an effects-based approach 1) is more costly for the Commission to carry out, 2) makes it more costly for undertakings to investigate whether commercial policies are legal or not and 3) makes it more costly for the EU Courts since they cannot, to the same extent as under a formalistic approach, rest on previous, similar cases. Secondly, an effects-based approach will more often fail to achieve consumer welfare (at least more often than the formalistic approach fails to achieve economic freedom). The reasons for this are mainly that uncertainty surrounds the central elements of the GP. The "efficiency defence" does not identify gainful effects to consumers in the same comprehensive way it identifies harmful effects, and this implies that the levelling act makes the net effects on consumer welfare uncertain. Furthermore, it is unclear why or when the Commission will make use of the "as efficient competitor test", or why or when the Commission will refrain from using it. This implies that there is a risk that inefficient undertakings are given protection.

The EU Courts are (and should be according to Articles 105 TFEU and 17 TEU) reluctant to become involved in economic issues. Therefore, an increasing frequency of false positives is troublesome because Article 19(1) TEU orders the Courts to do what they should not do according to Articles 105 TFEU and 17 TEU - become involved in economic issues. In other words, the ECJ might find itself in an position where it cannot become involved in economic issues although this is necessary in order to investigate whether the law has, or has not, been observed in an individual case. This position becomes very "uncomfortable" if the approach pursued by the Commission leads to more false positives. Instead, the ECJ would prefer if the formalistic approach was kept because its simplicity implies that the ECJ can have full control over the creation of desirable case law, i.e. case law less stained by false positives.

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