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Searching for the Long-Lost Soul of Article 82EC

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Abstract—This article has two interrelated purposes, one of historical and one of contemporary significance. It first seeks to challenge the common view in the literature that Article 82EC is a product of ordoliberalism. This is done by directly examining the *travaux préparatoires* of the competition rules of the EC Treaty to discover the intent of the drafters of Article 82EC. This inquiry is important for a modernized approach to Article 82EC since it must be determined whether Article 82EC *can* be applied with a 'consumer welfare' standard without a Treaty amendment. This is because, if the provision is 'ordoliberal', its objective *cannot* be the enhancement of 'consumer welfare'. As its second and policy-driven purpose, this article suggests that the intent of the drafters of Article 82EC provides the EC Commission and the courts with the means to apply Article 82EC in a modernized manner with a 'more economic approach'. The article shows that the drafters of Article 82EC were mainly concerned with increasing 'efficiency'. Hence, adopting a welfarist objective would *not* imply a fundamental change in the goals of Article 82EC. On the contrary, including efficiencies in the assessment would be a late but welcome recognition since efficiency is already imbedded in the provision.

1. *Introduction*

The EC Commission has been modernizing its approach to Article 82EC which prohibits the abuse of a dominant position in the Common Market with the aspiration to adopt a more economic and effects-based approach. Modernization in this area has long been called for since the application of Article 82EC has been criticized for not being based on sound economic

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analysis and economic effects, protecting competitors instead of competition and being inefficient in failing to deliver from a 'welfarist' perspective.[1] During its rethinking, the Commission has expressed the goal of Article 82EC to be enhancing 'consumer welfare'.[2] Yet, it has been questioned whether the objective of Article 82EC *can* indeed be 'consumer welfare' and whether Article 82EC *can* be applied with a 'consumer welfare' standard as it is currently conceived. This is because the predominant view is that Article 82EC is based on 'ordoliberal' foundations.[3] The main objective of ordoliberal competition policy is the protection of 'economic freedom' of market actors.[4] This has direct implications for the aim of Article 82EC since ordoliberal ideas are inconsistent with the 'consumer welfare' approach.[5]

Protecting the economic freedom of market actors and enhancing consumer welfare are fundamentally different objectives for competition policy.[6] Ordoliberalism protects the competitive process to achieve individual economic freedom and this can result in protecting inefficient competitors which would

[1] For various criticisms see amongst others P Jebsen and R Stevens, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union' (1996) 64 Antitrust LJ 443–516; EM Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness' (1986) 61 Notre Dame L Rev 981, 1004; B Sher, 'The Last of Steam-Powered Trains: Modernising Article 82' (2004) 25 European Competition Law Review 243–6; D Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 Journal of Competition Law and Economics 149–71; J Kallaugher and B Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82' (2004) 25 European Competition Law Review 263–85.

[2] See eg EC Commission 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf> accessed 15 February 2008 [4], [54], [55], [88]. The EC Commission's rethinking has culminated in the 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C451 which similarly expresses that the aim of the Commission's *enforcement activity* in relation to exclusionary abuses is to ensure that dominant undertakings do not impair effective competition with an adverse impact on 'consumer welfare' ([19]). One common definition of 'consumer welfare' is as 'consumer surplus' which is the aggregate measure of the surplus of all consumers. The surplus of a given consumer is the difference between her valuation of a good and the price she actually pays for it. 'Total welfare' is the sum of 'consumer welfare' and 'producer welfare'. 'Producer welfare' understood as 'producer surplus' refers to the sum of all profits made by producers in an industry; M Motta, *Competition Policy: Theory and Practice* (CUP Cambridge, 2004) 18. 'Consumer' in this article is used in the technical sense of the term to mean any person who is acting for purposes outside her trade, business or profession when entering into a transaction.

[3] See eg DJ Gerber, *Law and Competition in Twentieth Century Europe Protecting Prometheus* (OUP Oxford, 2001) 264; L Lovdahl Gormsen, 'Article 82 EC: Where are we coming from and where are we going to?' (2005) 2 The Competition L Rev 5, 10; KJ Cseres, *Competition Law and Consumer Protection* (Kluwer Law International The Hague, 2005) 82; G Marenco, 'The Birth of Modern Competition Law in Europe' in A von Bogdandy, PC Mavroidis and Y Mény (eds), *European Integration and International Co-ordination: Studies in Honour of Claus-Dieter Ehlermann* (Kluwer Law International The Hague, 2002) 303; E Rousseva, 'Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints' (2005) 42 CMLR 587, 590–1. Focusing on Article 81EC regarding the influence of ordoliberalism see G Monti, 'Article 81 and Public Policy' (2002) 39 CMLR 1057–99.

[4] See W Möschel, 'Competition Policy from an Ordo Point of View' in A Peacock and H Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Macmillan London, 1989) 149; H Willgerodt and A Peacock, 'German Liberalism and Economic Revival' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan London, 1989) 6–7.

[5] C Ahlborn and C Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 Competition Policy International 197, 198.

[6] L Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 European Competition Journal 329, 329.

conflict with the objective of enhancing welfare.[7] If Article 82EC is an 'ordoliberal' provision, its objective *cannot* be a welfarist or efficiency-based one; interpreting it consistently with such objectives would go beyond the letter and spirit of it. It has indeed been recently remarked by Gerber that adopting the 'consumer welfare' approach 'would represent a fundamental change in the goals of Article 82[EC]'.[8] Article 82EC arguably *cannot* make 'consumer harm' the ultimate test of anti-competitive conduct since it protects the competitive process itself which flows from the exercise of individual rights.[9] As the precise objectives of Article 82EC have never been articulated in any formal Community document or decision,[10] and currently the Commission is attributing a certain objective to the provision, namely 'consumer welfare',[11] the question whether the provision *as it is* can accommodate such an objective requires an answer.

This article has two interrelated purposes, one of historical and one of contemporary significance. It first seeks to challenge the common view in the literature that Article 82EC is a product of ordoliberalism by exploring how Article 82EC came to be as it is. This is done by directly examining the *travaux préparatoires* (preparatory works) of the competition rules of the EC Treaty to discover the intent of the drafters of Article 82EC. As its second and policy-driven purpose, this article suggests that the intent of the drafters of Article 82EC provides the Commission and the courts with the means to apply Article 82EC in a modernized manner with a 'more economic approach'. Finding that the drafters' main concern was 'increasing efficiency', it proposes that this intent be used by the Commission as the ground for its reformed approach since '[t]he suggestion that efficiency has always been an underlying objective of Article 82[EC] provides a solid foundation for contemporary policy'.[12] Hence, this article seeks to show that adopting a welfarist objective would *not* imply a fundamental change in the goals of Article 82EC since efficiency is already imbedded in the provision.

To demonstrate that Article 82EC was *not* envisaged as an ordoliberal provision, this article proceeds by explaining ordoliberalism and ordoliberal

[7] Ibid 330–1, 335.

[8] DJ Gerber, 'The Future of Article 82: Dissecting the Conflict' in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing Oxford, 2008) 37, 50–1.

[9] T Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses' (2005) 42 CMLR 129, 133; H Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in CD Ehlermann and M Marquis (eds), *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, Oxford 2008) 119, 161.

[10] R O'Donoghue and AJ Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing Oxford, 2006) 4.

[11] N Kroes, 'Preliminary Thoughts on Policy Review of Article 82' Speech at the Fordham Corporate Law Institute (New York 23 September 2005) 3; EC Discussion Paper (n 2) [4], [54], [55], [88]; N. Kroes, 'The Commission's Review of Exclusionary Abuses of Dominant Position' Speech before the Korean Competition Forum organized on the occasion of the Fourth Annual Bilateral Meeting (Seoul 26–27 June 2006) 6, http://ec.europa.eu/competition/speeches/text/sp2006_012_en.pdf (accessed on 21 May 2009)..

[12] R Whish, *Competition Law* (6th edn OUP Oxford, 2009) 193.

competition policy in Section 2. As such, it sets out the conditions which need to be satisfied for Article 82EC to qualify as an ordoliberal provision. Subsequently, Section 3 uses the *travaux préparatoires* as direct evidence of the position of the drafters of the competition rules of the EC Treaty to demonstrate that Article 82EC was *not* envisaged as an ordoliberal provision. The *travaux préparatoires* do not provide the necessary historical support to satisfy the conditions set out in Section 2. This is a contribution to the literature of modern legal history since, unlike the United States where the legislative intent of antitrust laws has been studied by many authors leading to fierce discussions,[13] a similar discussion has been almost non-existent in the EC.[14] It has indeed been stated that the origins of the wording of Article 82EC and what its drafters intended to mean are—surprisingly—not well documented.[15] Moreover, the proposition that Article 82EC was influenced by ordoliberalism has not been reached by examining the drafting process of the provision. Gerber, who has been prominent in the association of Article 82EC with ordoliberalism, has not investigated the official records of the drafting of the Treaty.[16] The alleged influence of ordoliberalism on Article 82EC has rather been identified by referring to the historical context, the people involved in the unification process and the application of the provision by the EC Commission and the courts *after* the Treaty's signature.[17] Thus, this article uses the *travaux préparatoires* to establish the real intent and position of the drafters of Article 82EC.

The findings of the article based on the *travaux préparatoires* are manifold. First, the drafters were greatly concerned with 'efficiency' and specifically 'productive efficiency'.[18] Although it has been suggested in the literature that,

[13] See eg RH Bork, 'Legislative Intent and the Policy of Sherman Act' (1966) 9 The Journal of Law and Economics 7–48 and RH Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings LJ 65–152.

[14] Two exceptions are articles by Forrester and Marenco which make—rather limited—use of the *travaux préparatoires* relevant for the discussions in the context of the modernisation of EC antitrust policy and specifically Article 81EC. See IS Forrester, 'The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security' in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart Publishing Oxford, 2001) and G Marenco, 'Does a Legal Exception System Require an Amendment of the Treaty?' in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart Publishing Oxford, 2001).

[15] O'Donoghue and Padilla (n 10) 8.

[16] See Gerber (n 3) 343 stating that the records were not available at the time of his writing.

[17] See eg Lovdahl Gormsen (n 3); Gerber (n 3). See Gerber, ibid 263 where the influence of ordoliberalism at the European level is explained by reference to the people who were involved in the process of unification. This article refers to the 'EC Treaty' unless otherwise stated. The 'Treaties of Rome' refer to the European Economic Community (EEC) Treaty and the European Atomic Energy Community (EURATOM) Treaty which both came into force in 1 January 1958. The 'Maastricht Treaty' (1992) brought the EEC, EURATOM and ECSC under one umbrella, namely the 'European Union' and renamed EEC as 'European Community' (EC).

[18] Efficiency can be classified into three types. 'Productive efficiency' occurs when a given set of products are being produced at the lowest possible cost (given current technology, input prices and so on); S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2nd edn Sweet & Maxwell London, 2002) 20. 'Allocative efficiency' relates to the difference between the cost of producing the marginal product and the valuation of that product by consumers; ibid. 'Dynamic efficiency' is achieved by investing in innovation, research and development of new products as well as new production processes that increase social wealth: Cseres (n 3) 16.

unlike the United States, efficiency played a notably marginal role in Europe and that Europeans have generally not been receptive to the idea of seeing antitrust as a tool for efficiency,[19] the evidence shows that efficiency was a very important concern for the drafters of Article 82EC. Therefore, Article 82EC differs significantly from what would have been a classic ordoliberal provision and this in itself renders it incorrect to characterize it as 'ordoliberal'.[20] This ultimate concern with efficiency is reinforced by the lack of a merger control provision in the Treaty and the positive attitude towards mergers in the early years; the drafters were not against the accumulation of power *per se*. They indeed deemed larger undertakings necessary for Europe to be able to compete with third countries. By not prohibiting dominant positions *per se*, but only their abuse, the drafters demonstrated that they accepted the lack of competition that would result from the existence of dominant positions. This leads to another finding of the article. The drafters intended to prohibit merely 'exploitative' abuses by dominant undertakings and not 'exclusionary' abuses.[21] Their main worry was not the effects on competitors of the dominant undertakings, but the effects on their customers. In contrast, the application of Article 82EC has so far been mainly directed at 'exclusionary' abuses, which implies that Article 82EC has been used for a purpose for which it is not fit.

After presenting in Section 3 the evidence showing that Article 82EC was not envisaged as an ordoliberal product, Section 4 elaborates on the implications of these findings for Article 82EC from a contemporary policy perspective. The historical findings of the article have implications for the current application of Article 82EC since associating the provision with ordoliberalism places it in a certain context. This association implies that the objective of Article 82EC *can* be the protection of 'economic freedom' and *cannot* be maximizing welfare. Section 4 seeks to demonstrate that Article 82EC *can* be applied with a welfarist approach. In fact, although the drafters do not appear to have considered the objectives of competition rules in terms of 'standards' in technical terms, their position appears close to what one might today call a 'total welfare standard'. At the time, they were mostly worried about 'increasing the size of the pie'. Hence, Article 82EC itself *can* accommodate not only a 'consumer welfare' approach, but also a 'total welfare' approach.

[19] Gerber (n 3) 420; similarly Cseres ibid 248.

[20] Due to the difference of views amongst ordoliberals concerning dominant undertakings the term 'classic' is used in this context referring mainly to views of Eucken as one of the founders of the School and his followers. See also (n 57), above.

[21] 'Exploitative' abuses can be defined as attempts by a dominant undertaking to exploit the opportunities provided by its market strength in order to harm customers directly. 'Exclusionary' abuses are those practices, not based on normal business performance, which seek to harm the competitive position of the dominant undertaking's competitors or to exclude them from the market altogether; CE Mosso and S Ryan, 'Article 82 – Abuse of a Dominant Position' in J Faull and A Nikpay (eds), *The EC Law of Competition* (OUP Oxford, 1999) 146. Joliet had also argued—based on the provision itself, rather than the *travaux préparatoires* which were not disclosed at the time—that Article 82EC prohibited merely 'exploitative' abuses; R. Joliet, *Monopolization and Abuse of Dominant Position* (Martinus Nijhoff La Haye, 1970) 250.

Consequently, Section 4 argues that, since the main concern of the drafters was increasing efficiency and they understood 'abuse' as meaning harm to 'customers' rather than 'competitors' of dominant undertakings, the drafters' intent provides the Commission with solid ground on which to base a more economic approach without any need to amend the provision. Similarly, if one accepts the view that the case-law of the EC courts on Article 82EC has been influenced by ordoliberalism,[22] the drafters' understanding also provides a further powerful foundation for a change in the courts' approach.[23] Although the legislative intent of the provision is not necessarily binding, it *can* and in this instance *should* be taken into account by the EC courts and Commission. After fifty years of implementation there is still a search for the objective and correct scope of Article 82EC and a modernized approach grounded more firmly in economics. This article suggests that the intent of the drafters provides the answer to this search.

The ECJ has usually favoured the 'teleological' method and interpreted the competition provisions in light of its own conception of what was necessary to achieve the integrationist goals of the Treaty.[24] Nonetheless, as confirmed by the ECJ, it does not act arbitrarily but judicially; it has to see that its interpretation reflects the intention of the parties to the Treaties and the *ratio legis* of the text.[25] In tracing the intention of the legislator, the Court *is* free to consult materials extraneous to the Treaty, such as the *travaux préparatoires*.[26] As put by Advocate General Lagrange, although the *travaux préparatoires* have no compulsory place in the interpretation of the Treaties, it is universally accepted that judges *may* turn to them for the purposes of information and to elucidate the intent of the legislator.[27] Hence, this article suggests that the intent of the drafters of Article 82EC, discovered from the *travaux préparatoires*, be used by those applying the provision since it indicates a particular objective

[22] See eg Gormsen (n 3) 8, 10, 11; P. Lowe, Director General, EC Commission Directorate-General for Competition, 'Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?' 13th International Conference on Competition and 14th European Competition Day, Munich 27 March 2007, 2.

[23] In any case, the ECJ and the CFI are not bound by their previous decisions; A. Arnull, 'Owning up to Fallibility: Precedent and the Court of Justice' (1993) 30 CMLR 247–66, 248, 262.

[24] DJ Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 Harvard ILJ 97–148, 109, 116–7.

[25] See Case 6/60 *Jean-E Humblet* v *Belgium* [1960] ECR 559, 575 and KPE Lasok, *Law & Institutions of the European Union* (7th edn Butterworths London, 2001) 165.

[26] Lasok, ibid. Both Advocates General and to a lesser extent the Court have referred to the intention of the drafters and the *travaux préparatoires* when interpreting legal provisions. See eg Case 15/60 *Gabriel Simon* v *ECJ* [1961] ECR 121, 125; *Jean-E Humblet*, ibid at 575; Case C-68/94 *French Republic and SCPA and EMC* v *EC Commission* [1998] ECR I-1375, [167]–[168]; Opinion of Advocate General Lagrange in Case 8/55 *Fédération Charbonnière Belgique* v *High Authority* [1954–1956] ECR 260, 271; Opinion of Advocate General Roemer in Case 6/54 *Netherlands* v *High Authority* [1954–1956] ECR 118, 125–6. See also references in Lasok ibid 165 (n 17). The Court has indeed stated that in the absence of *travaux préparatoires* clearly expressing the intention of the drafters of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation; *Simon*, ibid 125 and similarly *French Republic*, ibid [167]–[168]. Thus, *travaux préparatoires* clearly expressing the intention of the drafters can even be used directly in decision-making.

[27] Opinion of Advocate General Lagrange, ibid 271 and Lasok, ibid 166. The courts surely have complete discretion in their recourse to these materials; Opinion of Advocate General Lagrange, ibid.

for Article 82EC and provides the Commission with strong grounds for reforming its implementation of the provision. Taking into account the intent behind Article 82EC, even though this has not been done to date, would not breach consistency either since it is difficult to argue that the EC Commission and/or courts have an established, consistent method and objective when applying Article 82EC.

Finally, a word of caution. Although the Treaties of Rome were generated in less than two years and the actual drafting process was even shorter, the *travaux préparatoires* are nevertheless extensive. The research for this study was mainly limited to the negotiation of the competition rules. Thus, this study does not aim to be an exhaustive assessment of the legislative history and its claims are based on the evidence gathered from the documents studied.[28]

2. *Ordoliberalism and Ordoliberal Competition Policy*

The scholars of a group called 'ordoliberalism' or 'the Freiburg School' in the 1930s and 1940s in Germany tried to use law to protect market processes from distortion either by the public power of the state or by the private economic power of large firms.[29] One leading commentator argues that the structure of Articles 81 and 82EC closely track ordoliberal thought and bear little resemblance to anything to be found in other European competition laws at the time of the adoption of the Treaties of Rome.[30] As such, the concept of prohibiting the abuse of a dominant position was an important new development that was particularly closely associated with ordoliberal and German competition law thought and arguably very different from the discourse of US law.[31]

Competition policy of ordoliberalism focuses on the legitimization of 'economic freedom' in order to prevent this freedom from destroying its own prerequisites.[32] The goal of ordoliberal competition policy lies in the protection of individual economic freedom of action as a value in itself or vice versa, in the restraint of undue economic power.[33] 'Economic efficiency' as a generic term for growth, development of technical progress, and allocative efficiency is but

[28] The research was mainly aimed at covering a special fond on the Rome Treaties' negotiations at the Historical Archives of the EU in Florence. The fond is called 'Special Council of Ministers of the ECSC – The Rome Treaties Negotiations 1955-1957' and is abbreviated as CM3/NEGO. The whole fond consists of 418 dossiers, 815 microfiches. More information about the fond and its contents can be found at <http://www.arc.eui.eu/invpdf/inv-cm3.pdf>. However, the study was not limited to that fond or only to the period of the negotiations. In all cases, the language of the documents studied were mainly German, but also included French to a limited degree. Where available, documents in English were used in their original translations. As far as the author is aware, she has studied all the documents in German in fond CM3/NEGO. All translations from German and French are the author's, all documents can be found at the Archives and are on file with the author.

[29] DJ Gerber, 'Fairness in Competition Law: European and U.S. Experience' presented at a Conference on Fairness and Asian Competition Laws on 5 March 2004 in Kyoto, Japan 7–8 <http://www.kyotogakuen.ac.jp/~o_ied/information/fairness_in_competition_law.pdf> accessed 11 December 2007.

[30] Gerber (n 3) 264. See also Lovdahl Gormsen (n 3) 10.

[31] Gerber ibid.

[32] Möschel (n 4) 149.

[33] Ibid 146.

an indirect and derived goal; it results generally from the realization of individual freedom of action in a market system.[34]

The main concern of Eucken—one of the founders of ordoliberalism—was 'complete competition'; that is competition in which no firm in a market has power to coerce other firms in that market.[35] Concerning monopolies, the ordoliberal view was that monopolies should be *prohibited* because their very existence distorted the competitive order.[36] A firm or group of firms that had power over price or the power to hinder the performance of its rivals was structurally inconsistent with the complete competition standard.[37] Competition law had to provide a means of requiring that firms divest themselves of components of their operations or otherwise eliminate their monopoly situations.[38] Competition law would 'enforce' competition by creating and maintaining the conditions under which it could flourish.[39] The model of 'complete competition' provided the substantive standard for competition law, requiring that law be used to prevent the creation of monopolistic power, abolish existing monopoly positions where possible and, where not possible, control the conduct of monopolies.[40] This broad conception of economic power, it has been argued, distinguishes German and EC competition law from that of the United States.[41] Moreover, this concept was apparently perceived as a far more significant interference with private property than firms in Europe had experienced, except in wartime, and thus highly controversial.[42]

According to Eucken, 'avoidable monopolies' were to be broken up and 'unavoidable monopolies' were to be regulated.[43] The basic principle for this regulation was the *as if* standard which meant that the bearers of economic power should behave *as if* they were subject to competition, ie as if they did not have such power.[44] In practice, this would mean that every form of

[34] Ibid.

[35] DJ Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 AJCL 25, 43; Ahlborn and Grave (n 5) 200. For an explanation of the use of the term 'complete competition' and not 'perfect competition', see Gerber (n 3) 245 (n 52). It has been rightly suggested that although Eucken does not link 'complete competition' to a particular market structure and despite his criticism of neoclassical economics of perfect competition, the concept of complete competition does have an underlying structural assumption of polypoly and can best be understood as the real world adaptation of the model of 'perfect competition'; Ahlborn and Grave, ibid 200. For the model of 'perfect competition' see (n 49).

[36] Gerber (n 3) 251–2.

[37] Ibid 251.

[38] Ibid 252.

[39] Gerber (n 35) 50.

[40] Ibid 50–1.

[41] Ibid 51.

[42] Gerber (n 3) 252.

[43] W Eucken, 'The Competitive Order and Its Implementation' (translated by C. Ahlborn and C. Grave) reprinted in (2006) 2 Competition Policy International 219–45, 241. By 'unavoidable monopolies' Eucken seems to mean natural monopolies, such as a railway or a gas supplier, where the optimum operating size is so important that the quantity supplied by one undertaking is sufficient for the whole market and several businesses would not be able to sell at prices covering their costs; ibid 238.

[44] Gerber (n 3) 252. For the argument that the *as if* standard was not a proposition uniformly accepted by ordoliberals see Schweitzer (n 9) 134.

'impediment competition'[45] by embargos, loyalty rebates, predatory pricing, etc was prohibited.[46] Moreover, Eucken argued that under complete competition the same prices become established for the same goods and services.[47] Eucken also noted that most difficult was the implementation of the fundamental principle within the scope of determining price levels: the price is to be fixed in such a way that offer and demand are in equilibrium at this price and, at the same time, the marginal costs are just covered.[48] From these remarks, it becomes clear that Eucken's 'complete competition' was indeed 'perfect competition'.

For the purposes of this study, a number of points must be made. First, efficiency was not an *aim*, but rather an expected *result* of competition for ordoliberals. Second, monopoly itself was deemed harmful and had to be prohibited where possible. Third, the ordoliberal objective of competition was much closer to 'perfect' competition than, for example, 'workable'[49] competition. Since the ideal was 'perfect' competition, on markets where competition was not perfect (eg markets with monopolies), the state had actively to intervene to establish a market order of 'ordered regulated competition'.[50] These points raise two questions as regards Article 82EC: (i) what was the significance of efficiency for the drafters of the competition rules of the Treaty? and (ii) if the drafters were closely associated with ordoliberalism as argued, since they had a *tabula rasa* why did they not envisage a rule prohibiting the dominant position itself, but only the 'abuse' of it? Indeed, these two points demonstrate the crucial differences between Article 82EC and ordoliberalism to be discussed in Section 4. Fourth, for ordoliberals, 'a duty to deal' had to be introduced for monopolists in order to achieve a result analogous to competition within the context of the *as if* standard.[51] As will be seen below, some

[45] For the concepts of *Leistungswettbewerb* (performance competition) and *Behinderungswettbewerb* (impediment competition) see Gerber (n 3) 253.

[46] Eucken (n 43) 242.

[47] Ibid 243. According to Eucken, supply monopolies, for example, have a tendency to demand differentiated prices for the same goods/services from individual segments of demand, striving for the highest amount of profit. This price discrimination should therefore be prohibited in the competitive order; ibid. Although price discrimination is not consistent with 'perfect' competition, modern economics shows that it is possible and sometimes even necessary in competitive markets. See for example, WJ Baumol and DG Swanson, 'The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power' (2003) 70 Antitrust LJ 661, 662; JC Cooper, L Froeb, DP O'Brien and S. Tschantz, 'Does Price Discrimination Intensify Competition? Implications for Antitrust' (2005) 72 Antitrust LJ 327, 357.

[48] Eucken, ibid.

[49] In the model of 'perfect competition' there are many buyers and sellers of the product, the quantity of products bought by any buyer or sold by any seller is so small relative to the total quantity traded that changes in these quantities leave market prices unchanged, the product is homogeneous, all buyers and sellers have perfect information and there is both free entry and exit out of the market; Bishop and Walker (n 18) 17. Since 'perfect competition' does not exist in reality, the concept of 'workable competition' has been developed seeking for competitive outcomes in the absence of perfect competition. For 'workable competition' see JM Clark, 'Toward a Concept of Workable Competition' (1940) 30 American Economic Review 241–56; SH Sosnick, 'A Critique of Concepts of Workable Competition' (1958) 72 Quarterly Journal of Economics 380–423.

[50] N Goldschmidt and A Berndt, 'Leonhard Miksch (1901-1950): A Forgotten Member of the Freiburg School' (2005) 64 American Journal of Economics and Sociology 973, 977–8.

[51] Eucken (n 43) 237, 243.

remarks in the *travaux préparatoires* demonstrate that this idea was not totally shared by the German drafters of Article 82EC.[52] Moreover, the 'abuse' concept has been linked to the ordoliberal *as if* approach in the literature and this has been understood to mean that undertakings with market power were required to compete on the merits rather than 'abuse' their power to gain an unfair advantage over rivals.[53] However, as will be discussed below, this is not the 'abuse' concept of the drafters of Article 82EC since they were mainly concerned with the *customers* who dealt with the dominant undertakings, not their competitors.[54]

It must be re-emphasized that, if Article 82EC is ordoliberal in its foundations, then its objective *cannot* be the maximization of 'consumer welfare' or any other welfare for that matter. As expressed by one of the writers of the Freiburg School, American antitrust law currents which lean upon wealth maximization, utilitarianism or trade-off and transaction costs approaches are (as far as these can be traced to the Kaldor-Hicks criterion) incompatible with the ordoliberal system of values.[55] This is because ordoliberalism treats individuals as ends in themselves and not as the means of another's welfare.[56] This would imply that no one's welfare could be preferred over or sacrificed for anyone else's welfare.

It must nevertheless be pointed out that ordoliberal teachings do not constitute a completely standardized product; 'disagreement on matters of detail is common and that on more important questions is not rare'.[57] This creates another problem for associating Article 82EC with ordoliberalism. Ordoliberal authors did not always share the same view on everything, including monopolies.[58] In any case, it has rightly been argued that, since pursuing 'economic freedom'—which appears to be the common objective for all ordoliberals—does

[52] See below, text after n 81.

[53] Gerber (n 3) 307.

[54] See below, text after n 146.

[55] Möschel (n 4) 149. According to the 'Kaldor-Hicks' criterion, if a change in policy would result in some persons being better off and some worse off, and the gainers *could* compensate the losers in such a way that on balance everybody was better off, then welfare would be increased by implementing that change; DM Winch, *Analytical Welfare Economics* (Penguin Harmondsworth, 1971) 143. The 'consumer welfare' standard is usually understood as an application of the Kaldor-Hicks criterion; AT Kronman, 'Wealth Maximization as a Normative Principle' (1980) 9 JLS 227, 236 and eg RA Posner, *Economic Analysis of Law* (4th edn Brown and Company Boston, 1992) 13.

[56] Möschel, ibid.

[57] HM Oliver Jr, 'German Neoliberalism' (1960) 74 The Quarterly Journal of Economics 117, 117; For the argument that views of ordoliberals on monopolies differ, although predominantly they did not want to leave them to their own resources, see H Witkowski, *Zur Missbrauchsaufsicht über Preise marktbeherrschender Unternehmen* (Peter Lang Frankfurt, 1981) 181–2. The diversity of views among ordoliberals has actually been interpreted as proof of them being 'liberal'; Witkowski, ibid 159.

[58] For example one ordoliberal, namely Lutz has argued that welfare economics' finding—based on static assumptions—that monopolistic competition prevents an optimal allocation of the factors of production, loses its impact once the market is seen in dynamic terms. According to him, the argument of welfare economics loses weight 'because imperfect or monopolistic competition is probably more effective in raising living standards than perfect competition'; AF Lutz, 'Observations on the Problem of Monopolies' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan London, 1989) 162. Hence, under certain circumstances, a policy to combat monopolies is not necessary; ibid 163.

not always coincide with consumer welfare, a competition policy protecting economic freedom may in certain circumstances lead to consumer harm.[59] It is possible that ordoliberals were *against* monopolies and *for* all of those against the monopolies. As such, they may have failed to realize that the interests of the competitors and customers of monopolies might not always be aligned with the interests of consumers.

Finally, it is noteworthy that in general ordoliberals do not seem to acknowledge the incentives to compete and to become a monopoly as a spur to competition in dynamic terms. Rather the opposite; Eucken's 'complete competition' is—in his words—entirely different to the 'battle for a monopoly'.[60] According to him, 'complete competition' has rightly been compared to a race; it is not a battle man-to-man, but a race run in parallel.[61] This 'race run in parallel' clearly demonstrates the ordoliberals' concern with not harming 'competitors' which is another reason why one might find ordoliberalism to be in conflict with 'consumer welfare' since harming rivals may in certain circumstances result in benefits to consumers, for example, in the form of low prices.

3. *The Highlights of the History of the Competition Rules in the EC Treaty*

A. *Back to Basics: From Messina to the 'Spaak Report'*

The Messina Conference was the first step taken to widen the scope of the European integration which had been initiated with the European Coal and Steel Community.[62] The conference of the Foreign Ministers of the six founding states in Messina in 1955 resulted in the Messina declaration according to which the formation of a common European market without customs and quantitative restrictions was the aim of the Six in the realm of economic policy.[63] They considered that this market had to be realized gradually and its accomplishment required the study of certain matters among which 'the development of rules for the protection of free competition within the Common Market' was counted. Hence, the protection of competition was given primary importance from the early days of action.

[59] Ahlborn and Grave (n 5) 214. See also Gormsen (n 6) 329–30.
[60] Eucken (n 43) 228.
[61] Ibid 229.
[62] Although the competition rules of the ECSC Treaty provided a precedent for the EC Treaty, there are important differences between the rules, especially with regard to their scope since the former were applicable only to the coal and steel industry. On the competition rules of the ECSC Treaty in general see Gerber (n 3) 335–42.
[63] Tagung der Aussenminister der Mitgliedstaaten der Montangemeinschaft, Entschliessung der Aussenminister der Mitgliedstaaten der Montangemeinschaft anlässlich ihrer Tagung in Messina am 1. und 2. Juni 1955.

After Messina and another conference in Noordwijk, the Foreign Ministers of the Six held another meeting in Brussels in 1956. The minutes of this conference include an '*exposé*' by Paul-Henri Spaak and a discussion of the findings of the Intergovernmental Committee.[64] According to these minutes, the goal of a common market was to achieve the *optimal growth of production facilities through the use of the most advanced methods* of which the rival countries that already possessed a large market availed themselves.[65] As such, it is striking that, from early on, the drafters of the EC Treaty had in mind an idea close to what one could today call 'productive efficiency' as the goal of the Common Market. This is not surprising, however, as will be seen more clearly from the concerns expressed in the 'Spaak Report'.

B. *The 'Spaak Report'*

(i) *An overview*

As one of the first steps to the drafting of the Treaties, the Heads of Delegations (chaired by Spaak) prepared a report which comprised a programme they unanimously recommended to the governments.[66] According to one commentator, the 'Spaak Report' is a seminal document and the most important of the various *travaux préparatoires* upon which the subsequent Treaties of Rome were based.[67]

The Spaak Report explained the situation of Europe very clearly. While on the one hand the United States, in almost every sector, was producing one-half of the world's goods and, on the other, the Communist countries were increasing their production annually, Europe found its external position weakening, its influence declining and its capacity for progress diminished by internal divisions.[68] Thus, integration was necessary because, more than ten years after World War II, Europe's economy was still falling behind that of the United States and the USSR, and no country in Europe was able to compete on its own.

The authors of the Spaak Report seem also to have been aware that the mere creation of the Common Market would not solve all of the problems. They realized that, in the economic conditions of the time, broader markets and

[64] The Intergovernmental Committee was appointed at the Messina Conference to prepare the future conferences and draft the Treaties. According to the Messina declaration, it was to consist of government delegates assisted by experts under the chairmanship of a leading political figure. This figure was chosen to be Paul-Henri Spaak of Belgium. Under the Intergovernmental Committee, specialized Working Groups were formed to conduct the drafting of the provisions.

[65] Entwurf des Protokolls der Konferenz der Aussenminister der Mitgliedstaaten der E.G.K.S. (Brüssel, den 11. und 12. Februar 1956) Exposé der Präsidenten und Erörterung der Arbeitsergebnisse des von der Messina-Konferenz eingesetzten Regierungsausschuss 11.

[66] Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers ('Spaak Report') 21 April 1956 (Provisional English Text) 6. Although the report is called the 'Spaak Report' it was actually authored by Hans von der Groeben, Pierre Uri and Albert Hupperts.

[67] DG Goyder, *EC Competition Law* (4th edn OUP, Oxford, 2003) 23.

[68] Spaak Report (n 66) 5.

more open competition would not alone suffice to ensure the *most rational distribution of activities* and the *optimum rate of economic expansion*.[69] It was therefore desirable to consider what steps should be taken to ensure that the merging of markets would lead to the most rational distribution of activity, a general raising of the standard of living and a more rapid rate of expansion.[70] The policy for the Common Market—including competition rules—was to serve these ends by providing the legal framework. Although the first and the last of these ends can be expressed as 'efficiency' in economic terms, it is not that easy to identify the second, ie 'raising the standard of living' with 'consumer welfare' as it may also refer to 'total welfare' to include the welfare of producers as well. This will be discussed further in Section 4.

(ii) *The Common Market and the goal of efficiency*

According to the Spaak Report, the purpose of a European Common Market was to create a large area pursuing a common economic policy, constituting a powerful complex of industries and ensuring a continual gain in economic strength and stability, a more rapid rise in standards of living, and the development of harmonious relations between its component states.[71] To achieve these aims, the markets should be merged since, in this way, by more extensive division of labour, it would be possible to *avoid wasteful use of resources* and, by greater certainty of supplies, do away with *production at uneconomic cost*. The Common Market would give full play to the *efficiency* of management and men.[72]

As is obvious from the above remarks, for the drafters efficiency was indeed important and the aim of the whole Common Market project was to *avoid wasteful use of resources* and do away with *production at uneconomic cost*. It is clear that the drafters were well aware of the cause of the problem as the wasteful use of resources (in the context of labour) and production at uneconomic cost (ie productive inefficiency), and the solution envisaged was increased efficiency. Furthermore, it was realized that in many sectors of industry, national markets did not allow firms to develop to their *optimum size* unless they enjoyed a virtual monopoly.[73] Thus, the advantage of a wider market was seen as making large-scale production possible without the necessity for monopoly. By combining markets, large enough outlets that permitted the use of the most advanced production techniques could be created. Put in economic terms, this shows the concern of the drafters over national firms not being able to reach the 'minimum *efficient* scale' of production.

[69] Ibid 10.
[70] Ibid 43.
[71] Ibid 8.
[72] Ibid.
[73] Ibid.

Moreover, it is explicitly stated in the Report that, in a wider market, it would no longer be possible to maintain outmoded methods of production with their twofold effects of high prices and low wages; instead of remaining static, undertakings would have to pursue a dynamic investment policy in order to step up production, improve quality, and modernize their methods—they must make progress or fail.[74] Thus, not only were the drafters concerned about the productive inefficiency of the undertakings because of its consequences of *high prices* and *low wages*, they were also aware of 'dynamic efficiency' and its requirements.

This points out that, first, the undertakings were condemned for their *productive inefficiency*, namely the 'quiet monopoly life' which led to high prices and low wages due to *outmoded methods of competition*. Second, unlike the arguments that were made concerning the legislative history of the US Sherman Act,[75] monopolies were *not* condemned for the extortionate profits they earned at the expense of consumers or for stealing consumers' wealth. This could have been because, if their production costs were so high as to cause productive inefficiency, then they might not have been making extortionate profits; their high costs would have reduced both producer and consumer surplus. Thus, this leaves unanswered the question of what the stance of the drafters would have been on monopolies which were productively efficient but did not pass on the efficiency benefits to consumers. This will be returned to in Section 4.

Third, although there is mention of *high prices* which can be taken as a reference to 'allocative inefficiency', since this was expressed as a result of high production costs, the general problem with monopolies in the Spaak Report appears to have been their 'productive inefficiency', rather than their allocative inefficiency. Finally, the concern with *high prices and low wages* does not totally reflect the ordoliberal approach since the ordoliberals contemplated the instance of workers having 'just as strong an interest in the monopoly . . . as the entrepreneur' and possibly agreeing to higher prices so long as wages were increased.[76] Thus, ordoliberals did not see the interests of consumers as identical or always in conformity with the interests of workers.

(iii) *Problem of monopolies*

Regarding monopolies, the Spaak Report first drew attention to discrimination and suggested that action against discrimination would have to be included in the measures taken to preclude the *creation* of monopolies within the Market.[77] The Treaty should contain general provisions ensuring that monopoly positions *or* abusive practices did not lead to the frustration of the Common Market.

[74] Ibid.
[75] See Lande (n 13) 88, 93, 94 and Bork (n 13) 11.
[76] Eucken (n 43) 240.
[77] Spaak Report (n 66) 44.

Thus, steps should be taken to prevent: (i) any distribution of markets by agreement among enterprises since this would be tantamount to setting up cartels; (ii) agreements to restrict production or limit technical progress since such agreements would run counter to efforts to bring about greater productivity; (iii) monopoly or partial domination of the market for a product by a single enterprise since this would do away with one of the essential advantages of a large market, namely that of reconciling the use of mass production methods and the maintenance of competition.[78]

Apart from the similarity between these suggestions and the final versions of Articles 81 and 82EC, it is striking that the Spaak Report suggested measures to preclude the *creation* of monopolies and the *domination* of the market by a single enterprise. Moreover, provisions were recommended to ensure that monopoly positions *or* abusive practices did not frustrate the market.[79] From these expressions, at first glance, one can deduce that the recommendation was actually the prohibition of the *domination* of a market *per se*. Such an approach is much closer to that of ordoliberalism and the Sherman Act (prohibiting monopolization) than a provision merely prohibiting the 'abuse' of a dominant position. However, in the same section on monopolies, concerning discrimination it was stated that, after the complete removal of obstacles to trade at the final stage of the transition, discrimination would be possible only where undertakings enjoyed a monopoly position.[80] From this, one can infer that the authors of the Report envisaged the creation of monopoly situations and allowed for it since, if they had actually meant to prohibit the domination of the market, they would not have needed also to prohibit certain conduct (ie discrimination) by monopolists.

Moreover, the Report recognized that competition was not a sphere in which general solutions could be laid down from the outset for all cases likely to arise.[81] One particular caveat made was that no attempt should be made to lay down hard-and-fast rules concerning acceptance or refusal of orders or dates of delivery, any more than buyers could be expected to increase their demand and give up their traditional commercial relations. In other words, no 'duty to deal' was to be envisaged, unlike the abovementioned ordoliberal suggestion and some subsequent Community court decisions.[82] All in all, it is unclear from this section on monopolies in the Spaak Report what exactly was recommended to the Foreign Ministers. Perhaps one can interpret this as the first signal of the

[78] Ibid 45.

[79] The consequent counting of the steps in terms of 'agreements' versus 'monopoly or partial domination' gives one the impression that what is meant by 'abusive practices' is the *agreements* between enterprises that restrict competition and not the practices of monopolies.

[80] Spaak Report (n 66) 44.

[81] Ibid 46.

[82] See n 51, above. For cases where a duty to deal has been imposed on dominant undertakings see eg Cases 6 and 7/73 *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp* v *Commission* [1974] ECR 223; Case 27/76 *United Brands Co and United Brands Continental BV v EC Commission* [1978] ECR 207.

tension surrounding the competition rules which were to be subject to fierce negotiations in the following stages.

(iv) *'Fair' competition*

The Spaak Report also referred to 'fair competition'. Ensuring that undertakings observed the rules of 'fair competition' was one of the practical measures necessary for the establishment and operation of the Common Market.[83] Moreover, it was argued that *in the interests of producers themselves and in order to afford them the necessary security*, there had to be some direct method of enforcing the rules of 'fair competition'.

This reference to 'fair competition' can be understood in one of two ways. Either it can be interpreted as meaning competition 'fair' to competitors; ie the opposite of 'unfair competition' which was already regulated in, for example, Germany at the time and thus be seen as a reflection of ordoliberalism.[84] Alternatively, it can be interpreted within the context of the preceding paragraphs and their emphasis on 'efficiency' and be understood as competition based on the efficiency of undertakings. What is valid in both cases is that 'fair competition' is deemed necessary in the interests of *producers themselves* to afford them the *necessary security*. It is clear that *producers* would comprise any producer including monopolies and obviously would *not* include consumers.

The recommendation of the Report was that there be *direct* enforcement of the rules of 'fair competition' and, for that, an organ be created with powers independent from the governments responsible to the whole group.[85] Moreover, it was stated that one of the essential guarantees which must be given to enterprises was that there would be no 'unfair competition' as a result of artificial advantages being given to their competitors.[86] Any assistance given by governments had therefore to be very closely examined and, as a general rule, whatever form that assistance may take, it would be incompatible with a common market if it was prejudicial to 'fair competition' and the distribution of activity by favouring particular enterprises or branches of production.[87]

Thus, it is quite clear that 'fair competition' in the Spaak Report was not about competition conducted in fairness to 'competitors', but referred to undertakings not being disadvantaged due to certain advantages given to their

[83] Spaak Report (n 66) 17.

[84] 'Unfair competition' law deals with conduct between competitors and seeks to prevent dishonest and fraudulent rivalry in trade and commerce and the emphasis is on the prevention of 'unfair' behaviour by market participants in trade; RW de Vrey, *Towards a European Unfair Competition Law* (Martinus Nijhoff Publishers Leiden, 2006) 2–3.

[85] See Spaak Report (n 66) 17 where it is stated that '[i]n view of the need for rapid inspection and prompt decisions, the roundabout procedure adopted in intergovernmental relations or organisations would not meet the case. Moreover, it is difficult to see how supervision over the fulfilment of obligations, or the application of saving clauses could be subject to a vote by the governments . . . For both these reasons it appears indispensable to create an organ with independent powers responsible to the whole group'.

[86] Ibid 46–7.

[87] Ibid.

competitors by their governments. Hence, the main concern was 'state aid' by governments which could hamper competition.

C. *Drafting of the Competition Rules*

After the Spaak Report, the drafting of the competition rules was subject to fierce negotiations with numerous versions of the provisions going back and forth between delegations.[88] It is probably fair to say that the two extreme positions were those of Germany and France with the other four located in between them, usually closer to one or the other.[89]

In the first draft of the competition rules that the author was able to detect, the rules for undertakings consisted of two paragraphs; one on the prohibition of discrimination and one on monopolies. The rule on monopolies read:

> Paragraph 2 Monopolies
> Insofar as trade between Member States will thereby be affected, incompatible with the common market are:
>
> 1. the differential treatment of sellers or buyers who compete with one another, when setting prices or conditions for similar transactions, as a result of agreements or under the use of a dominant position, if a disadvantage accrues to them by way of this in comparison with their rivals.
>
> 2. The monopolies or abusive practices of the following type:
> a- division of markets through agreements between undertakings,
> b- agreements which aim at the restriction of production or limitation of technical progress,
> c- the full or partial domination of a product market by a single undertaking (1).
> . . .
> (1) The question arises, whether the case under (c) must be the subject of a specific test, since here it is not a matter of abusive practices but plainly of an existing position.[90]

The similarity of this first version to the recommendations of the Spaak Report is obvious and the question whether to prohibit the dominant position itself or

[88] The bulk of the negotiations of the EC Treaty was carried out from the base—the meetings of the specialized Working Groups—to the top—the meetings of the Heads of Delegations and the Ministers of Foreign Affairs, so that very little was ultimately left for the ministers to negotiate; A Bredimas, *Methods of Interpretation and Community Law* (North-Holland Publishing Amsterdam, 1978) 58. Hence, although the Working Groups are not the 'legislator' in the usual sense, since as a matter of fact, they have formulated the provisions, their intent in effect reflects the legislative intent. As far as this author is aware, Article 82EC has been adopted identically as drafted by the Common Market Working Group.

[89] One of the peculiarities of the negotiations was the drafting of a separate provision on discrimination which was to be one of the rules for undertakings apart from the prohibition of cartels and (abuse of) dominant positions. It appears that some of the most intense discussions were related to this provision with Germany arguing against such a prohibition and France arguing for it. The development of the discrimination provision will not be examined in this article as it is out of scope.

[90] Regierungskonferenz für den Gemeinsamen Markt und Euratom Brüssel, den 7. Juli 1956 Mar. Com. 4 (rev) Entwurf von Artikeln für die Ausarbeitung eines Vertrages über die Gründung eines Gemeinsamen Europäischen Marktes (MAE 153 d/56 hn) 4. The omitted parts of this provision are not relevant for this article since they relate to the procedure concerning the application of the provision.

the abuse of it arose as well. Thus, the prohibition of a dominant position *per se* rather than its abuse had been envisaged at the beginning of the negotiations, but was subsequently rejected.

It is understood from the minutes of one meeting of The Common Market Group that during the negotiations, whereas the German delegation suggested differential treatment of agreements and monopolies, the French delegation proposed that they be subject to the same test.[91] Thus, the French version of the article found incompatible with the Common Market all cartels, monopolies, and abusive practices which had the object of hindering competition or could have this result.[92] The German delegation's suggestion was that an outright prohibition should *not* be adopted for monopolies and oligopolies; rather, they should be subject to the control of abuse.

In another meeting of The Common Market Group during which the draft competition provisions were discussed, Alfred Müller-Armack (associated with ordoliberalism)[93] representing Germany drew attention to the fact that a too detailed and too rigid regulation of the mode of competition could have the consequence of removing all competition.[94] Accordingly, competition itself was not the consequence of a very complicated legal discipline nor could it only be ensured by law. On the contrary, the most immediate and direct source of competition lay in the fact of a very vast market. On the issue of monopolies, Müller-Armack went even further: after declaring that it was necessary to distinguish clearly between monopolies and oligopolies on the one side and cartels on the other, he argued that monopolies and oligopolies were *not* necessarily incompatible with a system of competition.[95] It was necessary to remove not monopolies themselves, but the abuses to which certain monopolistic situations could lead.[96] To this end, he proposed the deletion or at least revision of the subparagraph of the draft provision prohibiting 'the full or partial domination of a product market by a single undertaking'.

[91] Extrait du procès-verbal des réunions des 3–5 septembre 1956 du Groupe du marché commun de la conference intergouvernementale pour le marché commun et l'euratom (MAE 252/56), Premiere lecture des articles 40 a 43 du projet d'articles (Doc.Mar.Com. 17) (Premier Reading of Articles 40 to 43 of the Draft Articles). At the time, the draft articles of the Treaty relating to competition were numbered from Article 40 to Article 43. The single provision envisaged by the French delegation regulating both cartels and monopolies, also included an exemption clause from the prohibition for individual instances.

[92] Regierungskonferenz für den Gemeinsamen Markt und Euratom, Brüssel, den 4. September 1956 Mar. Com. 37 Arbeitsgruppe für den Gemeinsamen Markt, Bestimmungen, die den Artikel 42 des Dokuments Mar.Com.17 ersetzen Vorschlag der französischen Delegation.

[93] He was a professor of economics and founder of the term 'social market economy'. It has been argued that, although authors such as Müller-Armack shared important common ground with ordoliberals, there also existed certain differences between them, especially as regards the 'social market economy' of Müller-Armack; see VJ Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' Freiburg Discussion Papers on Constitutional Economics 04/11, 2.

[94] Secretariat Mémento interne Groupe du Marché Commun 3 et 4 septembre 1956 Fascicule 5 Bruxelles, 7 septembre 1956. In the introduction, it is stated that the President of the Common Market Group summarized the decisions of the Committee of the Chiefs of Delegation which are relevant for the Common Market Group and subjects to approval of the Group the minutes of the meeting of 19 and 20 July 1956. Then, the Group starts discussing the above-mentioned Premier Reading of Articles 40 to 43 of the Draft Articles (Mar.Com.17), 2.

[95] Mémento interne, ibid 4.

[96] Ibid 5.

Hence, it was indeed a-seemingly-ordoliberal German who argued against the prohibition of domination *per se* and proposed that merely *abuse* be prohibited. He did *not* defend the ordoliberal view that monopolies are inherently harmful to competition and should be prohibited as such. It was the French delegation that asked for a prohibition of monopolies identical to that of cartels. The proposal of Müller-Armack was opposed by the Italian and (to a stronger extent) French delegations. Indeed, the representative of France replied to Müller-Armack by stating that it was inconceivable for him to separate the system relating to monopolies from that relating to cartels. In any event, he noted that they were ready to study the proposal of the German delegation as soon as he knew their notion of 'abuse'.[97]

A synoptic table of the draft articles in the *travaux préparatoires* clearly shows the positions of the delegations. The French and the Belgo-Dutch drafts treated agreements and monopolies on the same footing; the French draft banned both in principle while the Belgo-Dutch text subjected both to the control of 'abuse'.[98] In contrast, the German draft envisaged the prohibition of agreements and subjected monopolies to the control of 'abuse'.

This matter was further elaborated upon in a Note proposed by the President of the Common Market Group—namely, Hans von der Groeben who was arguably another follower of ordoliberalism.[99] According to the Note, there were factual differences between cartels and monopolies for which allowance had to be made during the formulation of the relevant rules.[100] For example, cartels have the capacity to restrict or prevent competition and were to be prohibited to the extent that these effects were intended or realized. In contrast, in the case of monopolies, the more complete the monopoly, the less competition can be distorted or eliminated. Therefore, regarding monopolies, it was not the distortion of competition, but only the *abuse* of the market dominating position that could be prohibited. Furthermore, cartels can take many forms, such as the partition of supply and sales markets, which is not so in the case of monopolies. Finally, the sanction of voidness for the transactions should be stipulated only for cartel agreements. Therefore, for monopolies, only the abusive use of the market dominating position and not its emergence could be the subject of a sanction which would be applicable in all cases.[101] From a suggestion of von der Groeben it is understood that an 'undertaking in

[97] Ibid.

[98] Conference Intergouvernementale pour le Marche Commun et L'Euratom Bruxelles, le 18 Septembre 1956 Tableau Synoptique des Projets D'Articles Soumis par Les Délégations Concernant Les Regles de Concurrence Applicables Aux Entreprises.

[99] Regierungskonferenz für den Gemeinsamen Markt und Euratom, Brüssel den 20. Oktober 1956 Mar. Com. 88 Arbeitsgruppe für den Gemeinsamen Markt, Aufzeichnung über die Diskriminierungen, Kartelle und Monopole betreffende Vorschriften, die der President der Arbeitsgruppe der zweiten Lesung zugrunde zu legen vorschlägt.

[100] Ibid 4. According to the Note, the abusive use of a market dominating position was to be handled with a uniform principle regardless of whether this position has resulted from the production scale of an undertaking or created through a cartel agreement of many undertakings; ibid.

[101] Ibid 4–5.

a dominant position' meant an undertaking that was not exposed to any (substantial) competition in the whole or a substantial part of the common market.[102] Thus, the lack of competition due to the existence of a dominant undertaking was accepted by the drafters, contrary to the ECJ's later holding in *Continental Can*.[103]

Perhaps most importantly for the purposes of this study, the Note of von der Groeben went on to consider the issues of 'exclusion' and 'unfair competition' stating that

> [i]t has been proposed within the scope of the rules for cartels and monopolies, to announce, among others, cartel or monopoly situations or practices as incompatible with the common market when they have the aim or could have the effect of hindering the exercise of competition in that they facilitate the absorption or domination of the market for a certain product by a single or a group of undertaking(s). This proposal requires illumination. The proposed rule appears perhaps to be directed at practices by which the rival undertakings are excluded out of the market. Such practices, however, consist in not the restriction, but rather the strengthening of competition and therefore are to be combated only when it is a matter of unfair competition. However, if rules applying to unfair competition are to be included in the Treaty, for systematic reasons, they should be separated from the rules on the maintenance of competition.[104]

This paragraph demonstrates that the intention of the drafters of the competition rules—or at least of their President—was not to prohibit the practices by which rivals are excluded from the market; 'exclusionary abuses' were not intended to be covered.[105] At least this was not to be done by the competition rules of the Treaty. Exclusionary practices were to be combated only when they constituted 'unfair competition' and, if 'unfair competition' was to be regulated in the Treaty, this was to be done separately from the rules on competition. Hence, the drafters of the competition rules of the Treaty were well aware of the difference between 'protecting competitors' and 'protecting competition' since harming rivals by acts of 'unfair competition' was not seen as identical to harming competition.

Until the signature of the Treaties of Rome on 25 March 1957, several drafts of the competition rules were negotiated between the delegations. The final provisions appear to be a compromise between the delegations, with the Germans having their way more than any other delegation.

[102] Ibid 7.

[103] See Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, [24] and [26] where the ECJ held that Article 3[(g)]EC requires *a fortiori* that competition must not be eliminated and abuse may occur if a dominant undertaking strengthens such positions in such a way that the degree of dominance reached substantially fetters competition.

[104] Mar. Com. 88 (n 99) 5.

[105] Cf. Schweitzer (n 9) 136.

At the signature of the Treaty, the Foreign Minister of France stated clearly the intention of the Six:

> ... [N]o one should make a mistake over our intentions. The six States without doubt want to increase their production capacity and enhance their economic development by their unification. Therewith, they do not want to seclude themselves from the rest of the World and erect insurmountable barriers around themselves.[106]

Thus, the wish to increase production capacity was not directed at maintaining or providing Europe's self-sufficiency; they did not want to close themselves vis-à-vis the rest of the World by increasing their production capacity. 'Production capacity' in this sense referred to the '*ability* to produce' that the merging of markets would provide. This interpretation also conforms with the Spaak Report according to which, at the time, there was a lack of outlets and the existing ones were not able to reach the minimum efficient scale.[107] The markets had to be merged since, in that way, it would be possible to avoid the wasteful use of resources and do away with production at uneconomic cost.[108] As such, it is confirmed that the concerns expressed in the Spaak Report reflected the main intentions of the Six in the drafting process that followed. Therefore, if there was one objective which survived through the negotiations without any change, it appears to have been the aim for *efficiency*.

D. *The First Signs of Struggle: Proposal for Regulation 17*

Although the legislative history ends with the finalization of the Treaty, this sub-section examines some documents from the subsequent period since the political figures are largely the same as those involved in the drafting of the provisions. As such, they provide further insight into the intentions of the drafters. Moreover, they demonstrate how the competition rules were interpreted shortly after their enactment and what the general position on them was.

First, the minutes of the conference of the Ministers of the Six in November 1960 are noteworthy.[109] The conference was held in order to discuss the content of the proposal of the Commission for the first implementation Regulation on Articles 81 and 82EC which later came to be known as 'Regulation 17'.[110]

[106] Rede des Aussenministers Frankreichs, seiner Exzellenz Herrn Pineau, anlässlich der Unterzeichung der Verträge zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft Rom, den 25 März 1957 (Speech of Mr. Pineau, Foreign Minister of France on the occasion of the signature of the Treaties founding the European Economic Community and the European Atom Community, 25 March 1957).

[107] See text after n 72, above.

[108] See text after n 71, above.

[109] Entwurf eines Protokolls über die Ministertagung am 29. November 1960 in Luxemburg (Erster Teil) [R/1220 d/60 (Teil I) mue/us]. The conference was held by the Ministers of the Member States responsible for competition issues.

[110] Council Regulation 17/62 Implementing Articles 85 and 86 EC-Treaty [1962] OJ 13/204.

The remarks of van der Schueren (Belgium) are particularly notable as they demonstrate the positive attitude towards cartels in the early years. According to the Draft Regulation, the Commission was to reach its decisions concerning the application of Article 81(3)EC within three years of the receipt of application. Van der Schueren expressed his concern that this would mean that existing cartels could stay in the dark for a period of three years. As a result, it was to be feared that they would flinch from conducting any business during this period of time which—especially in the area of investments—would come at formidable cost. Such refrainment was not desirable and could under circumstances protract adjustments and specializations necessary within the scope of the Common Market.[111]

The comments of van der Schueren clearly show that the main concern was with investments and promoting specializations which can be coined as 'dynamic efficiency'. That this view was not limited to just one Member State was later demonstrated by van Alphen de Veer (Netherlands): he stated that the dominant view in his country was that there existed also good or at least acceptable cartels. According to him, except for some nuances, this view was shared in different countries of the Community.[112]

However, in this context, van der Schueren's argument met with opposition from Müller-Armack as the latter asserted that, if the former's proposal[113] was followed, the Community would, at least at the beginning, control only abusive practices.[114] Such an approach would contradict Article 81EC which prohibits all cartels apart from the exemption in Article 81(3)EC.[115] Moreover, Müller-Armack recognized that, although one must proceed step-by-step, 'one cannot base one's self on a foundation as shaky as abuse'.[116] This last statement is striking: a German, claimed to be associated with ordoliberalism, found the concept of 'abuse' too 'shaky' a foundation on which to base the prohibition of cartel agreements, although he had proposed that the provision on dominant positions prohibit their 'abuse'.

Nonetheless, a positive attitude towards cartels and dominant companies was apparent in the statements of other Ministers as well. For example, Elvinger (Luxembourg) argued that, since the competition rules took considerable space in the Treaty and that for the drafters it was clear that each integration movement inevitably resulted in mergers under single undertakings, the effects

[111] Ministertagung (n 109) 8–9.
[112] Ibid 29.
[113] Van der Schueren proposes the following: 'Assuming that Article 8[1] should not inhibit the undertakings, but should much more gradually result in the adherence to a certain competition order, one can take the following procedure into consideration in the first period of time. The authorisation procedure provided for in Article 8[1] (3) could be used by the cartels which would like an authorization and could prove that their activity complies with the criteria laid out in the Treaty. No sanctions would apply to those cartels that do not apply for this authorisation.', ibid 9.
[114] Ibid 12.
[115] Ibid.
[116] Ibid 13.

of such mergers should be monitored in so far as they were proved to run contrary to the common interest. [117] The agreements should not be condemned as such since the borderline between good and harmful agreements was certainly not very clear in all cases.[118] Interestingly, Elvinger quoted in this context the opinion of Schumpeter that giant companies eventually become the most powerful driver for progress, especially for the long-term expansion of production. A dynamic and realistic conception was to be set against the static view of unimpeded competition.[119] From these remarks, it is clear that there was awareness of 'dynamic competition' and competition economics in the first years of application of the rules.

The issue of 'fair competition' was also brought up at this conference. Van Alphen de Veer pointed out that, in the system of the prevailing order of economic life in the Community States (which was characterized by production through single undertakings), free competition had to be granted a pre-eminent position, so that a higher standard of living could be reached.[120] However, in his view, this free competition could lead to, or be used as a means to, a situation that was not desirable from a moral and economic standpoint.[121] Therefore, uncontrolled competition was not compatible with modern economic policy. He further stated that certain rules targeting competition restrictions had also been accepted in the United States in the form of 'fair trade laws'.[122]

In van Alphen de Veer's statements, one observes—as far as the author has tracked—for the first time the view that competition could be restricted on grounds of 'fairness' and moral values. What is striking is that this was done by reference to the United States and its 'fair trade laws', and not to Germany or its *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition) which regulates 'unfair competition'. One could argue, therefore, that the US laws at the time, and the perception of competition law there, influenced the early formulations of EC competition policy more than has been acknowledged. One reason for the reference to the United States when it comes to 'unfair competition' may be that, although ordoliberals did care for the fairness of competition, they did not actually offer specific solutions as to how this could be reconciled with free competition. This tension can be seen in the arguments of the prominent authors of the Freiburg School:

> Free competition must not be stopped on the erroneous grounds of alleged unfair practice. On the other hand, it must not be allowed to degenerate into truly unfair competition either. How the line is to be drawn between unfair and permissible

[117] Ibid.
[118] Ibid 14.
[119] Ibid 15.
[120] Ibid 29.
[121] Ibid.
[122] Ibid.

> competition . . . can only be decided by investigations conducted by economists into the various states of the market. The collaboration of the two sciences [law and economics], which . . . still leaves much to be desired, is clearly essential.[123]

Perhaps most important for the purposes of this article are the views of von der Groeben, who was not only the chief drafter of the competition rules of the Treaty, but was also the first Commissioner of the European Commission responsible for competition policy. During the discussions of the draft Regulation, von der Groeben clarified the two principles that guided the Commission in the preparation of the Regulation: (i) loyalty to the Treaty and to the execution of the Treaty's terms, and (ii) the desire to accomplish a workable competition policy.[124] Faced with the criticism that the proposed Regulation—which was originally intended to apply *only* to Article 81EC—did not strike the correct balance between Articles 81 and 82EC, von der Groeben countered by arguing that, if this equilibrium appeared insufficient to some Governments, then the question to be asked was what terms could be proposed for the concrete use of Article 82EC. In relation to the proposal of Cattani (Italy) to envisage administrative fines and penalty payments for breach of Article 82EC, von der Groeben remarkably argued that it would not be possible to proceed against a dominant position with punitive proceedings as long as no sufficiently detailed rules were devised for the conduct of market dominating positions.[125] This last argument clearly demonstrated that, at the early stages, even for the people who actually drafted the provision, Article 82EC was not perceived as a fully enforceable provision as such. This surely explains why, for many years, it was feared that Article 82EC would remain a 'dead letter'.[126]

Müller-Armack, in similar vein to von der Groeben, reminded the conference of the multiple difficulties evoked in the German legislation as a result of the concern to counteract the abuse of a dominant position.[127] According to him, the use of national law in Germany led to very humble achievements and 'herein arises the infirmity of the abuse concept'.[128] Moreover, he did not believe that the experience gained in Germany gave him the ability to offer a proposal for improving the Commission's proposal on this issue.

The statements of von der Groeben and Müller-Armack are puzzling for the purposes of understanding Article 82EC. This is because the two people who seemed to have been mostly prominent in drafting the rule do not seem to have been pleased with the rule at all. Thus, this begs the question of why the Treaty

[123] F Böhm, W Eucken and H Grossmann-Doerth, 'The Ordo Manifesto of 1936' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan London, 1989) 24–5.
[124] Ministertagung (n 109) 31.
[125] Ibid 38. However, it appears that criminal proceedings were not envisaged for Article 81EC either since the norms relating to that were also not yet sufficiently worked out, ibid.
[126] See I Samkalden and IE Druker, 'Legal Problems Relating to Article 86 of the Rome Treaty' (1966) 3 CMLR 158, 162.
[127] Entwurf eines Protokolls über die Ministertagung am 29. November 1960 in Luxemburg (Teil II) [R/1220 d/60 (Teil II) las/bs] 46.
[128] Ibid.

ended up having an 'abuse' prohibition if the concept was infirm and shaky even to its authors. The seemingly plausible answer is that the 'abuse' prohibition was offered to avoid, and as an alternative to, an outright prohibition of dominant positions. When seen in the context of the negotiations, where France was pushing for an outright prohibition of both cartels and dominant positions, a provision prohibiting merely the abuse of the latter was perhaps the only compromise that could be reached. Thus, the abuse prohibition was actually more pro-business and less restrictive of freedom than the only other alternative, namely the outright prohibition of dominant positions. From this, one can infer that—at least under the argument which prevailed during the negotiations—the existence of powerful undertakings were *necessary* for expanding production and gaining the strength to compete with the rest of the world; the simple prohibition of the 'abuse' of such powerful positions was deemed sufficient.

E. *Early Commission Interpretation*

In a speech before the European Parliament, von der Groeben elaborated on competition policy in a way which throws light on the understanding of the Commission at the time and during the following years. His comments illustrate the positive take on mergers and the paradox that mergers were necessary to increase Europe's competitiveness, whilst abuse of a dominant position was prohibited by Article 82EC. Von der Groeben explained that, for undertakings, it was a matter of matching the growing internal and international competition: '[t]hey accept competition as the source of our wealth as well as the guarantor of their economic freedom'.[129] The undertakings required that competition was conducted 'fairly', that it was not distorted artificially by state aid, differential taxation and different commercial laws; they required that equality of opportunity was established and ensured.[130] According to the Commissioner, especially great was the worry about the superiority of large, financially strong undertakings from third countries; thus, merging into larger undertakings were considered as a necessity and all artificial obstacles to mergers had to be abolished.[131] The Commission was of the view that these concerns of business were justified; they added up to the establishment of a system of undistorted competition, which would help to advance the living and employment conditions of the people. The basic duty of the Community thus consisted in accomplishing such an economic order that would optimally

[129] H von der Groeben, 'Die Wettbewerbspolitik als Teil der Wirtschaftspolitik im Gemeinsamen Markt' Rede vor dem Europäischen Parlament in Strassburg am 16. Juni 1965 ('Competition Policy as Part of the Economic Policy in the Common Market' Speech of H von der Groeben before the European Parliament in Strasbourg on 16 June 1965) 3.
[130] Ibid.
[131] Ibid 4.

advance wealth and economic freedom, and thereby also serve the consumer.[132]

Von der Groeben argued that such an economic order did not arise automatically, but rather only through the legal order and the embodiment of competition that was characterized by a number of rules and attitudes.[133] Competition policy thus did not mean fighting a battle with one's own resources against all, but rather the laying and realization of legal rules, to enable 'workable competition' and to protect undertakings from unfair competition. According to the Commissioner, only this type of competition had the effects of promoting wealth and freedom on which the success of the market economy rested. Competition policy was therefore general economic policy and was not to be separated from it. Moreover, the distortions of competition impaired the competitive positions of the disadvantaged, and deceptively secured the positions of the beneficiaries; the distortions led to dependence on the state and infringed the basic principles of equal treatment, fairness and reward for real commercial performance.[134]

Furthermore, it depended first and foremost on the undertakings themselves, whether competition could deploy their productive powers for the benefit of all market participants and the collectivity, and whether commercial opportunities that the market economy offered them would be realized.[135] Accordingly, even mergers were desired, so long as they were economically necessary—which the Commissioner defined as those 'increasing productivity'. Such accumulations of economic performance power boosted simultaneously the competitiveness and the resistance of the merged undertakings at the European and the international level.[136] The following passage from his speech demonstrates the Commissioner's policy clearly:

> Growth of undertakings: yes. Competition under large ones, if it is effective competition: yes. Monopolisation however, that is mergers, that make competition non-workable, that challenge the freedom of choice and activity of the consumer, supplier and buyer: no. To the extent that competition becomes non-workable, uncontrolled market power accrues to the merged undertakings. This can in many ways be employed to obtain private commercial advantages, without the need for reducing costs or increasing performances of them.[137]

According to the Commissioner, 'workable competition' meant practically active, effective competition.[138] Therefore, it was essential that entry to the concerned market stayed open, that the movement of supply and demand

[132] Ibid 3.
[133] Ibid 4.
[134] Ibid 5.
[135] Ibid 10.
[136] Ibid 13.
[137] Ibid 18–9.
[138] Ibid 19.

reflected itself in the price, that production and sales were not artificially restricted and that the freedom of action and freedom of choice of suppliers, buyers and consumers was not challenged. Moreover, competition policy was not pursued as the goal itself, but rather in order to reach the maximum possible productivity, fulfilment of demand, wealth and economic freedom for all people in the Common Market.[139] Furthermore, competition provided a basis for a division of income and fortune commensurate with social justice that must be complemented with an effective social and incomes policy.[140]

Certain parts of these remarks of von der Groeben are perhaps some of the most significant expressions of ordoliberalism in the history of EC competition policy. The concept of an economic order, its realization through the legal order, the concern with fairness and economic freedom are surely reflections of an ordoliberal view. However, it must be borne in mind that his expressions concerned competition *policy* as opposed to *law*. Put differently, this is how the Commission interpreted and applied the competition rules after their enactment at the time. It does not necessarily mean that this is what the law *is* or *should be* once it is accepted that the negotiations demonstrate that Article 82EC was not a classic ordoliberal provision as its drafters did not follow ordoliberal thought whilst drafting the provision. The tone of these remarks by von der Groeben is also strikingly different from those during the negotiations of the competition rules and the discussion of the Draft Regulation 17. The latter show a much more pro-business stance than the former which must also reflect the experience of the first couple of years.

Furthermore, some of von der Groeben's remarks, such as his statement that competition policy is not an aim in itself, is not actually ordoliberal since for ordoliberals competition *was* an aim in itself and not necessarily a tool to attain beneficial economic results.[141] In von der Groeben's speech, there is constant reference to (increasing) productivity, along with 'fairness' and economic freedom. It is noteworthy that the monopolization that he opposed was one which may be 'employed to obtain private commercial advantages, without the need for reducing costs or increasing performances'.[142] The concern with productive efficiency is again obvious. Thus, it is not clear what the position of the Commissioner would have been in the case, for example, of a merger leading to a dominant position which would reduce the costs of the merging undertakings and increase their productive efficiency, but simultaneously increase prices. What is clear is that the Commissioner saw mergers as 'a necessity' and unlike most ordoliberals was not against the accumulation of power *per se*.

[139] Ibid 20–1.
[140] Ibid 21.
[141] Cseres (n 3) 103.
[142] See text after n 137, above.

It must also be emphasized that, although the freedom of choice of the consumer was seen as part of competition policy and one of its aims, distributional concerns were *not* perceived in the same manner. Competition was assumed to *provide a basis* for a division of income and fortune commensurate with social justice which *must* be *complemented* with an effective social and incomes policy. Hence, competition itself was not expected automatically to bring about this division or redistribution of income.

4. *Implications for Article 82EC*

The foregoing discussions of ordoliberalism, the *travaux préparatoires* and the early interpretation of the competition rules by the Commission have several implications for understanding what Article 82EC actually is and what its aims are. The most basic but crucial point is that Article 82EC does not prohibit a dominant position itself and this must be for a reason. The most plausible reason from the *travaux préparatoires* appears to be the concern for efficiency. The drafters were aware that Europe had to have strong undertakings to expand its economy; efficiency was of the utmost importance for both prosperity at home and competitiveness abroad. The drafters did not intend to prevent undertakings from becoming more efficient, even if this meant larger and dominant undertakings. That is the rationale for not prohibiting the domination of a market itself. Efficient undertakings—dominant or not—were necessary to increase Europe's wealth and to improve its place in the world economy.[143] The positive attitude towards mergers also shows that the accumulation of power was not perceived to be harmful *per se*. Indeed, the lack of merger control provisions in the EC Treaty demonstrates an explicit rejection by the drafters of such a proposition given that the ECSC Treaty contained provisions on merger control and control of mergers was also envisaged in the Spaak Report.[144]

This signifies the most important difference between the intent behind Article 82EC and ordoliberalism: whereas efficiency was only a derived *result* of competition for ordoliberals, it was an *aim* for the drafters of the competition rules of the Treaty. Article 82EC departs from classic ordoliberalism significantly by not prohibiting a dominant position itself, but only its abuse. A classic ordoliberal rule would have prohibited dominant positions, would have envisaged their divestiture and would have provided the control of conduct only for those dominant undertakings which could not be divested. For ordoliberals, conduct control becomes an option only when it is not

[143] This perhaps explains why Article 82EC was seldom enforced until the late 1960s. Indeed, Gerber argues that the concern during the foundational period that Article 82EC might interfere with the objective of creating enterprises large enough to combat US multinationals diminished in the 1970s and Article 82EC thus became an active area of enforcement; Gerber (n 24) 121.

[144] ECSC Treaty Article 66 and Spaak Report (n 66) 45.

possible to eliminate the dominant position itself.[145] The drafters of Article 82EC obviously had the opportunity to contemplate an outright ban of dominant positions. Indeed, this was actually proposed by the French delegation during the negotiations. Nonetheless, it was rejected by the German delegation supposedly influenced by ordoliberalism.[146]

Article 82EC is not ordoliberal from another prominent perspective as well. It was not intended to protect the competitors or the economic freedom of the competitors of the dominant undertakings. It was intended to protect those who dealt with the dominant undertakings, namely the customers from the abuse of power. This is obvious from the statements of von der Groeben during the negotiations where he elaborated on the exclusion of rivals and found that exclusionary practices actually strengthened competition, and did not distort it—so long as they did not constitute 'unfair competition'.[147] What is striking is that the drafters did not perceive harming rivals as tantamount to harming competition. Indeed, their suggestion was that, if rules protecting *competitors* were to be included in the Treaty, this had to be done separately from the rules on competition, under rules on 'unfair competition'. Moreover, this is closely linked to not prohibiting the domination of a market itself since that would have meant prohibiting exclusion *per se* as harmful to competition which—according to von der Groeben—was not appropriate. Thus, the drafters of Article 82EC intended the provision to prohibit merely the *exploitation* of those who dealt with dominant undertakings. The texts of Article 82EC in French and German also support this view.[148]

Hence, the propositions in the literature that the purpose of Article 82EC is to ensure that the exercise of market power does not impair competitors' possibilities to succeed on the basis of superior business performance and that the provision protects competitors as part of the competitive process since the process of competition flows from the exercise of individual rights are questionable.[149] Similarly, the argument that, its German drafters must have intended Article 82EC to cover exclusionary abuses since the parallel debate in Germany concerning German competition law at the time focused on *exclusionary* abuses is not based on actual evidence.[150] The discussions at national level in Germany do not seem to have led to similar discussions during the drafting process of Article 82EC, but quite the contrary as far as the evidence this author has been able to find is concerned.[151] This is also supported by the fact that the drafters had the example of the Sherman Act

[145] Gerber (n 3) 252.
[146] See text after n 95, above.
[147] See n 104 text, above.
[148] In the French and German texts, Article 82EC prohibits 'abusive exploitation' ('. . . d'exploiter de façon abusive . . .' and '. . . missbräuchliche Ausnutzung . . .' respectively).
[149] Eilmansberger (n 9) 129, 133; Schweitzer (n 9) 161–2.
[150] Schweitzer, ibid 136–7.
[151] See n 104 text, above.

which prohibits 'monopolization' (ie exclusion), but did not envisage such a prohibition in Article 82EC.

Indeed, in the early years of implementation there was a dispute about whether Article 82EC applied only to exploitative abuses or covered exclusionary abuses as well. For example, Joliet (later a judge of the ECJ) was of the view that Article 82EC merely covered exploitative abuses; under the abuse theory of Article 82EC—unlike the Sherman Act—the test of legality was not interference with other firms' freedom to compete and the use of 'exclusionary' practices to achieve and hold power, but rather whether there was *monopolistic exploitation of the market*.[152] Joliet reached this conclusion by studying the examples listed in Article 82EC and finding that the main preoccupation of the Treaty was not the maintenance of a competitive system.[153] According to him, large size was considered an economic necessity, since the basic assumption underlying Article 82EC was that monopolistic market 'structure' did not inevitably lead to monopolistic 'performance'. The reason why monopoly power as such was not condemned was because the Treaty assumed that this power would not be systematically utilized. Joliet noted that

> if Article [82] were to be applied to policies erecting barriers to entry and *consolidating* market domination, it is difficult to perceive why in such a case the market dominant position itself should not be dismantled, a consequence which is rejected by all.[154]

Although Joliet did not refer to the *travaux préparatoires* of the Treaty, the documents this author has found confirm his viewpoint. Thus, the ECJ judgment in *Continental Can* holding that Article 82EC applies not only to exploitative practices, but also to exclusionary practices which strengthen the dominant position on the market,[155] appears to have been contrary to the intention of the drafters. It was indeed 'the apotheosis of the teleological method'.[156] As such, it has led to Article 82EC being predominantly used for a purpose for which it was not designed.

What is ironic is that, although the drafters wanted to protect those who dealt with dominant undertakings as customers, rather than their competitors and their attitude was much more pro-business and pro-efficiency than an ordoliberal viewpoint, the resulting provision is almost counterintuitive. This is because Article 82EC prohibits 'exploitative' abuse which is not only the most difficult to apply of the two types of abuse, but also the most intrusive one as

[152] Joliet (n 21) 250.
[153] Ibid 131.
[154] Ibid 252.
[155] *Continental Can* (n 103) [26]: '...As may further be seen from letters (c) and (d) of Article [82](2), 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 [g] 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 depends on the dominant one'.
[156] Gerber (n 24) 116.

regards the dominant undertaking's business practices since it gives the authorities leeway to set the terms of trade for the undertaking. Joliet has also emphasized this by finding that

> [a]lthough the abuse theory approach might have been taken to avoid facing the decision of decreeing radical structural reorganization of markets and thus might have been inspired by a policy favourable to big business, it results . . . in the possibility of more administrative regulation which . . . might appear more antagonistic to a system of free enterprise than the Sherman Act.[157]

It is still puzzling to this author why Article 82EC was couched in such vague terms even though Müller-Armack found abuse too 'shaky' a foundation and an infirm concept,[158] whilst von der Groeben did not think it possible to impose fines on dominant undertakings under Article 82EC as long as no sufficiently detailed rules were laid for their conduct which almost implies that the provision was not intended to be enforced. Perhaps the answer lies somewhere amongst the *travaux préparatoires* not yet discovered.

As for the objective of Article 82EC, one is left with a provision that was supposed not to hamper the efficiency of big business, but at the same time protect those who dealt with it from the abusive use of power. What stands out from the *travaux préparatoires* is that there is constant mention of 'raising the standards of living' for the people of the Community. However, this may not necessarily refer to the concept of 'consumer welfare' in the technical economic sense of the term. This is because 'raising the standards of living' does not seem to have been used as a term of art during the negotiations. It appears to have been used as a general term to state the obvious aim of enhancing the living conditions of all people in the Community. Given the fact that Europe was still trying to recover from war, this is totally rational. In that context, 'people' meant everyone in the Community and it did not technically refer to 'consumers'.[159] Indeed, when the drafters used the term 'consumer', they did not actually mean 'consumer', but meant 'customer'.[160] Therefore, it can also be understood as a reference to 'total welfare' which would include the welfare of all, including producers and consumers.

This is reinforced by the fact that, unlike the discussions at the US Congress that adopted the Sherman Act where monopolies were condemned for restricting output, raising prices and thereby earning extortionate profits at the expense of consumers,[161] the discussions concerning the prospective

[157] Joliet (n 21) 133.
[158] See n 116 and n 128, above.
[159] See (n 2) above for definition of 'consumer'.
[160] There are numerous examples of drafters' reference to 'consumers of atom energy' and 'consumers of ores and nuclear fuels' which demonstrate that they did not use the term in the technical sense. See eg Entwurf des Protokolls der Konferenz der Aussenminister der Mitgliedstaaten der E.G.K.S. Paris am 20. und 21. Oktober 1956, 13–14; Exposé der Praesidenten (n 65), 31; Entwurf des Protokolls der Konferenz der Aussenminister der Mitgliedstaaten der E.G.K.S. Venedig, den 29. und 30. Mai 1956, 9.
[161] See Lande (n 13) 88, 93, 94.

competition rules of the Treaty do not contain such remarks. Monopolies were mainly condemned for their inefficiency and specially their *productive* inefficiency, rather than the wealth transfers from consumers to producers that they caused. This is probably because, so long as there was no wealth to begin with, there was nothing to be shared between the producers and consumers. Hence, wealth had to be created by efficient undertakings in the first place. The drafters perhaps expected that increasing efficiency and competition would result in the benefits being passed on to the consumers as low prices since they saw high prices as the result of high costs and inefficiency. It is unclear from the *travaux préparatoires* what the attitude of the drafters would have been towards monopolies which did not pass on the benefits of increased efficiency to consumers. Nonetheless, if one tries to associate their position with a welfare standard, it stands closer to a total welfare standard than a consumer welfare standard. This is due to the strong emphasis on *productive* inefficiency since increasing productive efficiency would have increased *total* welfare, whereas preventing the wealth transfers would not have had any effect on total welfare but would have merely increased consumer welfare by redistributing existing wealth. The fact that the Treaty originally did not have a provision on consumer protection also supports their position being closer to 'total welfare' than 'consumer welfare'.

This is not challenged by the existence of Article 81(3)EC either. Although Article 81(3)EC requires a fair share of the benefits arising from an otherwise anti-competitive practice falling foul of Article 81(1)EC to be passed on to consumers for the practice to be excepted from the prohibition, such an exception does not exist for breaches of Article 82EC. The exception rule in Article 81(3)EC cannot be read into Article 82EC as the drafters envisaged that subparagraph merely for Article 81EC. Moreover, it is questionable whether that subparagraph sets the welfare standard of EC competition law as 'consumer welfare'.[162] Even if it is accepted that it does so, it does not necessarily mean that the same objective has to be adopted under Article 82EC as well. Articles 81 and 82EC regulate different conduct; whereas the former applies to practices more than one undertakings enter into with the 'object' or 'effect' of distorting competition, Article 82EC imposes limits on the *unilateral* conduct of undertakings. Hence, it is plausible for the provisions to have different aims due to their different contexts.

Given that the drafters were greatly concerned with increasing efficiency and considered efficiency gains in the context of both provisions but did not include an exception clause for such gains in Article 82EC, the most plausible explanation is that efficiency is imbedded in their concept of 'abuse'.

[162] See P Akman, 'A Tale of Three Cities: Fairness, Welfare and Exploitative Abuse under Article 82EC', (PhD thesis, University of East Anglia 2007) at 245 ff.

Therefore, a *necessary* condition for conduct to be abusive should be a lack of increase in efficiency. This interpretation provides the EC Commission and courts with a way of including efficiencies in their assessment under Article 82EC without breaching the coherence or spirit of the provision. As the ECJ has not only stated that the system set in Article 82EC for dominant positions does not recognize any exemption from the prohibition unlike Article 81(3)EC,[163] but also has recently held that efficiencies can be taken into account even under Article 82EC,[164] the understanding of the drafters constitutes a suitable method for including efficiencies in the assessment. As such, the intent of the drafters provides the Commission with strong grounds to adopt a reformed and more economic approach to Article 82EC. It similarly provides the EC courts with the grounds to accept an assessment of efficiencies in their decisions should they wish to support a more economic approach to Article 82EC. Hence, the arguments in the literature by Gerber and other commentators that adopting the 'consumer welfare' approach would imply a fundamental change in the goals of Article 82EC and that Article 82EC protects the competitive process itself flowing from the exercise of individual rights[165] are not backed by the provision itself as demonstrated by the intent of its drafters. Article 82EC *can* be applied with a welfarist goal.

Moreover, it is illuminating that *distributive* concerns do not seem to have been included in competition rules. Competition rules were not discussed with an eye to their distributive results. Competition was to provide the basis for the division of income which was to be complemented with an effective social and incomes policy.[166] This perspective also finds support in Müller-Armack's 'social market economy' albeit expressed elsewhere than the *travaux préparatoires*. According to Müller-Armack—who was clearly prominent in the formulation of the competition rules—in a social market economy, efforts are made to achieve social progress by means of measures which are 'in conformity with the market'.[167] By this is meant measures which safeguard social welfare without interfering with the working of the market. Income creation in the free market system provides a solid basis for the redistribution of income by the state.[168] Income redistribution is brought about through welfare benefits, equalization of pensions and so on. Indeed, Müller-Armack saw the justification of competition as a constant increase in *productivity*.[169] Rather than distort economic interrelationships by fixing prices and injecting purchasing

[163] *Continental Can* (n 103) [25].
[164] Case C-95/04 P *British Airways plc v EC Commission* [2007] ECR I-2331, [86].
[165] See Gerber (n 8) 50–1; Eilmansberger (n 9) 133; Schweitzer (n 9) 161.
[166] See n 140, above.
[167] A Müller-Armack, 'The Meaning of the Social Market Economy' in A Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan London, 1989) 84.
[168] Ibid.
[169] Ibid 85.

power, it was deemed better to adjust undesirable disparities in incomes via a clearly defined income tax system.[170]

Müller-Armack's perception of competition and the social market economy may also explain the non-existence of a discussion of the wealth effects of monopolies on consumers. The results of competition were to be complemented by other policies specifically designed for income redistribution. Such redistribution was not supposed to be a part of competition policy. The aim of the competition rules was perceived in terms of increasing the productivity and efficiency of the producers and thus 'the size of the pie', rather than how this should be distributed between consumers and producers. This may also explain why the *travaux préparatoires* are silent on the possibility of efficiency gains not being passed on to consumers. Even if they were not passed on as a result of the normal play of competition, the complementary income and social policies would pass these benefits onto consumers albeit in the form of welfare benefits, subsidies, etc.

What deserves elaboration is that the drafters do not appear to have considered or at least articulated the objectives of competition law in terms of the welfare standards which are commonly used today. They seem to have had the *immediate* concern of increasing the *efficiency* of Europe and its undertakings to be able to both make progress, improving the living standards of Europeans, and also compete with third countries. The welfare of consumers of Europe was obviously part of the aim of increasing the living standards of people. However, this does not mean that the drafters saw the aim of competition rules as that of increasing 'consumer welfare' in technical terms. What is important to note is that, given that Article 82EC was intended to apply to *exploitative* abuses that directly harm the customers of dominant undertakings, the concern with the *downstream* market is apparent, albeit without emphasis on final consumers. Thus, Article 82EC *can* accommodate a 'consumer welfare approach' in the technical sense and the provision itself does not need to be amended or reformed for this purpose. Indeed, it can even accommodate a 'total welfare approach'. The crucial issue is to give *efficiency* due weight as it appears to have been *the* rationale behind the whole exercise. This can only be done by recognizing efficiencies as part of the assessment of 'abuse' under the provision. This would not bring about or require an 'efficiency defence' by the dominant undertaking; unlike the current suggestion of the Commission, efficiencies would have to be considered *ex officio* as part of the 'abuse' test.[171] This has not been the way Article 82EC has so far been implemented and this underlying ultimate aim of increasing efficiency of even dominant undertakings appears to have been somehow lost in the decisional practice and case-law.

[170] A Müller-Armack, 'The Social Aspect of the Economic System' in W Stützel et al (eds), *Standard Texts on the Social Market Economy* (Gustav Fischer Stuttgart, 1982) 18.

[171] EC Guidance (n 2) [27], [29] suggesting the possibility of an 'efficiency defence' to be proved by the dominant undertaking.

5. *Conclusion*

No legal provision can properly be understood outside the circumstances of its adoption since only that context can explain why the provision was needed. The same goes for Article 82EC; it must be considered within the context of its foundation. This is not to deny the contributions of the EC Commission and courts to the provision or the need to adapt the rule to new conditions. This article has tried to fit Article 82EC in the context to which it belongs to see what it actually *is* and *can* be. For these purposes, the view that Article 82EC has been influenced by ordoliberalism is critical since that puts the norm in a certain context. Contrary to the prevailing view in the literature, this article has sought to demonstrate that Article 82EC was *not* envisaged as a classic ordoliberal norm. The fact that it does not prohibit the dominant position itself and the pervasive concern with efficiency throughout the negotiations are the most important reasons for this. Moreover, this article has tried to demonstrate that Article 82EC itself was *not* intended to protect the competitors of dominant undertakings. There is evidence in the *travaux préparatoires* that it was not meant to cover 'exclusionary' abuses at all. Thus, one could conclude that it has perhaps been the application of the provision by the EC Commission and courts that has been influenced by ordoliberalism which can be criticized for protecting competitors, but elaboration on this is beyond the scope of this article.

What is obvious is that one concern, namely the aim of 'market integration,' has dominated the implementation of competition rules, including Article 82EC in terms of objectives. This cannot be criticized as such since the goal of a unified market was *the* central impetus for the 'new Europe'.[172] What can be questioned is whether *efficiency* which appears to have been the main concern of the drafters and perhaps seen as the *means* to achieve the objectives of the 'new Europe' has been given enough importance throughout this application process. This is important since the objective of market integration may at times conflict with efficiency[173] and eventually may come at the expense of efficiencies in the organization of production or distribution.[174]

This article has suggested that the intent of the drafters of Article 82EC provides the basis for the EC Commission and courts to adopt a more economic approach to Article 82EC which is much to be desired. The arguments in the literature that adopting the consumer welfare approach would imply a fundamental change in the goals of Article 82EC and that Article 82EC

[172] Gerber (n 3) 347.

[173] Monti (n 3) 1064; D Neven, 'Working Paper' in CD Ehlermann and LL Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing Oxford, 1998) 118; Cseres (n 3) 255; R van den Bergh, 'The Difficult Reception of Economics Analysis in European Competition Law' in A Cucinotta, R Pardolesi and R van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (Edward Elgar Cheltenham, 2002) 35; Motta (n 2) 23.

[174] Van den Bergh, ibid 35.

cannot make consumer harm the ultimate test of anti-competitiveness do not find support in the provision itself as demonstrated by the intent of its drafters.[175] Hence, what is required is merely a change in the application of Article 82EC by the EC Commission and courts. What is guiding in this respect is that efficiency is already imbedded in Article 82EC. Thus, it would be a late but welcome recognition of this if the efficiency effects of allegedly abusive conduct were now considered under the provision. That efficiency was of the utmost importance for the drafters is in total conformity with the context of the provision's adoption. The whole purpose of having a Common Market was to expand the capacity of Europe's economy and efficient businesses—that could reach the optimum scale of production and reduce costs—were *necessary* for this. The *travaux préparatoires* demonstrate this clearly. This is also expressed by Hallstein—arguably another follower of ordoliberalism—who was the first president of the Commission: '[e]very businessman today is aware of the fact that real competition based on efficiency is one of the basic aims of the Treaty . . .'.[176]

The issue of efficiency brings out the question of what was the *ultimate* aim of Article 82EC as envisaged by its authors. Apart from the constant concern with increasing efficiency, it is not possible to determine another *ultimate* aim from the *travaux préparatoires*. Thus, one is left with an objective of increasing efficiency and a provision that prohibits 'exploitation' of those who deal with dominant undertakings. From this, one can infer that a *necessary* condition for 'exploitation' to occur is that the practice does not increase efficiency. In other words, conduct must be 'inefficient' to be abusive. The burden to prove this inefficiency would be on the competition authority and as such the undertaking would not have to prove efficiencies as a defence for its conduct.[177] Unfortunately, it is not possible to determine the *sufficient* conditions for exploitation from the *travaux préparatoires*. Thus, it is not clear whether an increase in efficiency that outweighs the loss to consumers would be safe from infringing the provision or whether part of those efficiency benefits has to be passed on to consumers for the practice not to breach the provision. It is possible either that the drafters presumed that, when the issue was the unilateral practice of an undertaking, these benefits would eventually be passed on or an increase in efficiency was sufficient, while the harm to consumers would be compensated by other policies.

What is problematic for applying Article 82EC in an economics-based way is that the interests of those customers who are not consumers may not always be

[175] See Gerber (n 8) 50–1; Eilmansberger (n 9) 133; Schweitzer (n 9) 161.
[176] C Roetter (tr) W Hallstein, *Europe in the Making* (George Allen & Unwin Ltd London, 1972) 116.
[177] Cf the EC Guidance (n 2) [29] according to which the burden to prove efficiencies would be on the undertaking.

aligned with those of consumers.[178] Furthermore, the vagueness of concepts such as 'exploitation' and 'abuse' do not provide a solid ground for the application of the provision. Nonetheless, one can conclude that Article 82EC is capable of being applied in a manner consistent with both the 'consumer welfare' and the 'total welfare' standard. What must not be lost sight of is the explicit concern which lies underneath the whole idea of the Common Market and Article 82EC: *efficiency*.

[178] See P Akman, '"Consumer" versus "Customer": the Devil in the Detail' ESRC Centre for Competition Policy Working Paper 08-34 at <http://www.uea.ac.uk/polopoly_fs/1.104698!ccp08-34.pdf> accessed 6 May 2009.