1. The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU

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1.1 INTRODUCTION

The Treaty on the Functioning of the European Union (TFEU) states in Article 3(3) as one of its goals the establishment of an 'internal market'. Protocol 27 on 'the internal market and competition', which has the same legal force as the Treaty to which it is annexed, explains that the 'internal market' includes 'a system ensuring that competition is not distorted'. This latter concept is based on four legal pillars: the prohibition of cartels (Article 101 TFEU), the prohibition of abuse of a dominant position (Article 102 TFEU), the prohibition of anti-competitive concentrations between undertakings (Article 2(3) Regulation 139/2004), and the prohibition of state aid (Article 107 TFEU). The control of dominant undertakings based on the notion of 'abuse' is therefore a core element of EU competition law.

'Abuse' is a rather vague term which lends itself easily to controversies about its meaning. It should therefore not come as a surprise that even within the specific context of EU competition law it has been interpreted from the very beginning in very different ways. Even its origin is disputed, and even more so its purpose and the way it should be applied. These disputes are not merely a matter of academic debate, but even between the Commission of the EU which is competent to implement Article 102 TFEU and the Court of Justice of the EU (CJEU) which is competent to supervise the Commission, there has not always been full agreement as to how 'abuse' should be properly conceptualized. Such disputes have been particularly fueled by the Commission's quest for a more welfare economic rather than legal approach to competition law in general and to the concept of 'abuse' of a dominant position in

particular.[1] Nevertheless, the prevailing normative understanding of 'abuse' may still be said to reflect ordoliberal ideas which have accompanied the drafting as well as the interpretation and application of EU competition law from the very beginning up to the present.

It is important to appreciate, though, that the ordoliberal approach has undergone considerable changes over time. The lack of understanding of these nuanced changes has caused many authors to end up in a confused picture of what the ordoliberal concept of competition means.[2] Starting with the founding fathers of the 'Freiburg School' (in particular the economist Walter Eucken and the lawyer Franz Böhm, both professors at the University of Freiburg, Germany, in the 1930s) as many as five generations of ordoliberals may be distinguished, all of which have contributed their own specific features. All of them have, however, relied and still are relying on the following basic notions:

- Competition results from individual freedom of producers to choose what they want to offer and of consumers to choose what they want to buy.
- Competition is understood as a dynamic system (process) of interaction between individuals who by making their choices reveal their preferences and produce the kind of information that other individuals need to make their choices.
- It is the fundamental role of the system of private law to provide individuals with legal rights the unrestricted use of which forms the basis of competitive rivalry between producers and of consumers' freedom of choice among alternative sources of supply.

We have to adopt a dynamic perspective, though, in order to understand in more detail what ordoliberalism meant at the time the Rome Treaty was negotiated, what it meant in the formative decades when especially the CJEU developed its jurisprudence, and what it means today when it is coming under attack from a welfare economic approach. I shall analyse

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[1] See Communication from the Commission, 'Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings', OJ 2009 C 45, 7–20.

[2] Many authors do not necessarily consult the original sources. See for an important contribution to the prevailing confusion C Ahlborn and AJ Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford and Portland Oregon: Hart Publishing 2008) 55–101, 64.

the Commission's and the CJEU's jurisprudence as to how they have reflected and still reflect an ordoliberal approach as far as the control of dominant undertakings is concerned (1.2) as well as the application of ordoliberal concepts to specific types of 'abuses' (1.3). After a brief discussion of the proper role of efficiency considerations (1.4) and of fairness (1.5) in ordoliberal thinking, I shall conclude (1.6).

1.2 THE ORDOLIBERAL APPROACH TO ARTICLE 102 TFEU

It must be admitted that the ordoliberals of the 'Freiburg School' did not yet have a fully developed concept of abuse. Even at the time the Rome Treaty was negotiated, no sufficiently sophisticated concept of abuse could have been offered by the German negotiating team. Nevertheless, Walter Eucken did in fact have some ideas about 'exclusionary' practices such as boycotts, predatory pricing or fidelity rebates as well as 'exploitative' practices such as unfair prices which, according to him, should be controlled in cases of 'unavoidable' monopolies (ie natural monopolies such as in the field of infrastructure industries).[3] A comprehensive ordoliberal concept of abuse was able to develop, however, only following the incorporation of Article 86 (now Article 102 TFEU) in the Rome Treaty. Once it had become part of a directly applicable prohibition that was designed to control unilateral conduct of dominant undertakings, it became indispensable to specify more clearly the meaning of abuse so as to allow the enforcement of the prohibition by the Commission and the CJEU as well as by the Member States.[4]

The starting point was a dispute between René Joliet, who later became judge at the CJEU, and Ernst-Joachim Mestmäcker, who is the

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[3] See W Eucken, 'Die Wettbewerbsordnung und ihre Verwirklichung' [The Competitive Order and its Implementation] (1949) 2 *ORDO: Jahrbuch für die Ordnung der Wirtschaft und Gesellschaft* 1–99, abridged version translated by C Ahlborn and C Grave, reprinted in (2006) 2(2) *Competition Policy International* 219, 239–41. The same ideas were later set out in W Eucken, *Grundsätze der Wirtschaftspolitik* [Foundations of Economic Policy] (Tübingen: Mohr Siebeck 1952, reprint 2004) 291–9.

[4] See for a more detailed in-depth analysis of the development of the interpretation of Article 86 EEC (later Article 82 EC, now Article 102 TFEU) 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 Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford and Portland Oregon: Hart Publishing 2008) 119–64.

leading representative of the second generation of ordoliberals and who in those days served as special adviser to the Commission's Directorate General IV (DG IV, now DG Competition). Even though both authors had published studies comparing section 2 Sherman Act 1890 and Article 86 Treaty establishing the European Economic Community (EEC),[5] they drew totally opposite conclusions. Joliet argued that conduct in order to be qualified as an 'abuse' under Article 86 EEC must be different from conduct that was qualified as 'monopolization' under section 2 Sherman Act. Whereas 'monopolization' was said to consist of 'exclusionary' market policies and practices 'through which monopoly structures are secured and maintained',[6] Article 86 EEC was characterized as not placing 'any direct prohibitions on monopolistic or highly concentrated oligopolistic market structures as such'. Also, whereas section 2 of the Sherman Act could, according to Joliet, 'not be used to support direct price regulation and output control of a monopoly which has been both lawfully acquired and maintained', under Article 86 EEC 'the offence lies mainly in abusive market exploitation through unreasonably high prices or monopolistic restriction of output'.[7] According to Joliet, Article 86 EEC seemed 'to be concerned in the first place – if not exclusively – with the protection of the consumers and of the dominant firm's purchasers or suppliers'.[8] And he went on to say:

> Its main preoccupation is not the survival of the competitive process. It is therefore not the acquisition and retention of a monopoly position by policies designed to exclude competition, but rather the abusive exploitation of existing power (ie by monopolistic performance) which constitutes illegal behavior.[9]

Hence Joliet's conclusion that 'exclusionary policies through which a firm furthers its dominance cannot be eradicated under the system of

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[5] R Joliet, *Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power* (The Hague: Martinus Nijhoff 1970); EJ Mestmäcker, 'Concentration and Competition in the EEC', Part I [1972] *Journal of World Trade Law* 615–47; Part II [1973] *Journal of World Trade Law* 36–63.

[6] R Joliet, *supra* n 5, 11.

[7] Id, 131.

[8] Id, 11.

[9] Id, 11.

Article 86. But conduct remedies can involve direct specification of performance in regard to prices and output […]'.[10] And Joliet explicitly stated that:

> This system is of course likely to lead to frequent public interference with industrial performance. Since the enforcement agency is without power to reduce a market dominant position or to control market structure, there is no other way for the enforcement agency to remedy unreasonably high prices than to dictate the dominant firm's future price and output policies.[11]

In sum, Joliet interpreted Article 86 EEC as 'opening the door to a broad regulation of a public utility type'.[12] His whole line of reasoning was explicitly based on the assumption that there are only two mutually exclusive approaches to the monopoly problem, an assumption that Corwin Edwards had put in the following terms:

> Either one can hold the power down to a level that one thinks is adequately curbed by competition, or one can introduce some kind of control that prevents the power from being used in ways one does not like.[13]

Joliet therefore interpreted section 2 Sherman Act and Article 86 EEC from the perspective of this dichotomy of approaches. It is true that 'monopolization' was in those days considered to clearly include, without being limited to, 'exclusionary' practices.[14] Hence, the interpretation of section 2 Sherman Act was in those days based on a structural approach towards monopoly power. Joliet regarded Article 86 EEC, however, as being based on a purely behavioural approach that allowed no structural remedies but only the supervision of the market conduct of dominant

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[10] Id, 131 *et seq*.

[11] Id, 132.

[12] Id, 133.

[13] C Edwards, Statement in *International Aspects of Antitrust*, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong, 2nd sess, Pt 1, 311 (quoted from R Joliet, *supra* n 5, 127).

[14] See *US v United Shoe Machinery Corp.*, 110 F.Supp. 295, 342 (D Mass 1953) where Judge Wyzanski distinguished three different categories of 'monopolization': (1) acquisition of the power to exclude, (2) use of market power to engage in exclusionary practices, (3) acquisition of an overwhelming market share without exclusionary conduct. See as an example for this latter proposition the famous case *US v Aluminium Co. of America*, 148 F. 2d 416 (2d Cir. 1945). Much later the Chicago school of economics would deny the viability (rationality) of exclusionary practices altogether.

firms. This reasoning clearly reflected the structure/conduct/performance paradigm in a way that underestimated the interdependence of these three elements of competition.

For Mestmäcker the starting point was the fact that the Rome Treaty had placed the abuse concept in a unique and novel context. Article 86 was, according to him, one of the competition rules' purpose was to establish a 'system ensuring that competition in the internal market is not distorted' as specified in Article 3(f) of the Rome Treaty (later Article 3(1)(g) EC Treaty). The same still holds true with regard to Article 102 TFEU read in conjunction with Protocol 27 on 'the internal market and competition', according to which the 'internal market' includes 'a system ensuring that competition is not distorted'. Since that system of competition was regarded as a means of achieving the fundamental goals of the Rome Treaty as listed in its Article 2, in particular the goal of 'raising the living standard' (ie the general welfare), efficiency, consumer welfare as well as economic progress were considered to result from market integration and competition. This link of competition to integration is the specific European perspective that determined and still determines the interpretation of Article 102 TFEU.

It cannot escape our attention that the wording of Article 3(f) of the Rome Treaty was particularly receptive towards the ordoliberals' systemic approach to competition. If competition is seen as a dynamic system of interaction of producers and consumers making choices between different lines of production and different sources of supply respectively, then it follows that abuse must be understood to refer to a restriction of market participants' freedom to make such choices which in turn is determined by the market structure. The more concentrated a market, the smaller the room for consumers to choose from independent sources of supply. Given that market dominance is not anti-competitive per se, the acquisition as well as the expansion of a dominant position by way of legitimate internal growth is not illegal. However, the acquisition or expansion of a dominant market position by means other than competition on the merits (ie by mergers or exclusionary practices) must be considered an illegitimate increase of market concentration. Hence, 'abuse' in Article 102 TFEU refers to an improper restriction of the residual competition that remains in an already concentrated market where one or some firms hold individually or collectively a dominant position.

This approach is based on the assumption that market structure, conduct and performance cannot be isolated from each other, but are mutually interdependent (without suggesting that causality runs in a specific direction). Anti-competitive conduct of dominant firms cannot be

limited to practices which harm consumers, but may as well lead to the maintenance or expansion of their dominant position. In other words: market conduct and performance may negatively affect the market structure and vice versa. The two approaches to the monopoly problem espoused by Corwin Edwards are therefore not mutually exclusive but complement each other.

As Mestmäcker emphasized, the structural concept of 'abuse' does not at all conflict with the protection of consumers that was Joliet's concern. From an ordoliberal perspective, 'competition as a process is advantageous to consumers'.[15] Article 102 TFEU therefore protects the residual range of consumers' choice. This approach is supported by Article 101(3) TFEU which grants an efficiency exemption from the prohibition of cartels only if there is no substantial elimination of competition. This means that, in order that consumers profit from the efficiency exemption, a cartel must leave sufficient competition so as to make sure that efficiencies are passed on to consumers. The assumption clearly is that consumers may benefit from the efficiencies only due to the residual pressure of competition on the market. Similarly, a dominant firm should be prevented from eliminating residual competition either by way of merger or by pursuing exclusionary practices which reduce choice.[16] An abuse therefore consists in particular of market conduct whereby the dominant firm suppresses actual or potential competition, especially by eliminating competitors by means other than competition on the merits, by hampering market access of potential entrants or by expanding its dominant position into neighbouring or downstream markets. The bottom line of Mestmäcker's approach[17] was the principle that a dominant firm must not engage in conduct that would not be possible under competitive conditions (put differently: conduct that is only possible due to market

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[15] EJ Mestmäcker, *supra* n 5, Part I, 641.

[16] The same idea was recently most clearly expressed in a comment by American Antitrust Institute (AAI) President Diana Moss on the Heinz-Kraft merger in the US published in the *Washington Post* of 25 March 2015 (quoted from AAI's website of 25 March 2015): 'All these food-space mergers give (buyers) the illusion of choice. They're thinking, "Oh gosh, look at all these brands". But what the consumer doesn't see is the smaller and smaller number of manufacturers maintaining those brands. It doesn't mean they compete with each other – they don't – and that gives them significant power to raise prices and reduce choice.' Available at: https://www.antitrustinstitute.org/content/aai-president-diana-moss-heinz-kraft-merger-washington-post (access date 9 September 2018).

[17] See for a more detailed account of Mestmäcker's approach H Schweitzer, *supra* n 4, 139–40.

dominance). How then did this ordoliberal concept of abuse influence the interpretation of Article 86 EEC (now Article 102 TFEU) by the Commission and the CJEU?

To begin with, it must be stated that Article 102 TFEU contains a non-exhaustive list of examples of abusive conduct that is not limited to exclusionary practices, but includes exploitative practices as well (such as the imposition of excessive prices or unfair trading conditions). This was due to pressure from the French delegation during the negotiations of the Rome Treaty. The concern of the German delegation was clearly focused on exclusionary practices. Heike Schweitzer, in her account of the history of Article 102 TFEU,[18] calls this 'an important fact shedding light on the intent of the drafters [of Article 86 EEC], given the German influence'. German ordoliberals accepted the inclusion of exploitative abuses only because the wording of Article 86 EEC limited such abuses to exceptionally excessive practices and therefore avoided the risk of anti-inflationary price controls that had been pervasive in some Member States before. Rather, Article 86 EEC put exploitative abuses within the context of competition rules and this may be regarded, therefore, even as a 'deregulatory' move.[19] As it turned out later, Article 86 EEC (later Article 82 EC, now Article 102 TFEU) has rarely been used by the Commission or the CJEU to 'micro-manage' dominant firms' pricing strategies.

The main thrust of the ordoliberal approach on the interpretation of abuse came to be felt with regard to exclusionary abuses. After the entering into force of the Rome Treaty in 1958 it took another 15 years before the first case, the *Continental Can* case[20] concerning a practice of a dominant firm that could be regarded as restricting the residual competition in the relevant market, was decided by the Commission and finally by the CJEU in 1973. It happened that Mestmäcker in his capacity as special adviser to DG IV was entrusted with preparing the Commission's decision. Upon appeal, the decision was upheld by the CJEU. The Court, quite along the lines of Mestmäcker's ordoliberal approach to the protection of residual competition for the sake of consumers' choice, started its reasoning by emphasizing the context within which Article 86 EEC (now Article 102 TFEU) had to be interpreted and from which the Court derived the function of the prohibition of abuse to contribute to the establishing of a 'system of undistorted competition' according to Article 3(f) EEC (now Article 3(3) TFEU in conjunction with Protocol 27 on

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[18] Id, 136 *et seq*.

[19] Id, 136.

[20] Case C-6/72 *Europemballage and Continental Can v Commission* [1973] ECLI:EU:C:1973:22, ECR 215.

'the internal market and competition'). Recognizing that Article 86 EEC (now Article 102 TFEU) covered not only exploitative but also exclusionary practices, the Court stated the purpose of the provision in the following terms:

> The provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty.[21]

Hence, in order to determine the exclusionary nature of a specific practice, the Court followed the notion of 'residual competition' which must be protected against strategies that would significantly strengthen the dominant undertaking's market position at the expense of consumers' choice. One author was fully justified in those days to state that 'the purpose of the competition rules is to preserve the freedom of choice of those who transact business' and 'the abuse therefore would materialize when the dominant position is used to restrain or eliminate the freedom of decision of either competitors or of the consumers'.[22] A little later, the CJEU refined in *Hoffmann-La Roche* the concept of abuse in the following terms:

> The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which through recourse to methods different from those which condition normal competition in product or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[23]

The Court also coined the widely misunderstood principle that a dominant firm has a 'special responsibility not to allow its conduct to impair undistorted competition in the common market'.[24] This principle does not imply that dominant undertakings are responsible for the protection of

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[21] Id, 26.

[22] A Deringer, *The Competition Law of the European Economic Community: A Commentary on the EEC Rules of Competition (Article 85–90)* (New York: Commerce Clearing House 1968) para 533.

[23] Case C-85/76 *Hoffmann-La Roche v Commission* [1968] ECLI:EU:C:1979:36, ECR 461, para 91.

[24] Case C-322/81 *NV Nederlandse Banden-Industrie v Commission* [1983] ECLI:EU:C:1983:313, ECR 3461, para 57.

their smaller rivals. The Court itself has explained later that 'special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings'[25] (and therefore would impair undistorted competition). The flip side of this holding is the ordoliberal idea that a dominant firm must not engage in conduct that would not be possible under competitive conditions (put differently: conduct that is only possible due to market dominance).[26] This idea is also reflected by the first instance judgment of the Court of First Instance (CFI) in the *Intel* case concerning exclusivity rebates, where the Court emphasized that it is the special responsibility of an undertaking in a dominant position 'not to allow its conduct to impair genuine, undistorted competition in the common market'[27] which would be the case, however, if such exclusivity rebates were applied in a dominated market where, 'precisely because of the dominant position of one of its economic operators, competition is already restricted'.[28]

This holding was totally in line with the CJEU's traditional protection of the competitive market structure for the sake of the protection of market participants' freedom of action (freedom of choice) as the basis for the competitive process.[29] In the case *TeliaSonera Sverige* the CJEU held in the clearest possible terms:

> In order to determine whether the dominant undertaking has abused its position […], it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's

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[25] See CFI joined cases T-191/98 and others, *Atlantic Container Lines AB and others v Commission* [2003] ECLI:EU:T:2003:245, ECR II-3275, para 1460.

[26] See EJ Mestmäcker and H Schweitzer, *Europäisches Wettbewerbsrecht* [European Competition Law] (3rd edn, Munich: C.H. Beck 2014) 405, para 9, where the authors state that the development of competition on a dominated market will be distorted by strategies that deviate from normal competition on the merits, that being the case if under conditions of effective competition such strategies would not be rational or appropriate.

[27] CFI Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, para 90.

[28] Id, para 89.

[29] See Case C-95/04 *British Airways v Commission* [2007] ECLI:EU:C:2007:166, ECR, I-2331, 2411, para 106; CFI Case T-340/03 *France Télécom v Commission* [2007] ECLI:EU:C:2009:214, ECR, II-117, 193, para 266; CFI Case T-201/04 *Microsoft v Commission* [2007] ECLI:EU:T:2007:289, ECR, II-3601, 3824, para 664; see also CJEU Case C-549/10 *Tomra Systems ASA et al v Commission*, ECLI:EU:C:2012:221, para 59 *et seq*, where the Court analysed a rebate scheme in light of Article 102 TFEU: The Court (as well as the Commission itself!) relied on the exclusionary effect of the scheme (ie its negative impact on the market structure!).

> freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition.[30]

In 2009 the Commission published its 'Guidance on the enforcement priorities in applying Article 102 TFEU',[31] according to which exclusionary practices should also be analysed in light of an 'as efficient competitor-test' (AEC-test).[32] This test may be applied in order to determine whether competitors are likely to be excluded from the market because they are less efficient than the dominant undertaking (they have to charge higher non-competitive prices due to higher costs) or because they are, in spite of their equally efficient cost structure, forced by the dominant undertaking to pursue an unsustainable below-cost pricing strategy that leads to their exit from the market. The test is based on a comparison of prices and average variable or avoidable costs of the dominant undertaking on the assumption that it is itself cost-efficient (ie the dominant undertaking's own costs are used as the point of reference). This approach has in the meantime been approved also by the CJEU in

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[30] Case C-52/09 *TeliaSonera Sverige* [2011] ECLI:EU:C:2011:83, ECR, I-527, para 28. See also earlier cases where an exclusionary abuse of market dominance was found to infringe upon Article 102 TFEU, because the negative impact upon the market structure was considered to restrict consumers' freedom of choice: Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECLI:EU:C:1979:36, ECR, 461, para 90 (exclusive purchasing agreement or loyalty rebate eliminates customers' choice among different sources of supply); Case C-202/07 *France Télécom v Commission* [2009] ECLI:EU:C:2009:214, ECR 2009, I-2369, para 112 (predatory prices harm consumers by limiting their options due to the elimination of competitors of the dominant firm); Case C-280/08 *Deutsche Telekom v Commission* [2010] ECLI:EU:C:2010:603, ECR, I-9555, para 182 (margin squeezing by a dominant firm that leads to the elimination of competitors harms consumers by limiting their choices); *Intel* [2009] COMP/C-3/37.990, para 1598 *et seq* (conditional rebates leading to a limitation of consumers' choices) upheld upon appeal by the CFI, *supra* n 27, para 77 (exclusivity rebates said to be 'designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market').

[31] See Commission, *supra* n 1; for a critical assessment of the Commission's 'Guidance on Article 82 EC enforcement priorities' see EJ Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidelines of 2008' in LF Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar 2011) 25–62, 39 *et seq*.

[32] See Commission, *supra* n 1, para 23–7.

the *Intel* case:[33] upon appeal against the judgment of the CFI,[34] the CJEU reiterated that a dominant undertaking has 'a special responsibility not to allow its behavior to impair genuine, undistorted competition on the internal market',[35] but then added that such undertaking is under no obligation to ensure that competitors who are less efficient than itself should remain on the market.[36] In order to prove an abuse, the Commission must accordingly assess 'the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market'.[37] However, the CJEU, far from giving up the structural test laid down in *Hoffmann-La Roche*,[38] imposed this test upon the Commission only 'in the case where the undertaking concerned submits […], on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects'.[39]

It should also be appreciated that the AEC-test has important limits. Firstly, it focuses on prices as exclusive means of competition (ie where producers compete with homogenous goods or services). The importance of qualitative and dynamic criteria which cannot easily be quantified in monetary terms is neglected. Secondly, the test measures merely productive efficiencies leaving allocative and dynamic efficiencies aside. Finally, the test is admittedly limited to cases where the relevant data are at hand.[40] It is no surprise therefore that the test has up to now been accepted only for exclusionary pricing strategies such as margin squeezes or rebate systems, but not beyond.[41] It does therefore not follow from the *Intel* case that the CJEU has given up its ordoliberal structural concept of abuse altogether. Dominant undertakings' behaviour remains to be controlled in order to protect the residual competition as a residual range of consumers' choice. Earlier jurisprudential holdings are therefore, in principle, still good law. Where appropriate, the AEC-test may merely be used as an evidentiary refinement.

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[33] Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632.
[34] See *supra* n 27.
[35] Case C-413/14, *supra* n 33, para 135.
[36] Id, para 133.
[37] Id, para 139.
[38] *Supra* n 23.
[39] Case C-413/14, *supra* n 33, para 138.
[40] See Commission, *supra* n 1, para 27.
[41] This transpires also from the Commission's 'Guidance on the enforcement priorities in applying Article 102 TFEU', *supra* n 1, para 23–7.

1.3 APPLICATION OF THE ORDOLIBERAL CONCEPTS TO SPECIFIC TYPES OF ABUSES

The following explanations will briefly discuss the consequences of the ordoliberal approach when it comes to the interpretation of specific categories of abuse such as exploitative abuses or exclusionary abuses like, for example, predatory pricing or refusal to deal.[42]

1.3.1 Exploitative Abuses

Sanctioning exploitative abuses such as the imposition of unfair prices or trading conditions requires direct state intervention in the pricing and marketing strategies of dominant undertakings. The fact that Article 102 TFEU includes exploitative abuses has, therefore, been attributed by some authors to the influence of ordoliberal concepts which are said to emphasize the 'goal of fairness' in order to protect individuals' economic freedom against impairment by private market power.[43] Others have explained the inclusion of exploitative abuses in Article 102 TFEU by the so-called 'as if' approach to the regulation of dominant firms which is said to be a core element of ordoliberal thinking[44] and according to which dominant undertakings' conduct should be controlled so as to ensure that they behave 'as if' they operated under competitive conditions. Hence the claim that ordoliberals are responsible for a strong regulatory interpretation of Article 102 TFEU. The role of 'fairness' in ordoliberal thinking will be separately discussed below (1.5). As far as the interventionist 'as if' standard is concerned, it is true that Walter Eucken, one of the founding fathers of the initial Freiburg School of Ordoliberalism, had at times been advocating its application to 'unavoidable' (natural) monopolies (ie infrastructure industries/public utilities)[45]

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[42] For the following text cf. in more detail H Schweitzer, *supra* n 4, 143 *et seq*; for an analysis of the ordoliberal foundation of the prohibition of tying see M Cole, 'Ordoliberalism and its Influence on EU Tying Law' (2015) 36 ECLR 255–62.

[43] See M Gal, 'Monopoly Pricing as an Antitrust Offence in the U.S. and the EC: Two Systems of Belief about Monopoly?' (2004) 49 *Antitrust Bulletin* 343–84, 364 *et seq*; C Ahlborn and AJ Padilla, *supra* n 2, 60 and 64 *et seq*.

[44] See, eg, C Ahlborn and AJ Padilla, *supra* n 2, 60; R O'Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford and Portland Oregon: Hart Publishing 2013) 839.

[45] W Eucken, *Grundsätze der Wirtschaftspolitik*, *supra* n 3, 295, 299.

and his follower, Leonhard Miksch,[46] had even advocated its general application to the conduct (or performance) of dominant undertakings. It should be appreciated, however, that this approach has very early on been criticized and that it has since long been abandoned by mainstream ordoliberals.[47]

David Gerber's widely followed characterization of ordoliberalism as an interventionist approach[48] is therefore not justified. On the contrary: it must be reiterated that it was rather René Joliet (clearly not an ordoliberal) who had argued in favour of an interpretation of Article 102 TFEU that would have limited the scope of the prohibition to vertical abuses only, and hence would have allowed regulating dominant firms' conduct vis-à-vis their customers.[49] Contrary to ordoliberal thinking, the enforcement agency could go as far as to set prices at which dominant firms can sell or to fix the quantities which they must produce, substituting the dominant firm's economic calculus by its own. Instead of protecting the system of undistorted competition in the ordoliberal sense, Joliet's approach would have implied a kind of public utility regulation. This truly regulatory approach to Article 102 TFEU was prevented from becoming law precisely due to the influence of ordoliberals such as Ernst-Joachim Mestmäcker. He had argued that the interpretation and

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[46] See L Miksch, *Wettbewerb als Aufgabe. Grundsätze einer Wettbewerbsordnung* [Competition as a Mission. Principles of a Competitive Order] (Stuttgart: Kohlhammer 1937); id, 'Die Wirtschaftspolitik des Als-Ob' [Economic Policy Based on As-If] (1949) 105 *Zeitschrift für die gesamte Staatswissenschaft* 310–38.

[47] See for a rigorous critique of the 'as if' approach in the context of German competition law (ie § 22 of the German Law against Restraints of Competition) EJ Mestmäcker, 'Verpflichtet § 22 die Kartellbehörde, marktbeherrschenden Unternehmen ein Verhalten aufzuerlegen, als ob Wettbewerb bestünde? [Does § 22 Oblige the Cartel Office to Instruct Dominant Undertakings to Behave as if Competition Would Exist?]' [1968] *Der Betrieb* 1800–1806; for the European context see EJ Mestmäcker, 'Die Beurteilung von Unternehmenszusammenschlüssen nach Art. 86 EWG' [The Assessment of Mergers under Art. 86 EEC] in E von Caemmerer, HJ Schlochauer and E Steindorff (eds), *Probleme des europäischen Rechts* [Problems of European Law], Festschrift für Walter Hallstein (Frankfurt am Main: Vittorio Klostermann 1966) 322–54, 335, n 13; see for a more detailed analysis H Schweitzer, *supra* n 4, 134; in the US, the difficulty of applying the criteria for controlling public utilities to other industries was highlighted by JM Blair, *Economic Concentration. Structure, Behaviour and Public Policy* (New York: Harcourt Brace Jovanovich 1972) 651 *et seq.*

[48] D Gerber, *Law and Competition in Twentieth Century Europe* (Oxford: Oxford University Press 1998) 252–3.

[49] See *supra* n 5 *et seq* with accompanying text.

application of Article 102 TFEU must be guided by its function to establish a 'system of undistorted competition' and to promote the integration of markets. Article 101(3) TFEU reflects this goal, according to Mestmäcker, by prohibiting the elimination of effective competition even in light of potential efficiencies of a cartel. In the same vein, Article 102 TFEU must also be interpreted to prohibit the elimination of residual competition which may still be effective on the dominated market or a related market.

Article 102 TFEU became therefore almost exclusively targeted at exclusionary abuses whereas exploitative abuses have practically fallen into 'benign neglect'.[50] In less than a handful of cases has the Commission condemned excessive prices and the CJEU, while establishing a very high threshold for the determination of excessively high prices,[51] has positively found an exploitative abuse in only one single case.[52] Consequently, neither may the extremely reluctant application of Article 102 TFEU to exploitative abuses serve as proof of an interventionist approach of EU competition law when it comes to the control of dominant undertakings, nor is it justified to characterize the ordoliberal concept of abuse as regulatory and interventionist in the first place. On the contrary: Pinar Akman's allegation that ordoliberal thinking has misguided the interpretation of Article 102 TFEU towards exclusionary abuses and her recommendation that the Commission and the CJEU should bring their interpretation back into line with the original intention of prohibiting exploitative abuses by integrating exploitation into the prerequisites for the finding of an abuse[53] would imply a very unfortunate reset and redirection of the whole system of Article 102 TFEU that may either thwart the control of abusive conduct or lead to a truly interventionist approach of the kind advocated very early on by Joliet.

It should be noted that a regulatory approach to monopoly control does in fact exist in the EU outside the framework of Article 102 TFEU with

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[50] H Schweitzer, *supra* n 4, 145.

[51] See the leading case Case C-27/76 *United Brands v Commission* [1978] ECLI:EU:C:1978:22, ECR 207, para 250.

[52] Case C-226/84 *British Leyland v Commission* [1986] ECLI:EU:C:1986:421, ECR 3263. See for a more detailed analysis of the case law H Schweitzer, *supra* n 4, 145 *et seq*; see for an in-depth analysis T Ackermann, 'Excessive Pricing and the Goals of Competition Law' in D Zimmer (ed), *The Goals of Competition Law: Fifth ASCOLA Workshop 2010* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar 2012) 349–70, 354 *et seq*.

[53] P Akman, 'The Role of Exploitation in Abuse under Art. 82 EC' in C Barnard and O Odudu (eds), (2008–9) 11 *Cambridge Yearbook of European Legal Studies* 165–88.

regard to certain infrastructural network industries such as telecommunications, energy (electricity and gas), railway transportation and so on. Where the *ex post* control of abuses on the basis of Article 102 TFEU is complemented by sector specific *ex ante* (preventive) control enforced by independent network agencies. This is in principle what Eucken already had in mind when he, in the early days of the Freiburg School, argued in favour of controlling the conduct of 'unavoidable' monopolies (ie natural monopolies such as network industries).[54] Ackermann, in his paper given at the Fifth ASCOLA Workshop 2010 in Bonn (Germany) has demonstrated in detail that competition law (ie Article 102 TFEU) and sector specific regulations are 'alternative' instruments for controlling monopolies, which must not be mixed up but which clearly complement each other. It is worth mentioning in this context that those few cases where the Commission or the Court found an exploitative abuse concerned monopolies whose monopoly profits could not be expected to be competed away in a reasonable period of time. Article 102 TFEU can therefore be said to be applied to exploitative abuses only where there is little hope that markets would self-correct,[55] that is, in Eucken's words, where the monopoly is 'unavoidable' so that regulation is exceptionally justified.

1.3.2 Exclusionary Abuses

The specific flavour of the ordoliberal approach to exclusionary abuses may be illustrated by two examples: predatory pricing and refusal to deal with regard to essential facilities. Heike Schweitzer has presented an in-depth study comparing the US approach and the approach of the CJEU which is still based on ordoliberal thinking.[56] What follows is based on her study.

1.3.2.1 Predatory pricing

Whereas US law concerning predatory pricing is based on the welfare economic concept of consumer welfare and therefore requires in addition to below-cost pricing the showing of an objective likelihood of recoupment (ie consumer harm), CJEU jurisprudence is not concerned with the effects of below-cost pricing on consumers' welfare but on the process of

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[54] See for an analysis of the comparative advantages of regulation and competition law as far as control of monopoly pricing is concerned: T Ackermann, *supra* n 52, 368 *et seq*.

[55] See id, 357.

[56] H Schweitzer, *supra* n 4, 149 *et seq*, 155 *et seq*.

competition and hence on the rivals of the dominant firm. Fully in line with the ordoliberal concept of competition, Article 102 TFEU is interpreted so as to 'ensure that the exercise of market power does not impair competitors' possibilities to succeed or prevail on the market on the basis of superior business performance'.[57] This reflects the ordoliberal conviction that competition results from the exercise of individual rights within a system of interaction the workability of which rests on the protection of all market actors against exclusion, and that does not result from competition on the merits but rather from the unilateral exercise of a dominant firm's market power. As Heike Schweitzer has put it, 'competition law will ensure that the fate of each competitor will depend on skill, business acumen and luck, and not on the exclusionary exercise of market power by a dominant firm'.[58] Hence no showing of consumer harm or of the likelihood of recoupment is necessary; what matters is the negative effect on competition. This approach is far from protecting inefficient competitors who would be driven out of the market by legitimate competition on the merits anyway.

1.3.2.2 Refusal to deal/essential facility

Another example for the adoption of an ordoliberal approach to the notion of 'abuse' may be found in the jurisprudence related to refusals to deal with an essential facility. The CJEU has recognized the basic principle that even dominant firms or monopolists enjoy the right to prevent actual or potential competitors from having access to facilities developed, produced and owned by themselves. Nobody is in principle obliged to assist his competitors to enter the market or to succeed on the market. Rather, in order to compete, competitors must engage in innovation. Where, however, the monopolist owns a resource that is an indispensable input for producers on the downstream market, because the resource cannot be duplicated, a refusal to deal may constitute an 'abuse', if otherwise competition on the downstream market or access to that market would be made absolutely impossible. Relevant cases typically relate to infrastructure like ports, telecommunication networks, pipelines and so on. Again: even in this context, the purpose of Article

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[57] T Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anticompetitive Abuses' (2005) 42 *Common Market Law Review* 129–77, 133.

[58] H Schweitzer, *supra* n 4, 155; cf. Commission Decision *Irish Sugar plc* [1997] 97/624/EC, OJ L 258/1, para 34.

102 TFEU is not to protect competitors, but to protect competition in favour of consumers' choice.[59]

1.4 THE PROPER ROLE OF EFFICIENCY CONSIDERATIONS

Ordoliberalism has often been said to disregard efficiency concerns. Pinar Akman has even argued that, since EU competition law has had efficiency as its aim from the very beginning, ordoliberalism cannot have had an influence upon its formation.[60] This is wrong. There is a misunderstanding here of the role that efficiency plays in the context of an ordoliberal approach to competition as opposed to the 'consumer welfare' approach. Ordoliberals have always appreciated and highlighted the positive welfare effects of competition in terms of productive, allocative and dynamic efficiencies. What they refuse, however, is to measure the allocative and dynamic efficiency effects of individual business strategies. The determination and materialization of these effects depends on consumers' choice in the market. In other words: allocative and dynamic efficiencies can only be the result of effective competition. These results cannot be specified *ex ante*, because that would require access to the full amount of information which competition is supposed to discover in the first place. Competition rules cannot, therefore, pretend to assess dominant firms' conduct according to their allocative or dynamic efficiencies but merely according to their impact upon competition and consumers' choice. The efficiency defense that is available according to Article 101(3) TFEU as well as, according to the jurisprudence of the CJEU, within the framework of Article 102 TFEU, is limited to productive efficiencies upon the condition, however, that sufficient residual competition is left. This allows the determination of allocative and dynamic efficiencies to be deferred to the competitive process, which allows consumers to make their choices. So, in the end, any business conduct that appears efficient on the micro-level of the individual firm(s) must pass the efficiency test on the macro-level of the system of competition where consumers decide what they want. Article 102 TFEU,

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[59] See for a more detailed analysis H Schweitzer, *supra* n 4, 155 *et seq*.

[60] Cf. P Akman, *The Concept of Abuse in EU Competition Law* (Oxford: Hart Publishing 2012) 63: '[If] EU competition law would preferably serve efficiency more than other goals, then Article 102 interpreted from an ordoliberal viewpoint would not be an appropriate tool since that approach is not grounded in efficiency.'

therefore, does not prohibit inefficient conduct, but conduct that restricts competition by exclusionary strategies. The prohibition of such strategies indirectly protects consumers by protecting workable competition.

Modern welfare economists tend to disregard the link between market participants' freedom of choice and allocative efficiency as a result of competition as rivalry; they rather believe that quantitative analysis of producers' conduct allows us to directly determine what is efficient or not. This optimism is shared neither by ordoliberals nor by the CJEU. They feel rather reassured by Richard Posner who once said that '[e]fficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further'.[61] If allocative efficiency means satisfaction of consumers' preferences, then we have to recognize that consumers' preferences must be revealed by market transactions based on consumers' choice.[62] There is no way to directly measure allocative efficiency, let alone dynamic efficiency. What is measurable, though, is productive efficiency, but here we should be reminded of what Robert Bork once said:

> Economists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured.[63]

The bottom line is that we simply cannot translate all qualitative criteria into quantitative criteria. To determine whether a dominant firm has abused its market power to the detriment of competition and consumer choice, will – in spite of the increasing relevance of econometric studies for the application of competition rules – remain a normative issue that requires not only an assessment of facts but judgement.

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[61] R Posner, *Antitrust Law* (2nd edn, Chicago and London: The University of Chicago Press 2001) 29.

[62] P Akman, *supra* n 60, p 57, correctly states that this concept of efficiency is fundamentally different from the traditional neoclassical welfare economic understanding of efficiency; however, the emphasis that Article 101(3) TFEU places on 'residual competition' (as a safeguard for the passing on of productive efficiencies to the consumers) provides the normative basis for this concept which cannot therefore easily be substituted by a different (equally normative) concept that would be incompatible with Article 101(3) as well as with Article 102 TFEU.

[63] R Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books Publishers 1978) 127.

1.5 THE PROPER ROLE OF FAIRNESS

Another misunderstanding has led some authors to believe that ordoliberal thinking puts much emphasis on fairness (especially towards competitors) rather than on efficiency, and hence protects competitors rather than competition.[64] In order to support this view, Pinar Akman relies on just one primary source, namely the 'Ordo Manifesto' published in 1936 by the original members of the Freiburg School,[65] as well as on a comment made by a panelist, who has likened EU competition law to 'unfair competition law', due to an alleged element of 'moral righteousness' in its enforcement.[66] The manifesto of 1936 is, however, totally inconclusive in this respect; it rather emphasizes the importance of drawing a line between 'free competition' protected by laws against restraints of competition (ie practices restricting market participants' freedom to compete and consumers' freedom to choose) and 'fair competition', protected by laws against unfair competition (ie unfair trade practices). This position has always been stressed by ordoliberals who have also always warned that rules against unfair competition may restrict free competition and may, therefore, even undermine the rules for the protection of free competition.[67] Hence, there are no moral overtones in the enforcement of Article 102 TFEU,[68] especially none that could be attributed to ordoliberal thinking, and the panelist's comment that asserted the contrary is simply polemic.

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[64] M Gal, *supra* n 43; C Ahlborn and AJ Padilla, *supra* n 2, 60 and 64 *et seq*; see also R O'Donoghue and J Padilla, *supra* n 44, 839; P Akman, *supra* n 60, 151 *et seq*.

[65] See for the wording of the relevant paragraph P Akman, *supra* n 60, 151. An English translation of the manifesto was published in AT Peacock and H Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Basingstoke: Palgrave Macmillan 1989) 15–26.

[66] IS Forrester, Panel Discussion 5 in CD Ehlermann and LL Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Oxford: Hart Publishing 1998), 321–48, 326 (quoted from P Akman, *supra* n 60, 152, n 29).

[67] See for an in-depth analysis in the context of German law EJ Mestmäcker, *Der verwaltete Wettbewerb* [Administrated Competition] (Tübingen: Mohr Siebeck 1984) 78 *et seq*.

[68] P Akman, *supra* n 60, 153, seems to support this view but then, strangely enough, turns it around and uses it as proof of her allegation that Article 86 EEC (now Article 102 TFEU) was not envisaged as an ordoliberal rule (because had it been otherwise, so the implicit argument goes, fairness would in fact have been an element of the abuse concept).

As has already been mentioned in a different context above, the conclusion that ordoliberals are preoccupied with fairness has also been derived from their emphasis on the protection of individual economic freedom of action as a value in itself against impairment by market power. This is also a misunderstanding, because ordoliberalism protects individual economic freedom not because the attribution of freedom to individuals is held to be fair, but because it is the foundation of a system of competition based on the rule of law. The fact that fairness does in fact play a role in Article 102 TFEU to the extent that an abuse may be found, if a dominant firm imposes unfair prices or trading conditions, needs to be put into perspective. As has been mentioned above already, this part of Article 102 TFEU has practically fallen into 'benign neglect' and the control of exceptionally 'excessive prices' was accepted in the negotiations on the drafting of the Rome Treaty by the German (ordoliberal) representatives only as an unavoidable concession to the French position that favoured price controls on a much broader scale.[69]

1.6 CONCLUSION

The notion of 'abuse' of a dominant position has from the very beginning been interpreted by the CJEU in light of the purpose of Article 102 TFEU to protect the residual competition that may still be left where the market is dominated by one or more undertakings. This in essence structural approach has been and still is informed by ordoliberal thinking. Without giving up their core concept of competition as a dynamic process of interaction between choice making individuals (producers and consumers), ordoliberals have over time distanced themselves in certain respects from the initial 'Freiburg School', but they have never abandoned their basic conviction that the goal of competition law is the protection of market participants' freedom of choice within the framework of the prevailing market structure. At the same time, ordoliberals have always been open to integrate new economic insights to the extent necessary, helpful and compatible with their fundamental convictions. This applies in particular to the 'as efficient competitor' test which may be helpful in order to identify abusive pricing strategies, so as to avoid the protection of less efficient competitors instead of protecting the survival of the competitive process as such.

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[69] See H Schweitzer, *supra* n 4, 136 *et seq*.