Searching for the Long-Lost Soul of Article 82EC

by

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Abstract: This paper examines the travaux préparatoires (preparatory documents) of Article 82EC which have so far been disregarded in the literature in order to find out the legislative intent of the provision. The legislative intent is important for understanding what Article 82EC currently is and aims at since its objectives have never been set out clearly by Community institutions. By using the travaux préparatoires the paper seeks to defy the common position that Article 82EC is based on ‘ordoliberal’ foundations. It shows that the drafters of Article 82EC were mainly concerned with increasing ‘efficiency’ and were not against accumulation of power per se. They did not intend to protect the competitors of dominant undertakings, but merely their customers. Thus, the provision was intended to apply to only ‘exploitative’ abuses and not ‘exclusionary’ abuses. Their main worry being ‘increasing the size of the pie’, their position on the objective of Article 82EC was closer to what one might today call ‘total welfare’ than ‘consumer welfare’.

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A Introduction

The aim of any legal provision would inevitably be influenced or even determined by the philosophy of its drafters as this would effect its legislative intent. The widely held view on Article 82EC is that it is based on ‘ordoliberal’ foundations.\(^1\) Moreover, the problems that bring about the need to modernise it are usually – albeit implicitly – linked to ‘ordoliberalism’ conveying the idea that the ordoliberal framework of Article 82EC is actually what stands between the provision and its economics-based application. This has implications for the objective and the welfare standard of Article 82EC since ‘ordoliberal ideas clash with the views held by proponents of the consumer welfare approach.’\(^2\)

The finding that Article 82EC was strongly influenced by ordoliberalism is hardly ever reached by examining the direct source of the controversy, namely the drafting process of the provision. It is usually attained by referring to the historical context, the people involved and the decisions of the Commission and/or the Community Courts after the Treaty’s signature.\(^3\) Indeed, one prominent author who has written most extensively on the subject has not had the chance to investigate the official records of the drafting of the Treaty of Rome since they had not been made public at the time.\(^4\) Other authors argue that surprisingly, the origins of the wording of Article 82EC and what its drafters intended to mean are not well documented.\(^5\) Thus, this paper seeks to draw attention to the travaux préparatoires (preparatory works) of the competition rules of the Treaty of Rome to prove that Article 82EC was not


\(^3\) See for example Gormsen (n 1); Gerber (n 1). See Gerber (n 1) 263 where the influence of ordoliberalism at the European level is explained by reference to the people that were involved in the process of unification.

\(^4\) See Gerber (n 1) 343.

envisioned as an ordoliberal rule at its inception. Admittedly, the ECJ has 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. Nonetheless, the legislative intent matters greatly when there is uncertainty as to the aim or scope of a provision and the precise objectives of Article 82EC have never been articulated in any formal Community document or decision. Whereas the legislative intent behind the antitrust laws has been studied by many authors in the US and has led to fierce discussions, a similar discussion is almost non-existent in the EC. Therefore, this paper will explore the travaux préparatoires seeking for the legislative intent behind Article 82EC.

The findings of the paper are manifold. First, one consideration has influenced the drafting of Article 82EC so much that it is incorrect to characterise Article 82EC as ‘ordoliberal’. This concern was ‘efficiency’ and specifically ‘productive efficiency’. Although it has been suggested in the literature that efficiency played a notably marginal role in Europe, unlike the US, and Europeans have not generally received well the idea of seeing antitrust as a tool for efficiency, this paper will argue that efficiency played a very important role for the drafters of Article 82EC. Therefore, Article 82EC differs significantly

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7 For the latter point see O’Donoghue and Padilla (n 5) 4.
10 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 ed 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 1) 16.
11 Gerber (n 1) 420; similarly Cseres (n 1) 248.
from what would have been a truly ordoliberal provision. Second, this paper seeks to show that 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, indicating that the drafters were not against 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 paper: the drafters intended to prohibit merely ‘exploitative’ abuses by dominant undertakings and not ‘exclusionary’ abuses. Their main worry was not the effects on competitors of the dominant undertakings, but the effects on their customers.

Finally, it must be pointed out that this is not an historical exercise just for the sake of it, but is rather an attempt to understand what the objective and the welfare standard of Article 82EC is. This paper is limited to the inquiry of what it was that the ‘founding fathers’ had in mind when they envisaged Article 82EC. Most importantly, it questions whether it was ‘consumer welfare’ which is at the centre of all the current discussions as the guiding principle.

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12 ‘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. On the other hand, ‘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* (Oxford University Press New York 1999) 146.

13 One common definition of ‘consumer welfare’ is as the ‘consumer surplus’ which is the aggregate measure of the surplus of all consumers. The surplus of a given consumer is the difference between his/her valuation of a good and the price he/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* (Cambridge University Press 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 his/her trade, business or profession when entering into a transaction.

14 See for example European Commission *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (Brussels, 2005) [4], [54] and Report by the Economic Advisory Group (EAGCP) for Competition Policy ‘An Economic Approach to Article 82’ (2005) 2. There is no single definition of the concept of ‘consumer welfare’. It has been argued that the consumer welfare model asserts that the pre-eminent goal of antitrust should be to prevent increases in consumer prices due to the exercise of
The answer to this question can provide guidance to the current application of the provision since the concerns of the drafters more than fifty years ago seem to be still valid, especially as regards the issue of efficiency. This paper finds that the drafters’ position was closer to what one might today call ‘total welfare’, rather than ‘consumer welfare’: They were mostly worried about ‘increasing the size of the pie’.

A word of caution. Although the Treaty of Rome was 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 negotiations of the competition rules and more generally the common market 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.16

This article is organised as follows. Section B examines ordoliberalism and ordoliberal competition policy to provide a basis for the comparison with the position of the drafters of the Treaty of Rome. Section C provides the highlights of the history of the competition rules from the Messina Conference to the signing of the Treaty. It also studies the discussions concerning the draft proposal of Regulation 1717 and early Commission interpretation as these are important for understanding how the rules were perceived shortly after their implementation.
after their adoption. Section D then elaborates on the implications of the findings for Article 82EC. Section E concludes.

B 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.18 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 Treaty of Rome.19 As such, the concept of prohibiting 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.20

Competition policy of ordoliberalism focuses on the legitimisation of ‘economic freedom’ in order to prevent this freedom from destroying its own prerequisites.21 The actual goal of competition policy for ordoliberals 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.22 Economic efficiency as a generic term for growth, encouragement and development of technical progress and for allocative efficiency is but an indirect and derived goal; it results generally from the realisation of individual freedom of action in a market system. Although ordoliberals all accept the market economy as indispensable for a modern free society, as regards the reason for this, they

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19 Gerber (n 1) 264. See also Gormsen (n 1) 10.
20 Gerber (n 1) 264.
21 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.
22 Möschel (n 21) 146.
would have a bias in favour of the expression of freedom that the market provides, even if this were demonstrably less efficient.\textsuperscript{23}

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.\textsuperscript{24} If there is competition on the supply side, as well as on the demand side and if the economic planning of both sides is based on such competition, then the market form of complete competition is achieved.\textsuperscript{25} Two indicators suggested by Eucken to understand whether complete competition exists on a market were: first, that the price is not forced upon the market by way of a market strategy, but taken from the market and second, that certain measures would indicate that complete competition does not exist as they cannot be implemented under complete competition (e.g. obstructions to purchasers or suppliers dealing with competitors, loyalty rebates, predatory pricing, etc).

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.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{23} H Willgerodt and A Peacock ‘German Liberalism and Economic Revival’ in A Peacock and H Willgerodt (eds) \textit{Germany’s Social Market Economy: Origins and Evolution} (Macmillan London 1989) 6-7.
\item \textsuperscript{24} DJ Gerber ‘Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe’ (1994) 42 American Journal of Comparative Law 25, 43; Ahlborn and Grave (n 2) 200. For an explanation of the use of the term ‘complete competition’ and not ‘perfect competition’, see Gerber (n 1) 245 n 52.
\item \textsuperscript{26} Ahlborn and Grave (n 2) 200. The authors also refer to another ordoliberal, Möschel, in this context who has noted that: ‘the scholars of ordoliberalism have also used economic models for the description of their ideas, for instance, the model of perfect competition as it was developed in the traditional theory of competition. Such models, however, served only for the description of general effects of a market system, illustrating them in what might be called a chemically pure form. That did not imply, however, that those partly unreal premises were to be integrated as goals into practical competition policy. Any attempts to disprove or ridicule the ordoliberal concepts of competition as unrealistic miss the point.’ Möschel (n 21) 146.
\end{itemize}
As for monopolies, the ordoliberal view was that they should be prohibited because their very existence distorted the competitive order.\(^{27}\) 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.\(^{28}\) Competition law had to provide a means of requiring that firms divest themselves of components of their operations or otherwise eliminate their monopoly situations.\(^{29}\) Competition law would ‘enforce’ competition by creating and maintaining the conditions under which it would flourish.\(^{30}\) The model of ‘complete competition’ provided the substantive standards 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.\(^{31}\) This broad conception of economic power has been argued to distinguish German and EC competition law from that of the US.\(^{32}\) 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 was highly controversial.\(^{33}\)

The ordoliberal approach to monopolies deserves more elaboration. According to Eucken, ‘avoidable monopolies’ were to be broken up and ‘unavoidable monopolies’ were to be regulated.\(^{34}\) The basic principle for this regulation was the as if standard which meant that the bearers of economic power behave as if they were subject to competition, i.e. as if they did not have such power.\(^{35}\) In practice, this would mean that every form of ‘impediment competition’\(^{36}\) by embargos, loyalty rebates, predatory pricing,
etc is prohibited.\textsuperscript{37} Moreover, Eucken argued that under complete competition the same prices become established for the same goods and services.\textsuperscript{38} However, 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.\textsuperscript{39} 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. From these remarks, it becomes clear that Eucken’s ‘complete competition’ was indeed ‘perfect competition’.

For the purposes of this study, a couple of points must be made: First, efficiency was not high on the list of ordoliberals; it was not an \textit{aim}, but rather an expected \textit{result} of competition. 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’\textsuperscript{40} competition. Since the ideal was ‘perfect’ competition, on markets where competition was not perfect (e.g. markets with monopolies), the state had to actively intervene to establish a market order of ‘ordered regulated competition’, as only state interventions in the market could remove

\textsuperscript{37} Eucken (n 25) 242.
\textsuperscript{38} Eucken (n 25) 243.
\textsuperscript{40} 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 10) 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) 20 American Economic Review 241; SH Sosnick ‘A Critique of Concepts of Workable Competition’ (1958) 72 Quarterly Journal of Economics 380.
market disruptions and maintain the general societal interest. These points raise two questions as regards Article 82EC: what was the significance of efficiency for the drafters of the competition rules of the Treaty? Further, if the drafters were as 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 will demonstrate the crucial differences between Article 82EC and ordoliberalism which is left for Section D. Fourthly, for ordoliberals, ‘a duty to deal’ or ‘obligation to contract’ had to be introduced for monopolists in order to achieve a result analogous to competition within the context of the as if standard. As will be seen below, some remarks in the travaux préparatoires demonstrate that this idea was not totally shared by the German drafters of Article 82EC. 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. However, as will be seen 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 rivals.

It must be made clear that if Article 82EC is ordoliberal in its foundations, then it becomes questionable whether its original objective can be the maximisation 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 directly upon wealth maximisation, in Richard Posner’s constrained utilitarianism or Oliver Williamson’s trade-off and transaction costs approach, as well as property-rights doctrines, are (as far as these can be traced to the Kaldor-Hicks criterion) incompatible with the ordoliberal system of values. This is because ordoliberalism treats individuals as ends in

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42 Eucken (n 25) 237, 243.
43 See text around n 77.
44 Gerber (n 1) 307.
45 See text around n 130.
46 Möschel (n 21) 149.
themselves and not as the means of another’s welfare.\textsuperscript{47} This would imply that no one’s welfare could be preferred over or sacrificed for anyone else’s welfare. Moreover, another ordoliberal, 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.\textsuperscript{48} 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’.\textsuperscript{49} However, it is not that clear what ordoliberals’ general opinion of welfare maximisation was since Böhm – one of the founders of the School – has actually emphasised that consumer interests are the sole directly justifiable economic interests and that the essential function of competition is to ‘place the entrepreneur’s pursuit of profit in the direct service of the consumer’.\textsuperscript{50}

Although especially Lutz’s view confuses one to the extent that it does not seem in total conformity with the hostility of ordoliberals towards monopolies – demonstrated by specifically Eucken’s previous statements – this may mean that ordoliberals were not completely unified in their approach towards monopolies and/or that their opinions evolved over time. It has indeed been pointed out in the literature that ordoliberal teachings do not constitute a completely standardised product; ‘disagreement on matters of detail is common and that on more important questions is not rare’.\textsuperscript{51} The diversity of views among ordoliberals has actually been interpreted as proof of them being ‘liberal’.\textsuperscript{52} However, this creates another problem for associating Article 82EC

\textsuperscript{47} Möschel (n 21) 149.
\textsuperscript{49} Lutz (n 48) 162. According to Lutz, under certain circumstances, a policy to combat monopolies is not necessary; ibid 163.
\textsuperscript{51} HM Oliver Jr ‘German Neoliberalism’ (1960) 74 (1) 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 \textit{Zur Missbrauchsaufsicht über Preise marktbeherrschender Unternehmen} (Peter Lang Frankfurt 1981) 181-2.
\textsuperscript{52} Witkowski (n 51) 159.
with ordoliberalism: Ordoliberal authors did not always share the same view on everything, including monopolies. In any case, it has rightly been argued that since pursuing ‘economic freedom’ does not always coincide with consumer welfare, a competition policy that protects economic freedom may in certain circumstances lead to consumer harm.\(^{53}\) It is possible that ordoliberals were against monopolies and for all of those against the monopolies which would include not only the competitors and customers of the monopolies, but also consumers. As such, they may have failed to realise 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 – perhaps apart from Lutz - 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’.\(^{54}\) 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.\(^{55}\) This ‘race run in parallel’ clearly demonstrates the ordoliberals’ concern with not harming ‘competitors’ which is another reason why one might find ordoliberalism conflicts with ‘consumer welfare’ since harming rivals may in certain circumstances result in benefits to consumers, for example, in the form of low prices.

C The Highlights of the History of the Competition Rules in the Treaty of Rome


The Messina Conference was the first step taken to widen the scope of the European integration which had been initiated with the founding of the

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\(^{53}\) Ahlborn and Grave (n 2) 214.

\(^{54}\) Eucken (n 25) 228.

\(^{55}\) Eucken (n 25) 229.
European Coal and Steel Community. The conference of the Foreign Ministers of the six founding states in Messina between 1 and 2 June 1955 resulted in the Messina declaration according to which the formation of a common European market without customs and without quantitative restrictions was the aim of the Six in the realm of economic policy. They considered that this market had to be realised 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, especially for the elimination of all forms of nationality-based discrimination’ was counted. Hence, the protection of competition was given primary importance from the early days of action.

After Messina and another conference in Noordwijk, the Foreign Ministers of the Six held another meeting in Brussels between 11 and 12 February 1956. The minutes of this conference include an exposé by Paul-Henri Spaak and a discussion of the findings of the Intergovernmental Committee which was appointed at the Messina Conference to prepare the future conferences and draft the treaties. 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 which the rival countries that already possess a large market availed themselves of. As such, it is striking that from early on, the drafters of the 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’.

56 Although the competition rules of the ECSC Treaty provided a precedent for the Treaty of Rome, there are important differences between the rules, especially with regard to their scope since the former were applicable to only the coal and steel industry. On the competition rules of the ECSC Treaty in general see Gerber (n 1) 335-342.

57 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.

58 According to the Messina declaration, the Intergovernmental Committee 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, specialised Working Groups were formed to conduct the drafting of the provisions.

2. The ‘Spaak Report’
   
a. 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.\(^\text{60}\) According to one commentator, the ‘Spaak Report’ is a seminal document and the most important of the various *travaux préparatoires* upon which the subsequent Treaty of Rome is based.\(^\text{61}\)

The first sentence of the foreword of the Spaak Report explains the situation of Europe very clearly:

> While on the one hand the United States, in almost every sector, are producing one-half of the world’s goods, and on the other the Communist countries, numbering a third of the world population, are increasing their production annually by ten or fifteen per cent, Europe, which once had a monopoly in the manufacturing industries and could count on its overseas possessions for considerable resources, now finds its external position weakening, its influence declining and its capacity for progress diminished by internal divisions.\(^\text{62}\)

The concerns that ultimately led to the need for integration and creation of the European Communities becomes even more obvious as the Report goes on:

> The expansion which has undoubtedly taken place in the last few years leaves no room for complacency. It is largely due to the rapid adoption of production techniques which until recently could not, owing to circumstances be developed in Europe. In its present economic state, Europe cannot maintain this rate of expansion by its own resources. … [S]triking examples could be quoted of the effect of the division of European markets seen in relation to the potentialities of the modern world. There is not a single motor-car factory in Europe large enough to use on an economic basis the most powerful American machine-tools. No country in continental Europe can build heavy transport aircraft without outside help.\(^\text{63}\)

\(^\text{60}\) Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers (‘Spaak Report’) 21\(^\text{st}\) 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.


\(^\text{62}\) Spaak Report (n 60) 5.

\(^\text{63}\) Spaak Report (n 60) 5.
Although none of these paragraphs concerns competition policy, they are nonetheless very important as they set the scene for what is to follow and demonstrate clearly why the Six are there apart from the obvious aim of avoiding war: they are there because more than ten years after the Second World War, Europe’s economy is still falling behind that of the United States and USSR, and no country in Europe is able to compete on its own.

The authors of the Spaak Report seem also to be aware that the creation of the common market alone will not solve all the problems. It is realised that in the economic conditions of the time, broader markets and more open competition will not alone suffice to ensure the most rational distribution of activities and the optimum rate of economic expansion. It is therefore desirable to consider what steps should be taken to ensure that the merging of the markets will lead to the most rational distribution of activity, a general raising of the standard of living and a more rapid rate of expansion. The policy for the common market – which surely included competition rules – is 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, i.e. ‘raising the standard of living’ with ‘consumer welfare’ as it may as well refer to ‘total welfare’ to include the welfare of producers as well. This will be discussed further in Section D.

b. The Common Market and the Goal of Efficiency

According to the Spaak Report, the purpose of a European common market is to create a large area committed to 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 living standards and the development of harmonious relations between its component states. To achieve these aims, the markets should be merged since in this way, by more extensive division of labour, it will be possible to avoid wasteful use of resources and, by greater certainty of supplies, do away with production at

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64 Spaak Report (n 60) 10.
65 Spaak Report (n 60) 43.
66 Spaak Report (n 60) 8.
uneconomic costs. More importantly, advantages in competition will less and less be determined by ‘natural conditions’. The common market will give full play to the efficiency of management and men; the pooling of resources will ensure equality of opportunity.

As is obvious from the emphasised parts of 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 costs. Moreover, the pooling of resources was expected to ensure equality of opportunity. As such, 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 costs (i.e. productive inefficiency), and the solution envisaged was increased efficiency. Furthermore, it was realised that in many sectors of the industry, national markets did not allow firms to develop to their optimum size unless they enjoyed a virtual monopoly. 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 permit the use of the most advanced production techniques could be created. Put in economic terms, this shows the concern of the drafters with the national firms’ not being able to reach the minimum efficient scale of production.

Moreover, it is explicitly stated in the Report that

\[\text{In a wider market, it will no longer be possible to maintain outmoded methods of production with their twofold effects of high prices and low wages; commercial concerns, instead of remaining static will have to pursue a go-ahead investment policy in order to step up production, improve quality and modernise their methods; they must make progress or fail.}\]

Thus, not only were the drafters concerned about the productive inefficiency of the commercial concerns of the time for their consequences of high prices and low wages, they were also aware of ‘dynamic efficiency’ and its requirements. This points out that first, the reason the concerns were

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67 Spaak Report (n 60) 8.
68 Spaak Report (n 60) 8.
69 Spaak Report (n 60) 8.
condemned was 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 Sherman Act, monopolies were not condemned for the extortionate profits they earned at the expense of consumers or for stealing consumers’ wealth. This could be because if their production costs were so high as to cause productive inefficiency, then they might not have been making extortionate profits since 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 be on monopolies which were productively efficient but did not pass on the efficiency benefits to the consumers. This will be returned to in Section D.

Third, although there is mention of high prices which can be taken as a reference to ‘allocative inefficiency’, since this is expressed as a result of high production costs, it is not evident that the problem with monopolies was perceived as output restriction and the resulting deadweight loss. The general problem with monopolies in the Spaak Report appears to be 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 ‘a just as strong interest in the monopoly as the entrepreneur’ and possibly agreeing to higher prices so long as wages were increased. Thus, ordoliberals did not see the interests of consumers to be identical or always in conformity with the interests of workers.

c. Problem of Monopolies

Directly related to the purposes of this study, the Spaak Report contains a section on the problem of monopolies. In this section, attention is firstly paid to discrimination and it is suggested that action against discrimination would have to be included in the measures taken to preclude the creation of

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70 See Lande (n 8) 88, 93, 94 and Bork (n 8) 11.
71 Eucken (n 25) 240.
monopolies within the market.\textsuperscript{72} The Treaty should contain general provisions ensuring that monopoly positions or abusive practices do not lead to frustration of the common market. In this connection steps should be taken to prevent: any distribution of markets by agreement among enterprises, since this would be tantamount to setting up cartels; agreements to restrict production or limit technical progress, since such agreements would run counter to efforts to bring about greater productivity; 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.\textsuperscript{73}

Some points in this last paragraph are worth elaborating on further. Apart from the clear 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 \textit{creation} of monopolies and \textit{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.\textsuperscript{74} From these expressions, at first glance, one can deduce that the recommendation was actually the prohibition of \textit{domination} of a market \textit{per se}. Such an approach is much closer to that of ordoliberalism and the Sherman Act (which prohibits monopolisation) than a provision merely prohibiting ‘abuse’ of a dominant position. However, in the same section on monopolies, concerning discrimination, it is stated that after the complete removal of obstacles to trade at the final stage of the transition period, discrimination will be possible only where supply undertakings enjoy a position of monopoly on account of their size, their specialisation or the agreements concluded by them.\textsuperscript{75} From this statement, one can infer that the authors of the Report envisaged the creation of monopoly situations and allowed for it since if they actually meant to

\textsuperscript{72} Spaak Report (n 60) 44.
\textsuperscript{73} Spaak Report (n 60) 45.
\textsuperscript{74} 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 \textit{agreements} between enterprises that restrict competition and not the practices of monopolies.
\textsuperscript{75} Spaak Report (n 60) 44.
prohibit the domination of the market, then they would not have needed to also prohibit certain conduct (i.e. discrimination) by a monopolist.

Moreover, the Report recognised that competition was not a sphere in which general solutions can be laid down from the outset for all cases likely to arise.\(^76\) 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 ordoliberal suggestion mentioned above and some subsequent Community Court decisions.\(^77\) All in all, it is not clear 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 tension surrounding the competition rules which were to be subject to fierce negotiations in the following stages.

d. ‘Fair’ Competition

The Spaak Report also refers to ‘fair competition’: ensuring that commercial undertakings observe the rules of fair competition is one of the practical measures necessary for the establishment and operation of the common market.\(^78\) Moreover, as one of the guiding principles it is argued that in the interests of producers themselves and in order to afford them the necessary security, there must 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; i.e. the opposite of ‘unfair competition’ which was already regulated in, for example, Germany at the time and thus may be seen as the reflection of

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\(^76\) Spaak Report (n 60) 46.

\(^77\) See text around n 42. 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.

\(^78\) Spaak Report (n 60) 17.
ordoliberalism. Alternatively, it can be interpreted within the context of the preceding paragraphs and their emphasis on ‘efficiency’. As such, ‘fair competition’ can be understood as competition based on the efficiency of undertakings. What is valid in both cases is that this ‘fair competition’ is deemed necessary in the interests of producers themselves to afford them the necessary security. It is clear that producers in this sense would include any producer, including monopolies, and it obviously does not include consumers. Moreover, what is meant by necessary security here is most probably security from being disadvantaged by government intervention in favour of national companies. This is because the recommendation of this paragraph is 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.79 Indeed, later in the Report it is explicitly stated that

[one of the essential guarantees which must be given to enterprises is that there will be no unfair competition as a result of artificial advantages being given to their competitors. Any assistance given by governments must therefore be very closely examined … As a general rule, whatever form assistance may take, it will be incompatible with a common market if it is prejudicial to fair competition and the distribution of activity by favouring particular enterprises or branches of production.80]

Thus, it is not at all evident from the statements in the Spaak Report that ‘fair competition’ means competition conducted in fairness to ‘competitors’. It is more likely that it merely refers to undertakings not being disadvantaged in competition due to certain advantages given to their competitors by their governments. Hence, the main concern was state aid by governments which could hamper competition.

3. Drafting of the Competition Rules

After the Spaak Report, the drafting process of the competition rules was subject to fierce negotiations with numerous different versions of the

79 See Spaak Report (n 60) 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 fulfillment 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.’

80 Spaak Report (n 60) 46-7.
provisions going back and forth between delegations. 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.81

In the first draft of the competition rules (after the Spaak Report) 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 can be affected, incompatible with the common market are:
1. the differential treatment of sellers or buyers who stand in competition with one another, in the arrangement of prices or conditions for similar transactions due to 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 situation 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.82

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 the abuse of it appears to have arisen as well. Thus, the prohibition of a dominant position per se rather than its abuse has been the subject of the prohibition during negotiations at the beginning, but subsequently rejected.

81 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 detail in this study as it is out of scope.

82 Regierungskonferenz für den Gemeinsamen Markt und Euratom Brüssel, den 7. Juli 1956 Mar. Com. 4 (rev) Entwurf von Artikelen 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 study since they relate to the procedure concerning the application of the provision.
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.\(^83\) Thus, the French version of the article was found to be incompatible with the common market: all cartels, monopolies and abusive practices which have the object of hindering competition can have this result.\(^84\) 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 a meeting of The Common Market Group on 7 September 1956, the draft of the competition provisions was further discussed. In this discussion, Alfred Müller-Armack (who was a professor of economics, founder of the term ‘social market economy’ and associated with the Freiburg School)\(^85\) representing Germany drew the attention of the Group to the fact that a too detailed and too rigid regulation of the mode of competition could have the consequence of removing any competition.\(^86\) Accordingly, competition itself was not the consequence of a very complicated legal discipline nor could it only be

\(^83\) 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.


\(^85\) 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.

\(^86\) 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 summarised 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.
assured by law. On the contrary, the most immediate and direct source of competition lay in a very vast market. On the issue of monopolies, Müller-Armack went even further: after declaring that it was necessary to distinguish well between monopolies and oligopolies on one side and cartels on the other, he argued that monopolies and oligopolies were not necessarily incompatible with a system of competition.\textsuperscript{87} What it was necessary to remove were not the monopolies in themselves, but the abuses to which certain monopolistic situations could lead.\textsuperscript{88} 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’.

Hence, it was indeed an – apparently – ordoliberal German who fought against the prohibition of domination \textit{per se} and proposed that merely \textit{abuse} be prohibited. He did not argue for 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 – Donnedieu de Vabres – replied to Müller-Armack that it was inconceivable for him to separate the system relating to the monopolies from that relating to cartels. In any event, he noted that he was ready to study the solution under consideration by the German delegation as soon as he knew their notion of ‘abuse’.\textsuperscript{89}

A synoptic table of the draft articles found in the \textit{travaux préparatoires} clearly shows the positions of the delegations: the French and the Belgo-Dutch drafts treat the agreements and monopolies on the same foot.\textsuperscript{90} Whereas the French draft bans both in principle, the Belgo-Dutch text subjects both to the control of abuse. On the contrary, the German draft envisages the prohibition of agreements and subjects the monopolies to the control of abuse.

\textsuperscript{87} Mémento interne (n 86) 4.
\textsuperscript{88} Mémento interne (n 86) 5.
\textsuperscript{89} Mémento interne (n 86) 5.
\textsuperscript{90} Conférence Intergouvernementale pour le Marché 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.
This matter was further elaborated on in a later Note which was proposed by the President of the Common Market Group – namely, Hans von der Groeben who was arguably another follower of ordoliberalism - to underlie the second reading of the articles.\textsuperscript{91} According to the Note, the abusive use of a market dominating position is 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.\textsuperscript{92} Moreover, there are factual differences between cartels and monopolies for which allowance must be made during the formulation of the relevant rules. For example, cartels have the quality to restrict or prevent competition and are to be prohibited due to these effects to the extent that those effects occur or are aimed at. On the contrary, with monopolies, competition that could be distorted or eliminated exists the less, the more complete the monopoly in question is. Therefore, with monopolies, not the distortion of competition, but only the abuse of the market dominating position can be prohibited. Furthermore, the abusive use of a market dominating position by cartels can take forms, such as the partition of supply and sales markets, which do not come into question in the case of monopolies. Finally, the sanction of voidness for the transactions resulting from the market dominating positions should be stipulated only for cartel agreements. Therefore, it is suggested that concerning monopolies, only the abusive use of the market dominating position and not its emergence can be the subject of a sanction applicable in all cases.\textsuperscript{93} From a suggestion of von der Groeben it is understood that an ‘undertaking in a dominant position’ means an undertaking that is not exposed to any or any substantial competition in the whole or a substantial part of the common market.\textsuperscript{94} Thus, the lack of competition due to the existence of a


\textsuperscript{92} Mar.Com. 88 (n 91) 4.

\textsuperscript{93} Mar.Com. 88 (n 91) 4-5.

\textsuperscript{94} Mar.Com. 88 (n 91) 7.
dominant undertaking was accepted by the drafters, unlike the ECJ’s later holding in *Continental Can*.\textsuperscript{95}

Perhaps most importantly for the purposes of this study, the Note of von der Groeben goes on to the issues of exclusion and ‘unfair competition’. It states that

\begin{quote}
[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.\textsuperscript{96}
\end{quote}

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 out of the market; it was not intended to cover ‘exclusionary abuses’. At least, this was not to be done with 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 common market 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.

\textsuperscript{95} 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(f)EC [now 3(1)(g)] 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.

\textsuperscript{96} Mar.Com. 88 (n 91) 5.
Until the signature of the Treaty of Rome on 25 March 1957, several more 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.

At the signature of the Treaty, the Foreign Minister of France, Christian Pineau states clearly the intention of the Six in his speech:

At the moment, in which we get ready to sign these two Treaties, however, no 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.\(^{97}\)

Thus, the wish to increase production capacity is not directed at maintaining or providing Europe’s self-sufficiency; they do not want to close themselves vis-à-vis the rest of the World by increasing their production capacity. What ‘production capacity’ refers to in this sense is indeed the ‘ability’ to produce that the merging of the markets will provide, rather than the size of the production facilities. This is also the interpretation in conformity 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 efficient minimum scale.\(^{98}\) The markets had to be merged since, in that way, it would be possible to avoid wasteful use of resources and do away with production at uneconomic costs.\(^{99}\) As such, Pineau’s statement confirms that the concerns expressed in the Spaak Report reflected the main intentions of the Six in the drafting process to follow. Therefore, if there is one objective which has survived through the negotiations without any change, it is the aim for efficiency.

4. The First Signs of Struggle: Proposal for Regulation 17

\(^{97}\) Rede des Aussenministers Frankreichs, seiner Exzellenz Herrn Pineau, anlässlich der Unterzeichnung 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) (MAE 871 d/57 l0/hn).

\(^{98}\) See text around n 63 and n 68.

\(^{99}\) See text around n 66.
Although the legislative history ends with the finalisation of the Treaty, this section will examine some documents from the subsequent period since the political figures are largely the same as those who drafted the provisions. As such, they provide 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 Foreign Ministers of the Six on 29 November 1960 are noteworthy. The conference was held by the Ministers of the Member States responsible for competition issues in order to discuss the contents of the proposal of the Commission for the first implementation Regulation on Articles 81 and 82EC (then 85 and 86) which later became to be known as Regulation 17.

The remarks of van der Schueren (Belgium) are specifically 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 expresses his concern that this would mean that the existent cartels could stay in the dark for a period of three years. According to him, it is to be feared that they flinch from conducting any business during this period of time which – especially in the area of investments – is connected to formidable costs. Such immobility is not desirable and could under circumstances protract adjustments and specialisations necessary within the scope of the Common Market.

The comments of van der Schueren clearly show that the main concern was investments and specialisations which can be coined as ‘dynamic efficiency’. That this view is not limited to just one Member State is later on demonstrated by van Alphen de Veer (Netherlands) as he states that the dominant view in

100 Entwurf eines Protokolls über die Ministertagung am 29. November 1960 in Luxemburg (Erster Teil) [R/1220 d/60 (Teil I) mue/us].
101 Ministertagung am 29. November 1960 (Teil I) (n 100) 8-9.
his country that there exist also good or at least acceptable cartels is shared in different countries of the Community except for some nuances.\textsuperscript{102}

However, in this context, van der Schueren’s argument meets with opposition of Müller-Armack as the latter asserts that if the former’s proposal\textsuperscript{103} is followed, then the Community would, at least at the beginning, control only abusive practices.\textsuperscript{104} Such a method would contradict Article 81EC which prohibits all cartels apart from the exemption in Article 81(3)EC. Moreover, Müller-Armack recognises that although one must proceed step-by-step, ‘one cannot emanate from such a foundation as shaky as abuse’. This last statement is striking as it is a German claimed to be associated with ordoliberalism who has actually suggested that the provision on dominant position prohibits ‘abuse’ finds the concept too ‘shaky’ a foundation for the rule on cartels.

Nonetheless, the positive attitude towards cartels and dominant companies is apparent in the statements of other Foreign Ministers as well. One example is Elvinger (Luxembourg) who argues that since the competition rules take considerable space in the Treaty in whose drafters’ minds it was clear enough that each integration movement inevitably results in mergers under single undertakings, their effects should be watched over insofar as they are proved to run contrary to the common interest.\textsuperscript{105} The agreements should not be condemned as such since the borderline between good and harmful agreements is certainly not very clear in all cases.\textsuperscript{106} Interestingly, Elvinger quotes in this context the opinion of Schumpeter that giant companies eventually become the most powerful drive for progress, especially for the long-term expansion of production. A dynamic and realistic conception is to

\textsuperscript{102} Ministertagung am 29. November 1960 (Teil I) (n 100) 29.
\textsuperscript{103} Van der Schueren proposes the following: ‘Assuming that Article 85 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 85 (3) could be used by the cartels which would like an authorisation 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 authorization, Ministertagung am 29. November 1960 (Teil I) (n 100) 9.
\textsuperscript{104} Ministertagung am 29. November 1960 (Teil I) (n 100) 12.
\textsuperscript{105} Ministertagung am 29. November 1960 (Teil I) (n 100) 13.
\textsuperscript{106} Ministertagung am 29. November 1960 (Teil I) (n 100) 14.
be set against the static view of unimpeded competition.\textsuperscript{107} From these remarks, it is clear that there was awareness of ‘dynamic competition’ and in competition economics in the first years of application of the rules.

The issue of ‘fair competition’ is also brought up at this conference as van Alphen de Veer points out that according to the Dutch government, in the system of the order of economic life which is identified after individual undertakings through production and prevails in the States of the Community, free competition must be given a pre-eminent place with which a higher life standard can be reached.\textsuperscript{108} However, according to him, this free competition could lead to or be used as a means to a situation that is not desired from a moral and economic standpoint. Therefore, uncontrolled competition is not compatible with a modern economic policy. He further states that certain stipulations targeted on competition restrictions have also been accepted in the United States in the form of ‘fair trade laws’.

In van Alphen de Veer’s statements, one observes – as far as the author has tracked – for the first time the view that competition can be restricted for purposes of ‘fairness’ and moral values. What is striking is that this is done by reference to the US 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 have influenced the early formulations of EC competition policy more than it has been acknowledged. One reason for the reference to the US when it comes to ‘unfair competition’ may be because of the fact that although ordoliberals did care for the fairness of competition, they did not actually offer specific solutions as to how this can be reconciled with free competition. This tension can be seen in the arguments of the prominent authors of the Freiburg School:

\begin{quote}
[f]ree 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 competition, whether
\end{quote}

\textsuperscript{107} Ministertagung am 29. November 1960 (Teil I) (n 100) 15.
\textsuperscript{108} Ministertagung am 29. November 1960 (Teil I) (n 100) 29.
competition is restricted, whether competition is efficient or obstructive, whether or not price-cutting contradicts the principle of the system – all these issues 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 in this respect still leaves much to be desired, is clearly essential.\textsuperscript{109}

Perhaps most important for the purposes of this study are the views of von der Groeben who was not only the chief drafter of the rules of the Treaty concerning the Common Market, but also the first Commissioner of the European Commission responsible for competition policy. During the discussions of the draft Regulation von der Groeben clarifies the two principles that guided the Commission in the preparation of the Regulation: the loyalty to the Treaty and to the execution of the Treaty’s terms, as well as the desire to accomplish an actually workable competition policy.\textsuperscript{110} Faced with the criticism that the proposed Regulation – which was originally intended to apply only to Article 81EC – does not strike the correct balance between Articles 81 and 82EC, von der Groeben counters by arguing that if this equilibrium appears insufficient to some Governments, then the question to be asked is 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 argues that it would not be possible to proceed against a dominant position with punitive proceedings as long as no sufficiently detailed rules were laid for the conduct of market dominating positions.\textsuperscript{111} This last argument clearly demonstrates that even at the early stages and 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 as ‘dead letter’.\textsuperscript{112}

\textsuperscript{110} Ministertagung am 29. November 1960 (Teil I) (n 100) 31.
\textsuperscript{111} Ministertagung am 29. November 1960 (Teil I) (n 100) 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.
\textsuperscript{112} See I Samkalden and IE Druker ‘Legal Problems Relating to Article 86 of the Rome Treaty’ (1966) 3 CMLR 158, 162.
Müller-Armack, similar to von der Groeben, reminds the conference of the multiple difficulties that were provoked in the German legislation related to the concern to counteract the abuse of a dominant position. According to him, the use of the national law in Germany led to very humble achievements and ‘herein arises the infirmity of the abuse concept’. Moreover, he explains that he does not believe that the experience gained in Germany gives him the possibility 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 seem to have been mostly prominent in drafting the rule do not seem to appreciate it at all. Thus, this begs the question of why the Treaty ended up having an ‘abuse’ prohibition if the concept was infirm and shaky even to its founders. The seemingly plausible answer is that the ‘abuse’ prohibition was offered to be able 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. Moreover, the abuse prohibition was actually more pro-business and less freedom-restrictive than the only other alternative, namely the outright prohibition of dominant positions. From this, one can infer that – at least under the winning argument during the negotiations – the existence of powerful undertakings were seen as necessary for expanding production and gaining the strength to compete with the rest of the world and the prohibition of merely the ‘abuse’ of such powerful positions was deemed sufficient.

5. Early Commission Interpretation

In a speech before the European Parliament, von der Groeben elaborates on competition policy as part of the economic policy which throws light on the

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113 Entwurf eines Protokolls über die Ministertagung am 29. November 1960 in Luxemburg (Teil II) [R/1220 d/60 (Teil II) las/bs] 46.
114 Ministertagung am 29. November 1960 (Teil II) (n 113) 46.
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 explains that for the undertakings, it is a matter of matching the growing internal and international competition: ‘they accept competition as the source of our wealth as well as the guarantor of their economic freedom’.\(^{115}\) Still, the undertakings demand that competition is conducted fairly, that it is not distorted artificially by state aid, by differential taxation and by different commercial laws; in short, they demand that equality of opportunity is established and ensured. According to the Commissioner, especially ample is the concern with the superiority of financially strong large undertakings from third countries and therefore, in many cases, merging into larger undertakings are considered as the requirement of the hour and the abolishment of all artificial constraints for mergers is required.\(^{116}\) The Commission is of the view that these concerns of the trade are justified; they boil down to the establishment of a system of undistorted competition, with whose help at the same time the living and employment conditions of the population shall be advanced. The basic duty of the Community thus consists in accomplishing such an economic order that optimally advances wealth and economic freedom, and thereby also serves the consumer.

Von der Groeben argues that such an economic order does not arise automatically, but rather only through the legal order and embodiment of competition that is characterised by a number of rules and attitudes.\(^{117}\) Competition policy thus does not mean provoking a fight left to one’s own resources against all, but rather the laying and realisation of legal rules to enable ‘workable competition’ and to protect undertakings from unfair competition. According to the Commissioner, this is because only this type of competition has the wealth and freedom increasing effects on which the

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\(^{116}\) Von der Groeben (n 115) 4.

\(^{117}\) Von der Groeben (n 115) 4.
success of the market economy rests. Competition policy is therefore general economic policy and is not to be separated from it. Moreover, the distortions of competition impair the competitive positions of the disadvantaged, they cradle the beneficiaries in deceptive safety; they lead to dependence on the state and infringe the basic principles of equal treatment, fairness and reward of real commercial performance.\footnote{118}

Furthermore, von der Groeben points out that it depends first and foremost on the entrepreneurs themselves, whether competition can deploy their productive powers for the benefit of all market participants and the collectivity, and whether commercial opportunities that the market economy offers them will be realised.\footnote{119} Incumbent upon the Commission and the organs of the Community are merely to foster this dynamic process in the Common Market and to make sure that its fruits benefit all people. Accordingly, even mergers are desired, so long as they are economically necessary – which the Commissioner defines as ‘increasing productivity’ – since such augmentations of economic performance power boosts simultaneously the competitiveness and the resistance of the merged undertakings at the European and international level.\footnote{120} The following passage from this speech demonstrates the policy of the Commissioner clearly:

\begin{quote}
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.\footnote{121}
\end{quote}

According to the Commissioner, ‘workable competition’ means practically active, effective competition.\footnote{122} Therefore, it is especially essential that the entry to the concerned market stays open, that the movement of supply and demand reflects itself in price, that production and sales are not artificially

\footnote{118} Von der Groeben (n 115) 5.
\footnote{119} Von der Groeben (n 115) 10.
\footnote{120} Von der Groeben (n 115) 13.
\footnote{121} Von der Groeben (n 115) 18-9.
\footnote{122} Von der Groeben (n 115) 19.
restricted and the freedom of action and freedom of choice of suppliers, buyers and consumers is not challenged. Moreover, competition policy is 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.\textsuperscript{123} Furthermore, competition provides a basis for a division of income and fortune commensurate with social justice that must be completed with an effective social and income policy.\textsuperscript{124}

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 realisation 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 this is competition ‘policy’ as opposed to ‘law’. In other words, this is how the Commission interpreted and applied the competition rules 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 is not a truly ordoliberal provision. The tone of these remarks by von der Groeben is also quite different from those during the negotiations of the competition rules and the discussion of the Draft Regulation 17. The latter shows a stance much more pro-business than the former which must also carry the experience of the first couple of years.

Furthermore, some of von der Groeben’s remarks, such as that competition policy is not an aim in itself, is not actually ordoliberal either since for ordoliberals competition was an aim in itself.\textsuperscript{125} In von der Groeben’s speech, there is constant reference to productivity and increasing productivity, along with fairness and economic freedom. It is noteworthy that the monopolisation that he seems to oppose is one which may be ‘employed to obtain private commercial advantages, without the need for reducing costs or increasing

\textsuperscript{123} Von der Groeben (n 115) 20-21.
\textsuperscript{124} Von der Groeben (n 115) 21.
\textsuperscript{125} Cseres (n 1) 103.
performances’. The concern with productive efficiency is again obvious. Thus, it is not clear what the position of the Commissioner would be against, for example, a merger leading to a dominant position which would reduce the costs of the merging undertakings and increase their productive efficiency, but simultaneously lead to increased prices. What is clear is that the Commissioner sees mergers as ‘the requirement of the hour’ and unlike most ordoliberals is not against accumulation of power per se.

Another point worth mentioning is that although the freedom of choice of the consumer is seen as an inherent part of the competition policy and one of the aims, distributional concerns are not necessarily perceived in the same manner. In other words, competition is assumed to provide a basis for a division of income and fortune commensurate with social justice which must be completed with an effective social and income policy. Hence, competition itself is not expected to automatically result in or bring about this division or redistribution of income.

D Implications for Article 82EC

The foregoing discussions of ordoliberalism, the travaux préparatoires and the early application of the competition rules of the Treaty of Rome by the Commission have several implications for understanding what Article 82EC currently is and aims at. The most basic but crucial point to be emphasised 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, and efficiency was of utmost importance for both prosperity at home and competitiveness abroad. As far as this author understands, the drafters had no intention of preventing 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

\[126\] See text to n 121.
to increase Europe’s wealth and improve her place in the world economy.\textsuperscript{127} The positive attitude towards mergers also shows that the accumulation of power was not perceived to be \textit{per se} harmful.

This signifies the most important difference between the intentions behind Article 82EC and ordoliberalism: whereas efficiency was only a derived \textit{result} of competition for ordoliberals, it was an \textit{aim} for those who drafted the competition rules of the Treaty of Rome. Article 82EC departs from ordoliberalism in a significant way by not prohibiting a dominant position itself, but only its abuse. A truly 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 cannot be divested. This is because for ordoliberals, conduct control becomes an option only when it is not possible to eliminate the dominant position itself.\textsuperscript{128} The drafters of Article 82EC definitely had the chance to contemplate an outright ban of dominant positions. Indeed, this was actually proposed by the French delegation during the negotiations. Nonetheless, as seen from the abovementioned discussions,\textsuperscript{129} it was rejected by the German delegation supposedly influenced by ordoliberalism.

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\textsuperscript{130} where he elaborates on exclusion of rivals and finds that exclusionary practices actually strengthen competition, rather than distort it – so long as they do not constitute ‘unfair competition’. What is striking here

\textsuperscript{127} 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 6) 121.

\textsuperscript{128} Gerber (n 1) 252.

\textsuperscript{129} See text around n 83.

\textsuperscript{130} See text to n 96.
is that the drafters did not perceive harming rivals as synonymous with 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 for ‘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 had intended the provision to prohibit merely the exploitation of those that dealt with the dominant undertakings. The texts of Article 82EC in French and German also support this view.\(^{131}\)

This explains why at the early years of implementation there was a dispute about whether Article 82EC applied to only exploitative abuses or included exclusionary abuses as well. For example, Joliet (later a judge of the ECJ) was of the view that it merely covered exploitative abuses; under the abuse theory applicable to Article 82EC – unlike the Sherman Act – the test of legality is not the interference with other firms’ freedom to compete and the use of ‘exclusionary’ practices to achieve and hold power, but rather whether there is monopolistic exploitation of the market.\(^{132}\) Joliet reached this conclusion by studying the examples listed in Article 82EC and finding that the main preoccupation of the Treaty is not the maintenance of a competitive system.\(^{133}\) According to him, large size was considered as an economic necessity, the basic assumption underlying Article 82EC being that monopolistic structure does not inevitably lead to monopolistic performance. The reason why monopoly power as such was not condemned is because the Treaty assumed that this power would not be systematically utilised. Joliet noted that

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\text{if Article 86 [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.}^{134}\]

\(^{131}\) In the French and German texts, Article 82EC prohibits ‘abusive exploitation’ (‘...d’exploiter de façon abusive...’ and ‘...missbräuchliche Ausnutzung...’ respectively).


\(^{133}\) Joliet (n 132) 131.

\(^{134}\) Joliet (n 132) 252.
Although Joliet does not refer to the *travaux préparatoires* of the Treaty, the documents this author has been able to find seem to be in conformity with his viewpoint. Thus, the ECJ judgment in *Continental Can* holding that Article 82EC applies to not only exploitative practices, but also exclusionary practices which strengthen the dominant position on the market, appears to have been contrary to the intention of the drafters.\(^{135}\) It was indeed ‘the apotheosis of the teleological method’.\(^{136}\)

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 provision that finally came out is almost counterintuitive. This is because Article 82EC prohibits abuse in the ‘exploitation’ sense of the word, and that is not only the most difficult to apply of the two types of abuse, but also the most intrusive one as regards the dominant undertaking’s business practices since it gives the Commission leeway to set the terms of trade for the undertaking. Joliet has also emphasised 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 fact in the possibility of more administrative regulation which, to an American mind, might appear more antagonistic to as system of free enterprise than the Sherman Act.\(^{137}\)

It is still puzzling to this author why Article 82EC was couched in such vague terms even though Müller-Armack finds abuse too ‘shaky’ a foundation and an infirm concept\(^{138}\) whilst von der Groeben does not see it possible to

\(^{135}\) *Continental Can* (n 95) [26]: ‘… As may further be seen from letters (c) and (d) of Article 86 (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 (f) 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.’

\(^{136}\) Gerber (n 6) 116.

\(^{137}\) Joliet (n 132) 133.

\(^{138}\) See text around n 104 and n 114.
impose fines on dominant undertakings under Article 82EC as long as no sufficiently detailed rules were laid for their conduct. Perhaps the answer lies somewhere amongst the thousands of documents of 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 abusive use of power. What stands out from the travaux préparatoires is that there is constant mention of ‘raising the living standards’ of the people of the Community. However, this does not necessarily refer to the concept of ‘consumer welfare’ in the technical and economic sense of the term. This is because ‘raising the living standards’ of people does not seem to have been used as a term of art during the negotiations. It was used as a general term to state the obvious aim of enhancing the living conditions of all people in the Community. In that context, ‘people’ meant everyone in the Community and it did not specifically refer to ‘consumers’ in the technical sense of the term. Indeed, when the drafters used the term ‘consumer’, they did not actually mean ‘consumer’, but rather meant ‘customer’. Therefore, it can as well 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 fifty-first 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, the discussions concerning the prospective competition rules of the Treaty do not contain such remarks. Monopolies were mainly condemned for their inefficiency and specifically their productive inefficiency, rather than allocative. The drafters perhaps expected that

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139 See above n 13 for definition of ‘consumer’.

140 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 (MAE 460 d/56 eg) 13-14; Exposé der Praesidenten (n 59) 31; Entwurf des Protokolls der Konferenz der Aussenminister der Mitgliedstaaten der E.G.K.S. Venedig, den 29. und 30. Mai 1956 (MAE 126 d/56 der/ip) 9.

141 See Lande (n 8) 88, 93, 94.
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, their position seems to be closer to a total welfare standard than a consumer welfare standard. The fact that the Treaty originally did not have a provision on consumer protection also supports this position.

What is guiding is that distributive concerns did not seem to be included in competition rules. Competition rules were not discussed with an eye for their distributive results. 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. As such, competition was to provide the basis for division of income which was to be complemented with an effective social and income policy. This perspective also finds support in Müller-Armack’s ‘social market economy’ albeit expressed elsewhere than the travaux préparatoires. According to Müller-Armack – who has been obviously prominent in the formulation of the competition rules of the Treaty – in a social market economy, efforts are made to achieve social progress by means of measures which are ‘in conformity with the market’. By this it is meant measures which safeguard social welfare without interfering with the working of the market. Accordingly, income creation in the free market system provides a solid basis for the redistribution of income by the state. Income redistribution is brought about through welfare benefits, equalisation of pensions and compensation payments, housing grants, subsidies, etc. Indeed, Müller-Armack sees the justification of competition as a constant increase in productivity. According to him, the aim had to be to establish a market economy tempered by social safeguards which are consistent with

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142 See text around 124.
144 Müller-Armack (n 144) 84.
145 Müller-Armack (n 144) 85.
free-market principles. Rather than distort economic interrelationships by fixing prices and injecting purchasing power, it was deemed better to adjust undesirable disparities in incomes via a clearly defined income tax system.\textsuperscript{146}

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. Aim of the competition rules was not perceived in terms of preventing wealth transfers from consumers to producers, but in terms of increasing the productivity and efficiency of the producers. This may also explain why the \textit{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 indeed pass these benefits to consumers albeit in the form of welfare benefits, subsidies, etc.

\textbf{E Conclusion}

No legal provision can be properly 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 Courts and the Commission to the provision or the necessity of adapting the rule to the new conditions. This paper has merely tried to fit Article 82EC into the context to which it belongs to see what it actually \textit{is}. Whilst doing this, the view that Article 82EC is ordoliberal in its foundations becomes critical since that puts the norm in a certain context. Contrary to the prevailing view in the literature, the paper has sought to demonstrate that Article 82EC was not envisaged as an ordoliberal norm for several important reasons. The fact that

it does not prohibit the dominant position itself and the prevailing concern with efficiency throughout the negotiations are the most important reasons for this. Moreover, this paper 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 implementation and application of the provision by the EC Commission and Courts that has been influenced by ordoliberalism and that can be criticised for protecting competitors, but elaboration on this is beyond this paper’s scope. It is indeed ironic that the ‘sufficiently detailed rules’ von der Groeben deemed necessary for a proper enforcement of Article 82EC forty-six years ago are still not existent.

What is important for the current application and a possible modernisation of Article 82EC is that efficiency is already embedded in Article 82EC. Thus, it would be a very late recognition if the application of the provision now considered the efficiency effects of allegedly abusive conduct. That efficiency was of utmost importance for the founding fathers is in total conformity with the context of the provision’s adoption, as the whole purpose of having a common market was to expand the capacity of Europe’s economy, and efficient businesses that can 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 – another arguably follower of ordoliberalism – who was the first president of the Commission, as he states that ‘[e]very businessman today is aware of the fact that real competition based on efficiency is one of the basic aims of the Treaty …’.  

The issue of efficiency brings out the question of what was the ultimate aim of Article 82EC as envisaged by its founders. 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. 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 and whether or not part of those efficiency benefits has to be passed on to consumers. It is possible that either the drafters had presumed that when the issue was the unilateral practice of an undertaking, these benefits would ultimately be passed on, or that increasing efficiency was sufficient while the losses incurred by consumers would be compensated by other policies.

What is also 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 aligned with those of consumers. 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 as the norm itself is capable of being applied in a manner consistent with both consumer and total welfare. What must not be lost sight of is the explicit concern of the drafters which lies underneath the whole idea of the common market and Article 82EC: efficiency. The study of whether or not the provision has so far been applied in a manner consistent with consumer welfare and more importantly, whether the standard for Article 82EC should be consumer welfare, is left for future work.
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