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The Making and Unmaking of Ordoliberal Language

A Digital Conceptual History
of European Competition Law



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Abbreviations

ACDP	Archive for Christian Democratic Politics
AEI	Archive of European Integration
AG	Advocate General
ATJ	Andean Tribunal of Justice
BDI	Federation of German Industries (<i>Bundesverband der Deutschen Industrie</i>)
BDI-Entwurf	BDI Draft Act (<i>Formulierungsvorschläge des Arbeitskreises Kartellgesetz BDI</i>). Source: Böhm papers, ACDP
BER	Block Exemption Regulation
BGB	German Civil Code (<i>Bürgerliches Gesetzbuch</i>)
Böhm 1946	Draft of an Anti-Monopoly Act (<i>Skizze zum Entwurf eines Antimonopolgesetzes</i>), 1946. Source: Eucken papers, Jena
Böhm 1955	Draft Act against Restraints of Competition (<i>Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen</i>), 1955. Source: Verhandlungen des Bundestages
CDU	Christian Democratic Union of Germany
CJEU	Court of Justice (of the European Union)
CML Rev.	Common Market Law Review
DG	Directorate-General of the European Commission
DG IV	Directorate-General for Competition (now: DG COMP)
DH	Digital Humanities
Disc. paper 2005	DG Competition, Discussion paper on the application of Article 82 of the Treaty to exclusionary abuse (Brussels, Dec. 2005)
DMA	Digital Markets Act
Draft Notice 2002	Commission, Draft Commission Notice on Appraisal of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, OJ C 331/03 (31.12.2002), pp. 18–31
EAGCP	Economic Advisory Group on Competition Policy
EC	European Community
EC Merger Reg.	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22
ECB	European Central Bank

ECSC	European Coal and Steel Community
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
EPG	European Political Community
EU	European Union
FAZ	Frankfurter Allgemeine Zeitung
Follow-up 1998	Commission, Follow-up to Green Paper on Vertical Restraints: Proposal for a Council Regulation (30.9.1998), COM/98/0544 final
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GC	General Court
GCEE	German Council of Economic Experts (<i>Sachverständigenrat</i>)
GewO	German Trade Act (<i>Gewerbeordnung</i>)
GG	Basic Law for the Federal Republic of Germany (<i>Grundgesetz</i>)
Green Paper 1997	Commission, Green Paper on Vertical Restraints in EC Competition Law (22.1.1997), COM(96)721 final
Guidance 2009	Commission, Guidance on the Commission's Enforcement Priorities in applying Article 82 EC Treaty to Abusive Exclu- sionary Conduct by Dominant Undertakings, OJ C 45/02 (24.2.2009), pp. 7–20
Guidelines 2000	Commission, Guidelines on Vertical Restraints, OJ C 291/01 (13.10.2000), pp. 3–44
Guidelines 2001	Commission, Guidelines on the applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ C 3/02 (6.1.2001), pp. 2–30
Guidelines 2004	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31/03 (5.2.2004), 5–18
GWB	Act against Restraints of Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen</i>)
HAEU	The Historical Archives of the European Union
HHI	Herfindahl-Hirshman Index
ILI	International Law Institute
IO	Industrial Organisation
JLE	Journal of Law & Economics
KWIC	Key Word in Context
LDA	Latent Dirichlet Allocation
MEA	More Economic Approach
MEP	Member of the European Parliament
MFW	Most frequent words

ML	Machine Learning
MPS	Mont Pèlerin Society
NCA	National Competition Authority
NIE	New Institutional Economics
NIEO	New International Economic Order
NS	National Socialism
OCR	Optical character recognition
RPM	Resale price maintenance
RRC	Raising Rivals' Costs
SEA	Single European Act
SEPA	Single Euro Payments Area
SME	Small and medium-sized enterprise
SSNIP	Small but significant and non-transitory increase in price
STM	Structural Topic Model
SVM	Support Vector Machine
TEU	Treaty on European Union
Tf-idf	Term frequency-inverse document frequency
TFEU	Treaty on the Functioning of the European Union
TVA	Tennessee Valley Authority
UBC	United Brands Company
US	United States
UWG	Act against Unfair Competition (<i>Gesetz gegen den unlauteren Wettbewerb</i>)
WTO	World Trade Organisation

Popularising ordoliberal concepts in Brussels

‘The concepts we use to think and work emerge from a certain attitude towards things and tasks, they show which problems concern us and how we treat these problems; a consideration of the concepts of a man, a direction, a time must therefore be able to enlighten us about aspirations and achievements, a critique of the concepts must become a critique of the overall content of the conscious intellectual life.’¹

On occasion of the twentieth anniversary of Walter Eucken’s death in March 1970, the journalist Hans Herbert Götz wrote in the *Frankfurter Allgemeine Zeitung* (FAZ), one of Germany’s leading broadsheets, that many domestic academics still considered Eucken to be the ‘most important scientific personality in German economics since the First World War.’ He noted that ‘much of what Eucken thought and demanded has been realised and *his initially purely scientific vocabulary has become part of the everyday language of economic policy*.’² In this remark, made in passing, lies the key to understanding the influence of Eucken’s Freiburg School on European competition law and policy – a controversial question to this day, which the present study aims to clarify by analysing the development of the ‘scientific vocabulary’ and ‘everyday language’ regarding competition through a novel combination of qualitative economic- and legal-historical analysis with quantitative, digital Text Mining methods. Götz himself, never shy in making bold claims, concluded his tribute by noting that the legacy of Eucken’s concept of ordoliberalism was crucial for understanding the competition rules in the European Treaties and their application in

- 1 EUCKEN, *Geschichte und Kritik der Grundbegriffe der Gegenwart*, v. Unless stated otherwise, all translations into English are mine. In ambivalent cases where I want to point out (meaningful or incorrect) translations, I also indicate the German or French original in square brackets. To visually support the distinction between literature and historical sources (incl. newspaper articles and archival documents), references to scholarly publications feature surnames in small capitals (and are listed in the bibliography), while authors of primary sources are provided with full names without small capitals (and are listed separately outside the bibliography).
- 2 Hans-Herbert Götz, *Walter Eucken und die Freiburger Schule*, FAZ (21.3.1970), p. 15 (my emphasis). On the FAZ as *Leitmedium*, see HOERES, *Zeitung für Deutschland*.

the decisions of the European Commission and the judgments of the European Court of Justice (CJEU).³

While this study will come to a more nuanced assessment of the ordoliberal influence on European competition law, Götz's assessment is illustrative of the mechanics behind the transmission of ordoliberal language from Germany to Europe. After receiving a doctorate from Eucken in Freiburg, his teacher had recommended Götz to the FAZ, which he joined in 1949.⁴ In 1963, he became the paper's first correspondent of the Economic Affairs Department to report exclusively on the emerging European Community, a position he kept until 1975. In contrast to Röpke, an ordoliberal economist and social philosopher whose criticism of the Schuman Plan is often taken, *pars pro toto*, as evidence of fundamental ordoliberal scepticism regarding European integration, Götz was a strong supporter of European institutions.⁵ He quickly earned great professional esteem in Brussels and cultivated an intimate relationship with the first President of the European Commission, Walter Hallstein. His assessment that Hallstein's speeches 'relied on helpful aides'⁶ was undoubtedly born out of personal experience, as Götz himself had helped Hallstein write his book *Der unvollendete Bundesstaat* ('The Unfinished Federation'), to which he apparently contributed about 100 of the 250 pages.⁷ As this study will demonstrate, Götz's case is only one example in a broader conceptual and semantic effort by the post-war ordoliberal community to impose an interpretation of the new legal order that was consistent with their distinctive understanding of competition.

While it is unknown whether Walter Eucken read the introduction to his father's *Geschichte und Kritik der Grundbegriffe der Gegenwart* ('History and critique of the basic concepts of the present') cited above,⁸ the intellectual and ultimately political impact of the school of thought which he established in

3 Hans-Herbert Götz, Walter Eucken und die Freiburger Schule, FAZ (21.3.1970), p. 15. Böhm himself stated, in an interview with Götz, that he saw his notion of competition realised in the concept of 'undistorted competition' contained in the EEC Treaty. Hans-Herbert Götz, Architekt der Freiheit, FAZ (15.2.1975), p. BuZ6.

4 JJ., Personalien: Hans Herbert Götz 70, FAZ (29.1.1991), p. 4. For a general assessment of Götz's role in the history of the FAZ, see KUTZNER, Marktwirtschaft schreiben, 214–220.

5 Shortly after his secondment to Brussels, he wrote to Erich Welter, editor-in-chief of the *FAZ für Wirtschaft*: 'Röpke has always been wrong in his assessment of the EEC.' Quoted after: KUTZNER, Marktwirtschaft schreiben, 214.

6 Hans-Herbert Götz, Das aktuelle Buch: "Nein! So nicht! So nicht!"; FAZ (14.5.1979), p. 10.

7 HERZER, Rise of Euro-journalism, 92. Götz noted that Hallstein thought 'pretty much the same way I do.' KUTZNER, Marktwirtschaft schreiben, 215.

8 For their relationship, see DATHE and GOLDSCHMIDT, 'Wie der Vater, so der Sohn?'

interwar Germany can indeed be understood best by tracing the ‘core concepts’⁹ that first-generation ordoliberals developed in order to criticise the ‘normal science’ (Thomas Kuhn) of their time and that subsequent generations of followers like Götz then popularised. Following research on the role of language in economic thought,¹⁰ this study traces the dissemination of ordoliberal concepts such as *vollständiger Wettbewerb* (‘complete competition’), *Leistungswettbewerb* (‘performance-based competition’), and *Wirtschaftsverfassung* (‘economic constitution’) in the negotiations of the Treaties, the accompanying academic debate, and the extensive case law jointly produced by the Commission and the European Courts to describe the changing influence of ordoliberalism on European competition law between c. 1950 and 2020. The qualitative and quantitative evidence suggests that the specific ordoliberal language of Freiburg School members was not only highly relevant for the domestic discourse on competition but – perhaps even more so – for the European competition order that emerged after the end of the war. However, this period of strong ordoliberal language, particularly apparent in the seminal case law of the 1970s and 1980s, eventually ended in the early 2000s, when institutional and ideational changes initiated by the Commission led to a rise in neoliberal concepts and semantics.

Although it is now commonplace that the *ideas* of early ordoliberals provided the theoretical underpinning for Germany’s social market economy, the effect of their *semantic* innovations and distinctive ways of speaking has been forgotten – especially in the transnational sphere.¹¹ Like other academic schools,¹² ordoliberalism is more than joint ideas; it is a social network that shares a common identity and language.¹³ From the outset, ordoliberals positioned

9 Concepts manifest in language but are not equal to words. Core concepts serve as reference points that justify political action. See KOSELLECK and RICHTER, ‘Basic Concepts in History’.

10 See McCLOSKEY, ‘The Rhetoric of Economics’. See also: CALLON, ‘Economics Is Performative’.

11 Gerber suspects that the ‘leading vehicle’ for the European influence of ordoliberalism might have been their ‘new language,’ but does not provide evidence. GERBER, ‘Constitutionalizing the Economy’, 67. Contemporaries noted the success of the specific ordoliberal ‘terminology.’ BEHLKE, *Gestaltung der Wirtschaftsverfassung*, 46.

12 See BECHER and TROWLER, *Academic Tribes and Territories*, 41–57; TIRYAKIN, ‘Bedeutung von Schulen’.

13 Quinn Slobodian’s study of ‘ordo-globalists’ focuses solely on ideas and thus ends up with a rather heterogenous group. By contrast, Janek Wasserman’s account of the Austrian School emphasises the cultural milieu and social gatherings for the development of a joint identity. SLOBODIAN, *Globalists*; WASSERMAN, *The Marginal Revolutionaries*, 17–48, 85–92.

themselves in the ‘current great contest of ideas’¹⁴ by developing a ‘different language.’¹⁵ They worked at a time when philosophers emphasised the role of language, and due to their interdisciplinary interests, ordoliberals were well aware of these philosophical debates.¹⁶ On occasion of the *Colloque Walter Lippmann* – an event that is often described as the ‘birthplace of neoliberalism’¹⁷ – some participants welcomed that the ideas put forward at this event were very different to the ‘technical jargon’ and the ‘arcane detail’ that dominated the economics discipline at the time.¹⁸ They would use this insight into the role of persuasive language when forming their school, which essentially attempted ‘to translate the doctrinal edifice of classical economic philosophy from the language of economics into the language of law,’ as Franz Böhm, a liberal-Protestant lawyer and the group’s spokesman for competition law, expressed it in 1933.¹⁹

As Eucken’s father Rudolf, a philosopher and Nobel laureate for literature, remarked in his *Grundbegriffe*, the language that one uses does not only reflect the problems that one faces and one’s attitude towards them but, in turn, shapes the way one thinks and how one treats these problems. This aligns with modern conceptual history.²⁰ First-generation ordoliberals developed their ideas during a period of domestic crises and worldwide disintegration, as a result of which they ‘tended to think in large terms, to paint their vision of the future with broad strokes, and to *seek a new vocabulary of thought*.’²¹ This ordoliberal language was characterised by a shared set of critical concepts like *Leistungswettbewerb*, *vollständiger Wettbewerb*, and *Wirtschaftsverfassung*, which ordoliberals skilfully embedded in ‘narrative plots,’²² a socialisation in the German mother tongue, specific lessons from past crises, underlying ethical values, and an emotional tone (chapter I). The orientation towards German history and culture reflected the dramatic times in which ordoliberal thought originated: After spending their first academic years with ‘overcoming’ the remaining echoes of the Historical School, which had isolated German economics from the theoretical

14 BIEBRICHER, *Die politische Theorie des Neoliberalismus*, 207.

15 Quoted after: SALA, ‘Methodologische Positionen und soziale Praktiken in der Volkswirtschaftslehre’, 33.

16 See KLUMP and WÖRSDÖRFER, ‘On the Affiliation of Phenomenology and Ordoliberalism’; MIETTINEN, ‘Governing with Ideas’.

17 DENORD, ‘Aux origines du néo-libéralisme en France’, 20.

18 These comments were made with respect to the liberal manifesto of Walter Lippmann, an American journalist and author. SLOBODIAN, *Globalists*, 79.

19 BÖHM, *Wettbewerb und Monopolkampf*, IX.

20 See BUSSE, *Historische Semantik*, 208. See also the literature cited below.

21 GERBER, *Law and Competition*, 239 (my emphasis).

22 TANNER, ‘Ordnung’, 41.

developments taking place elsewhere, the NS period entailed an even more radical, total exclusion of ordoliberalism from the ‘intellectual work being pursued outside our borders,’ as Eucken noted.²³ After the war, their travels and interactions with the broader liberal community revealed their distinctive identity.²⁴

By including ordoliberals into an Atlantic network of ordo-globalists,²⁵ by emphasising their international connections within the Mont Pèlerin Society (MPS) and other associations,²⁶ by placing them in a cross-national tradition of conservative liberalism,²⁷ or by simply subsuming their ideas under an hegemonial US-led project,²⁸ current accounts of neoliberal economic thought seem to have lost sight of this intuitive point of language. By contrast, this study assumes that the Freiburg School’s identity and influence can be modelled best by tracing its distinctive language about *Ordnungspolitik*, the ‘untranslatable soul’²⁹ of ordoliberal thought, which can be regarded as a semantic innovation that enabled the development of a joint intellectual and political agenda. Focusing on semantic group characteristics leads to a broad, inclusive understanding of ordoliberalism,³⁰ which helps to circumvent drawing an exact boundary between members of the Freiburg School and ordoliberals living in other parts of Germany or even Europe;³¹ a contested issue that becomes particularly relevant in the post-war context. As tracing the influence of ordoliberal language also entails reflecting on conceptual transfers, rivalling usages, and simple misunderstandings at the intersection of national, European, and American discourses, this research approach nevertheless fits well with the recent historiographic trend towards more transnational histories of entanglements, normativities, and translations.³²

23 Quoted after: GOLDSCHMIDT and HESSE, ‘Eucken, Hayek and The Road to Serfdom’, 138.

24 See the ‘internal Methodenstreit’ experienced by Friedrich Lutz after his emigration: GRUDEV, ‘Emigration with a Pulled Handbrake’.

25 SLOBODIAN, *Globalists*.

26 MIROWSKI and PLEHWE, eds., *The Road from Mont Pèlerin*. Conceptually similar: SCHULZ-FORBERG, ‘Embedded Early Neoliberalism’.

27 DYSON, *Conservative Liberalism, Ordo-liberalism, and the State*, 241–265.

28 For a critical review of this literature, see GERMANN, *Unwitting Architect*, 6, 53.

29 GERBER, *Law and Competition*, 246.

30 See the ‘broad’ definition by LORCH, *Vom Ordoliberalismus zum substantiellen Liberalismus*, 21.

31 Scholars usually distinguish between the Freiburg School, a ‘sociological wing,’ and the practitioners. See PTAK, *Vom Ordoliberalismus zur sozialen Marktwirtschaft*, 17; KOLEV, *Neoliberale Staatsverständnisse im Vergleich*.

32 See, e.g., the theoretical reflections in: DUVE, ‘Wie schreibt man eine Geschichte der Globalisierung von Recht?’; DUVE, ‘Rechtsgeschichte – Traditionen und Perspektiven’.

This basic conceptual idea behind the present study might be illustrated by Götz's FAZ articles, which convey the typical flavour of ordoliberal language. Economic policy proposals were examined for their *ordnungspolitischen Inhalt* ('regulatory content'),³³ while competition was applauded for its *ordnungstiftende Kraft* (order-creating power).³⁴ The successful new beginning after 1945 was explained with the implementation of ordoliberal policies like the 1948 currency reform³⁵ or the 1957 Competition Act,³⁶ which, in line with the prevailing social market economy narrative, were said to be based on the conceptual work of the Freiburg School.³⁷ Götz participated in the specific ordoliberal 'language game' that soon shaped the economic and legal discourse on the new European competition rules, for instance, by describing the latter as *Spielregeln* ('rules of the game') that one had to abide by.³⁸ Being aware of semantic subtleties, he warned his readers that while many economic concepts were used throughout the world, any 'similarity between words is only apparent.'³⁹ For him, 'competition' was one of these contested concepts.⁴⁰ His own understanding of the latter was based on a regular reading of the ORDO yearbook,⁴¹ an annual flagship publication of the Freiburg School founded in 1948, and on his admiration for Böhm, whose 1933 work *Wettbewerb und*

- 33 Hans-Herbert Götz, Höret die Signale! Gorbatschows Lehren für die DDR, FAZ (9.6.1988), p. 13. See also: Hans-Herbert Götz, Berlin wartet auf den Wahlsonntag. Danach: die Entzugstherapie, FAZ (7.5.1981), p. 9; Hans-Herbert Götz, Berlin braucht einen Neubeginn. Die Kammer und die Wohnungsnot, FAZ (1.4.1981), p. 13.
- 34 Hans-Herbert Götz, Architekt der Freiheit, FAZ (15.2.1975), p. BuZ6.
- 35 Hans-Herbert Götz, Im Vorfeld der sozialen Marktwirtschaft. Erhards wieder-gefundene Denkschrift aus dem Jahre 1943, FAZ (28.1.1977), p. 10.
- 36 Hans-Herbert Götz, Walter Eucken und die Freiburger Schule, FAZ (21.3.1970), p. 15.
- 37 Hans-Herbert Götz, Ein Bekenner im Freiburger Kreis. Erinnerungen an Constantin von Dietze, FAZ (8.8.1991), p. 11; Hans-Herbert Götz, Die Ordnungspolitik ist wichtiger denn je. Anmerkungen zum neuen "verjüngten" Ordo-Jahrbuch, FAZ (31.1976), p. 9; Hans-Herbert Götz, Denken in Ordnungen, FAZ (3.5.1952), p. 5.
- 38 See, e.g., Hans-Herbert Götz, Die Europäer hoffen immer noch, FAZ (16.7.1975), p. 1; Hans-Herbert Götz, Ein Stück Vernunft in dieser Welt, FAZ (3.2.1975), p. 1.
- 39 Hans-Herbert Götz, In der Kaderschmiede der Planungsfunktionäre. Die Hochschule für Ökonomie "Bruno Leuschner", FAZ (23.7.1983), p. 11.
- 40 Hans-Herbert Götz, Höret die Signale! Gorbatschows Lehren für die DDR, FAZ (9.6.1988), p. 13.
- 41 Hans-Herbert Götz, Die Ordnungspolitik ist wichtiger denn je. Anmerkungen zum neuen "verjüngten" Ordo-Jahrbuch, FAZ (31.1976), p. 9; Hans-Herbert Götz, Ordnungspolitik muß modern bleiben, FAZ (1.2.1969), p. 17.

Monopolkampf ('Competition and the Struggle for Monopoly') he praised for its 'new language.'⁴²

For a long time, most scholars would have supported Götz's notion of a strong ordoliberal influence on the European competition order. According to the influential account of US antitrust lawyer David Gerber, German actors like the above-mentioned Commission President Hallstein, Hans von der Groeben, the first Commissioner for Competition, and Alfred Müller-Armack, the German Secretary of State for European Affairs, injected ordoliberal ideas into the DNA of European competition law,⁴³ which formulates a cartel ban (Art. 101 Treaty on the Functioning of the European Union, TFEU, formerly Art. 85 Treaty establishing the European Economic Community, EEC) and prohibits abusing a dominant economic position (Art. 102 TFEU, formerly Art. 86 EEC Treaty).⁴⁴ Over time, Gerber's seminal work has been supported by a stream of papers which detected ordoliberal preferences, among other things, in the legal consideration of broader socio-economic objectives,⁴⁵ in the protection of small and medium-sized enterprises (SMEs),⁴⁶ in the balance between competition infringement and property rights,⁴⁷ in the subordinate role of consumer welfare in merger control,⁴⁸ in the use of the ordoliberal 'as if' principle,⁴⁹ and in the equation of 'abuse' of a dominant position with the restriction of other market operators in early Art. 102 cases.⁵⁰ This ordoliberalism hypothesis has found its way into historical narratives of early European integration, albeit to varying degrees.⁵¹

However, several scholars have questioned the alleged link between ordoliberalism and EU competition law. Some historians still believe that European

42 Hans-Herbert Götz, *Architekt der Freiheit*, FAZ (15.2.1975), p. BuZ6.

43 GERBER, *Law and Competition*; GERBER, 'Constitutionalizing the Economy'.

44 With effect from Dec. 1, 2009, Arts. 81 and 82 EC Treaty (previously: 85 and 86 EEC Treaty) have become Arts. 101 and 102 TFEU. The content has remained identical. In the chapters, I refer to the numbering valid at the time.

45 MONTI, 'Article 81 EC and Public Policy', 1057–1064.

46 WIGGER and NÖLKE, 'Erosion of Rhenish Capitalism', 491 f.

47 GIOCOLI, 'Competition versus Property Rights'.

48 SCHMITZ, 'Question of the Goals of Antitrust Law'.

49 PERA, 'Changing Views of Competition', 147.

50 See FELICE and VATIERO, 'Ordo and European Competition Law'; GORMSEN, 'Conflict Between Economic Freedom and Consumer Welfare'.

51 See HAMBLOCH, *Europäische Integration und Wettbewerbspolitik*; SEIDEL, 'DG IV and the Origins of a Supranational Competition Policy'; SEIDEL, *The Process of Politics in Europe*; WARLOUZET and WITSCHKE, 'Economic Rule of Law'.

competition law imitates US antitrust law.⁵² Laurent Warlouzet argues that ordoliberalism was less decisive in the early application of the respective rules.⁵³ Political economists suspect that any ordoliberal influence has been resisted by other Member States and the lobbying of a transnational capitalist class.⁵⁴ In this spirit, Sigfrido Ramírez and Sebastian van de Scheur argue that *within* the Commission's Competition Directorate, ordoliberal ideas had to compete with a 'Keynesian' discourse that reflected planning and neo-corporatism.⁵⁵ Recent legal research has rejected the ordoliberalism hypothesis as a 'myth,'⁵⁶ arguing that there is little archival evidence of an ordoliberal influence during the Treaty negotiations⁵⁷ but rather a growing influence of the Chicago School.⁵⁸ So far, this debate has not been resolved.⁵⁹ As Stephen Wilks, a professor of politics specialised in competition policy, noted more than a decade ago, 'a comprehensive study of the impact of economic doctrine on European competition enforcement has yet to be written.'⁶⁰

To remedy this gap in the literature, the present study combines an in-depth analysis of the alleged influence of ordoliberalism on the genesis and formulation of European competition law with a similarly detailed examination of the actual relevance and dissemination of ordoliberal language in the competition law decisions of the Commission and the corresponding judgments of the European Courts. Such a dual focus on the 'law in books' and the 'law in action' is necessary, as the effect of legal rules depends largely on how they are applied and interpreted.⁶¹ This diachronic perspective is accompanied by the introduction of previously unconsidered source material and an innovative Text Mining methodology from the field of Digital Humanities, which allows quantifying the prevalence of different economic schools of thought in case law and complements a more traditional conceptual history focused on the overlaps between ordoliberal competition thought and the emerging European conceptualisation of competition. In short, this study provides a quantitative and qualitative re-

52 See, e. g., ABELSHAUSER, *Deutsche Wirtschaftsgeschichte seit 1945*, 234–239.

53 See WARLOUZET, 'The Difficult Quest to Implement Cartel Control'; WARLOUZET, 'The Centralization of EU Competition Policy', 731 ff.

54 See BUCH-HANSEN and WIGGER, *The Politics of European Competition Regulation*.

55 See PÉREZ and SCHEUR, 'The Evolution of the Law on Articles 85 and 86 EEC'.

56 See AKMAN and KASSIM, 'Myths and Myth-Making in the European Union'.

57 See KARAGIANNIS, 'The Origins of European Competition Policy'; AKMAN, 'Searching for the Long-Lost Soul'.

58 See BARTALEVICH, 'The Influence of the Chicago School'.

59 See WARLOUZET, 'Competition at the Service of the Market', 306.

60 WILKS, 'Trajectory of European Competition Enforcement', 435.

61 See VOGENAUER, 'Sources Of Law and Legal Method in Comparative Law', 878 f.

evaluation of Gerber's ordoliberalism hypothesis that focuses attention on changes over time, not only in respect to the developing case law but also regarding the development of competition schools themselves.

This task is significantly complicated by the lack of a concrete, detailed, and dynamic definition of what ordoliberal competition law and policy is actually about, as the recent debate about the potential role of ordoliberalism in handling the Eurozone crisis illustrates.⁶² Following influential opinion-makers, who had criticised the theoretical assumptions behind German leaders' insistence on budget consolidation, structural reforms, and restrictive monetary policy, several academics explained these policy stances with ordoliberal thought having a determining influence over German and European policy.⁶³ Sometimes drawing on highly questionable causal chains,⁶⁴ it is essentially argued that German academics and politicians are 'prisoners' of a rigid ordoliberal belief system that does not accept modern Keynesian tenets and naively prefers legal rules that exclude discretionary actions.⁶⁵ From this perspective, a 'German oddity' in the field of economic and legal thought explains the current 'rule of economics' and austerity in southern EU Member States.⁶⁶

Despite this apparent consensus about the importance of ordoliberalism for German thought, there has been little consensus on what ordoliberalism really is. When discussing the alleged influence of ordoliberal thought on Germany's handling of the Eurozone crisis, the school's name was basically 'expanded into a laundry list of all the issues that Germany's crisis managers are pushing for.'⁶⁷ At least according to modern ordoliberals, this list does not represent what makes ordoliberal thought distinctive.⁶⁸ The notion has been 'overused and under-

62 For an overview, see BIEBRICHER, 'The Return of Ordoliberalism in Europe'. Hien and Joerges note that current 'criticism of ordoliberalism is above all a criticism of German crisis policy.' HIEN and JOERGES, 'Dead Man Walking?', 143.

63 See BLYTH, *Austerity*, 142. A particular focus was on Wolfgang Schäuble, the Germany Finance Minister, who has studied in Freiburg. See, e.g., RAHTZ, 'The Soul of the Eurozone'.

64 See VAN DER WALT, 'When One Religious Extremism Unmasks Another'. For the ordoliberal reply, see DOLD and KRIEGER, 'Ordoliberalism is not Responsible for Jihadist Terrorism in Europe'.

65 BIBOW, 'Germany's Anti-Keynesianism'; BRATSIOTIS and COBHAM, eds., *German Macro: How it's Different and Why that Matters*; DULLIEN and GUÉROT, 'The Long Shadow of Ordoliberalism'. This argument was already made by ALLEN, 'Underdevelopment of Keynesianism'.

66 BECK and KOTZ, eds., *Ordoliberalism: A German Oddity?*; BIEBRICHER and VOGELMANN, eds., *The Birth of Austerity*; HIEN and JOERGES, eds., *Ordoliberalism*.

67 GERMANN, *Unwitting Architect*, 188.

68 FELD, KÖHLER, and NIENTIEDT, 'The German Anti-Keynes?'; DOLD and KRIEGER, 'Use and Abuse of Freiburg's Ordoliberalism'.

theorised⁶⁹ also in general, going beyond current discussions on the Eurozone.⁷⁰ There is even disagreement within the ordoliberal camp itself, as the differing receptions of ordoliberalism by the *Walter-Eucken Institute* and the *Walter-Eucken Archive* or the recent split of the *Netzwerk für Ordnungsökonomik und Sozialphilosophie* from the Hayek Society illustrate.⁷¹ In this way, ordoliberalism has become an ‘essentially contested concept,’ whose normative character, multidimensional nature, and openness to modification generate debate over its meaning and application.⁷² In short, ordoliberalism is a phenomenon which scholars have written about extensively without ever agreeing on a detailed definition that can be operationalised for empirical studies on its conceptual legacy.

This study takes on these definitional challenges not only on the general level of ordoliberalism but also on the sub-level of ordoliberal competition policy. To investigate the latter’s influence on European law, one needs first to establish a definition of ordoliberal competition policy that can later be used as a benchmark for comparison. Such definitions, however, have not been a significant issue for legal scholars. Ryan Stones offers a sobering summary of competition lawyers’ perception of ordoliberalism as follows: ‘Whenever the law is condemned as too interventionist, overly-burdensome, stifling of business efficiency, the pejorative label of “[o]rdoliberal” is commonly found.’⁷³ In their influential 1,200-page volume on EU Competition Law, Alison Jones and Brenda Sufrin devote only about half a page to the background of ordoliberalism.⁷⁴ Drawing strongly on Peter Behrens,⁷⁵ they define ordoliberal competition policy as a list of four elements:⁷⁶

- Competition results from the individual freedom of both producers and consumers.
- Competition is understood as a dynamic system of interaction between choice-making individuals.

69 YOUNG, ‘The Hijacking of German Ordoliberalism’, 11.

70 Typically, scholars do not distinguish between the normative views of the school, its policy advice (*Ordnungspolitik*), and its academic research programme (*Ordnungsökonomik*). See HORN, ‘Ordoliberalism’.

71 For these conflicts, see the discussions by OSWALT, ‘Die falschen Freunde der offenen Gesellschaft’, 95; WASSERMAN, *The Marginal Revolutionaries*, 274–289.

72 Ordoliberalism fulfils Gallie’s criteria of contested concepts. See GALLIE, ‘Essentially Contested Concepts’. Gallie’s framework has been used to explain the different usages of ‘neoliberalism.’ See BOAS and GANS-MORSE, ‘Neoliberalism’.

73 STONES, *EU Competition Law and the Rule of Law*, 67.

74 JONES and SUFRIN, *EU Competition Law*, 25 f.

75 BEHRENS, ‘Ordoliberal Concept of “Abuse” of a Dominant Position’, 6.

76 Summarised statements based on: JONES and SUFRIN, *EU Competition Law*, 26.

- The system of private law is crucial in providing individuals with legal rights.
- It is the task of the state to provide laws against restraints of such competitive rivalry and enforce them as rules of the game.

Even ordoliberalism itself provides a list of ‘basic statements’ that allegedly reflect the ‘Freiburg style of thinking.’⁷⁷ Only a few of these ‘basic statements’ have meaning for competition policy, they are too general to be applied to concrete questions of cartel formation or abuse of dominance, and some are even misleading.⁷⁸

Certainly, the general nature of these lists reflects the fundamental fact that ordoliberalism, like any academic school that encompasses several generations of scholars and their idiosyncratic writings, will tend to develop certain internal contradictions or at least ambivalences over time.⁷⁹ However, there are at least four reasons why the existing definitions of ordoliberal competition policy are unsatisfactory for the present purpose, thereby justifying the in-depth analysis of ordoliberal competition thought conducted in the first part of this study: they lack key normative elements of ordoliberalism that cannot be separated from the school’s position on competition law; they provide no guidance in cases of trade-offs, which invariably arise in concrete competition law cases; they ignore the school’s conceptual evolution, even though the European competition rules only developed after the first generation of ordoliberals had emerged; and they often confuse ordoliberalism with neoliberalism, albeit both strands of liberalism rely on different approaches to competition law. I will deal with these shortcomings in turn.

First, due to their ignorance of the interdisciplinary nature of the ordoliberal project, many definitions lack the main elements of ordoliberal thought stressed by historians and philosophers. For instance, the Jones/Sufrin-definition does not feature the ordoliberal preference for SMEs,⁸⁰ it ignores ordoliberalism’s background in Protestantism and German language,⁸¹ and it lacks the political-

77 GOLDSCHMIDT and WOHLGEMUTH, eds., *Grundtexte zur Freiburger Tradition der Ordnungsökonomik*, 13 f. A similar list consisting of four elements is composed by MÖSCHEL, ‘Competition Policy from an Ordo Point of View’, 142.

78 References to ‘competition as a method of discovery’ (Statement No. 4) suggest a convergence to Austrian thought, and the emphasis on competition ‘in the interests of consumers’ (Statement No. 6) sounds like the consumer welfare approach. GOLDSCHMIDT and WOHLGEMUTH, eds., *Grundtexte zur Freiburger Tradition der Ordnungsökonomik*, 13 f.

79 Ordoliberalism is not a ‘completely standardised product.’ OLIVER, ‘German Neoliberalism’, 117. Similar: WÖRSDÖRFER, *Die normativen und wirtschaftsethischen Grundlagen des Ordoliberalismus*, 305.

80 MONTALBAN, RAMÍREZ-PÉREZ, and SMITH, ‘EU Competition Policy Revisited’, 9.

81 GOLDSCHMIDT, ‘Christlicher Glaube, Wirtschaftstheorie und Praxisbezug. Walter Eucken und die Anlage 4 der Denkschrift des Freiburger Bonhoeffer-Kreises’;

economical dimension that emphasises the role of competition in minimising the adverse effects of special interests. By triggering the ordoliberal fight against any concentrations of power, these arguments constitute crucial features of ordoliberal thought (chapter I). A possible counter-argument might state that applying economic policy such as competition policy is a highly technical, purely legal process that does not require reference to such socio-economic or political aspects.⁸² But there is no *ex-ante* reason why these idealistic, perhaps naïve, but in any case normative ideas should not play a role in competition policy.⁸³ Not least because some accounts of ordoliberalism argue erroneously that the latter is based on a specific form of depoliticisation,⁸⁴ this aspect requires a thorough discussion. In fact, this study argues that the quantification and depoliticisation of modern European competition law, as part of the Commission's 'More Economic Approach,' need to be seen as a substantial deviation from the ordoliberal beginnings of this law (chapter VII).

Second, competition policy is always about trade-offs.⁸⁵ Clarity and coherence in statutory goals are often missing in competition laws, and multi-function agencies are commonplace.⁸⁶ Most notoriously, in European competition law, there are different types of benefits for consumers that may, pursuant to Art. 101(3) TFEU, justify an otherwise prohibited anti-competitive agreement.⁸⁷ Simple bullet-point lists of ordoliberal elements, as cited above, do not provide any hint on the *relative* importance of the listed factors, even if it is assumed for a moment that they are complete and representative of ordoliberal thought. To give an example, applying the list of 'basic statements' devised by the Eucken Institute to a current merger case would lead to insurmountable problems. For instance, would the statement about satisfying 'consumer interests' be the decisive factor, or rather the statement about the relevance of 'competition'? What is thus needed is a method to identify those arguments that are

KRARUP, 'Lutheran Genealogy of Ordoliberalism'; MANOW, 'Ordoliberalismus als ökonomische Ordnungstheologie'; DYSON, 'Conservative Liberalism, Ordo-liberalism, and the State', 210–238.

82 Non-legal reasons are, according to a widely held view in the literature, not relevant for doctrinal work. But see STARK, 'Interdisziplinarität der Rechtsdogmatik'.

83 For the role of normative elements, see ANDRIYCHUK, 'The Normative Foundations of European Competition Law'.

84 See, e.g., BIEBRICHER, 'Neoliberalism and Law'. See also: MÜLLER, 'Furcht und Freiheit', 18.

85 VANBERG, 'Wettbewerbsfreiheit und ökonomische Effizienz', 120, fn. 11.

86 KOVACIC, 'Prioritization, Project Selection, and Competition Agency Effectiveness', 21. See also chapter VIII.

87 For an empirical analysis, see BROOK, 'Struggling with Article 101(3) TFEU'.

representative of ordoliberal thought and determine how essential ordoliberals deem these arguments in relation to each other.

Third, in contrast to the impression given by list-like definitions, ordoliberalism is not a static school of thought. As modern ordoliberals themselves explain, ‘it goes without saying for a living tradition of research that it does not dogmatically defend a definitively completed and unchangeable doctrinal edifice.’⁸⁸ Similarly, Behrens argues that the standard account fails to recognise that ‘the ordoliberal approach has undergone considerable changes over time’ and ignores ‘original sources’ of ordoliberal writers.⁸⁹ While the importance of the internal development of ordoliberalism has repeatedly been noted by scholars, a detailed treatment of the school’s post-war history is still missing.⁹⁰ Accordingly, the first part of this study describes the birth and evolution of ordoliberalism, captures its different generations as accurately as possible in terms of personnel and content, and engages in a longitudinal comparison with the rivalling Chicago School. This temporal dimension is particularly relevant when dealing with competition policy ideas, given the dynamic nature of the discipline and the phenomenon of competition itself.⁹¹

Fourth, ordoliberalism is nowadays usually treated as a sub-category of a broader ‘neoliberal thought collective,’⁹² often with a pejorative overtone and with little regard for a precise understanding of neoliberalism. Contrary to the current usage, the term ‘neo-liberalism’ was coined at the 1938 *Colloque Walter Lippmann* in Paris to signify the break from the previous *laissez-faire* liberal tradition.⁹³ It was in this sense of an intellectual opposition that ordoliberals

88 GOLDSCHMIDT and WOHLGEMUTH, eds., *Grundtexte zur Freiburger Tradition der Ordnungsökonomik*, 13 f.

89 BEHRENS, ‘Ordoliberal Concept of “Abuse” of a Dominant Position’, 6, esp. fn. 2. Similar: IBÁÑEZ COLOMO, *Shaping of EU Competition Law*, 280, fn. 11.

90 Scholarly accounts usually stop in the early post-war years. See PTAK, ‘Neoliberalism in Germany’, 100. Comments on the development of ordoliberalism can be occasionally found in works on German economics post 1945, such as: NÜTZENADEL, *Stunde der Ökonomen*; HESSE, *Wirtschaft als Wissenschaft*. Even when post-war ordoliberalism is explicitly considered, this is typically limited to the ‘first generation.’ See, e.g., RAHTZ, *The Politics of Order*. Helpful reflections on post-war ordoliberalism were recently provided by DYSON, *Conservative Liberalism, Ordo-liberalism, and the State*.

91 For an overview of the disciplinary changes, see KOVACIC and SHAPIRO, ‘Antitrust Policy’.

92 This expression was coined by MIROWSKI and PLEHWE, eds., *The Road from Mont Pelerin*.

93 For the term’s history, see REINHOUDT and AUDIER, *The Walter Lippmann Colloquium*, 4 ff.; SCHULZ-FORBERG, ‘Früher Neoliberalismus oder der letzte Grund’.

themselves initially used the term,⁹⁴ only adopting the expression ‘ordoliberalism’ after establishing the *ORDO* journal.⁹⁵ Even after this internal change of terminology, however, many scholars continued to discuss the writings of the Freiburg School under the notion of neoliberalism,⁹⁶ not least because the alternative ordoliberalism was ‘less widely used and probably unfamiliar to most American readers.’⁹⁷ This might explain why modern scholars often equate ordoliberalism with neoliberalism and assume that there are only differences in emphasis.⁹⁸ In this way, early ordoliberal ideas became increasingly conflated with the more market-radical ideas of Chicago economists and their Austrian School counterparts, who participated in the neoliberal transformation of Western societies that started with the 1973 oil crisis and is often linked with institutions like the MPS, the International Monetary Fund, or the World Bank and with the incumbencies of Ronald Reagan, Margaret Thatcher, and Helmut Kohl.⁹⁹

The intermingling of ordo- and neoliberal ideas affected scholarship on the role of German economists¹⁰⁰ and shaped how competition lawyers thought about the Freiburg School.¹⁰¹ This development is problematic since ordoliberals were not simple free-marketeters.¹⁰² There are essential conceptual differences between German ordoliberalism and American neoliberalism when it

94 See REINHOUDT and AUDIER, *The Walter Lippmann Colloquium*, 26.

95 MÜLLER, *Furcht und Freiheit*, 86.

96 FRIEDRICH, ‘The Political Thought of Neo-Liberalism’.

97 OLIVER, ‘German Neoliberalism’, 117.

98 Ralf Ptak writes that ‘[o]rdoliberalism is substantially less different from other streams of neoliberal thought than many have thought.’ PTAK, ‘Neoliberalism in Germany’, 99. Hans Willgerodt sees ‘only a difference in emphasis.’ WILLGERODT, ‘Der Neoliberalismus – Entstehung, Kampfbegriff und Meinungsstreit’, 55. Lars Gertenbach argues that ordoliberalism must be understood as the ‘epitome’ of neoliberalism’s ‘political rationality.’ GERTENBACH, ‘Economic Order and Political Intervention’, 252.

99 See BACCARO and HOWELL, *Trajectories of Neoliberal Transformation*; BURGIN, *The Great Persuasion*; HARVEY, *A Brief History of Neoliberalism*.

100 See ÖTSCH, PÜHRINGER, and HIRTE, *Netzwerke des Marktes*.

101 Since they often rely on Michel Foucault, who described economic liberalism as a mix of ordoliberalism and the Chicago School. FOUCAULT, *Die Geburt der Biopolitik*, 132. For instance, Kiran Patel and Heike Schweitzer refer to Foucault’s lectures for ‘a reliable characterization of [o]rdoliberalism by an outsider.’ PATEL and SCHWEITZER, ‘Introduction’, 2, fn. 1. Hien and Joerges argue that Foucault identified the legal nature of ordoliberalism ‘very precisely.’ HIEN and JOERGES, ‘Dead Man Walking?’, 144. Foucault overlooked these internal differences since his characterisation of liberalism was heavily influenced by contemporary developments, according to: BEHRENT, ‘Liberalism without Humanism’.

102 PLUMPE, *Das kalte Herz*, 380; MÜLLER, *Furcht und Freiheit*, 33.

comes to the role of the state and the design of competition law.¹⁰³ As Behlke noted in 1961, ‘Eucken’s ORDO idea’ needed to be ‘distinguished from neo-liberalism outside the Freiburg School,’ since it included competition ideas that relied on ‘an institutional safeguarding of economic competition under the responsibility of the state.’¹⁰⁴ It is thus not surprising that early ordoliberals regularly clashed with ‘paleo-liberals’ (Alexander Rüstow) such as Ludwig von Mises, one of the key representatives of the Austrian School, and Friedrich von Hayek, another Austrian economist with close ties to the Chicago School.¹⁰⁵ Moreover, the recent historiography dealing with neoliberalism has been motivated mostly by the global financial crisis of 2008.¹⁰⁶ The search in this literature for the origins and defects of present-day neoliberalism might therefore suffer from a teleological bias that abstracts too much from the internal differences within the liberal camp.¹⁰⁷

The specific differentiation between ordoliberal and neoliberal concepts and semantics alluded to here is not usually employed by scholars investigating the intellectual doctrines behind European competition law¹⁰⁸ and therefore requires explanation. In this study, the term neoliberal is used as an analytical category to distinguish between positions regarding competition law.¹⁰⁹ Crucially, the competition law ideas and semantics of early ordoliberals were thoroughly shaped by the goal of minimising subjection to economic power (chapter I). In contrast, the competing ideas and semantics of the Austrian School and the Chicago School enable a far more lenient competition policy by framing competition either as a mere instrument of discovery that functions best if left alone or as an omnipresent, perfectly working abstract force that rules out any anti-competitive attempts due to the constant striving of companies to maximise profits (chapters III and IV). This distinction between ordoliberal and neoliberal competition policy arguments is thus based on a scale that might change over time. As will be shown, even the ordoliberal school itself shifted along this scale over the post-war period (chapter III). With the orientation on

103 YOUNG, ‘Germany’s and Europe’s Crisis Politics’; KOLEV, *Neoliberale Staatsverständnisse im Vergleich*.

104 BEHLKE, *Gestaltung der Wirtschaftsverfassung*, 16.

105 KOLEV, GOLDSCHMIDT, and HESSE, ‘Walter Eucken’s Role in the Early History of the Mont Pèlerin Society’, 9–21; MÜLLER-ARMACK, *Auf dem Weg nach Europa*, 45.

106 For concise surveys, see STEWART, ‘New Historiography of (Neo)Liberalism’; DAVIES, ‘Neoliberalism’.

107 See the critique of: OFFNER, *Sorting out the Mixed Economy*, 16, 273 f.

108 For example, Milène Wegmann refers to ‘neo- or ordoliberalism.’ WEGMANN, *Der Einfluss des Neoliberalismus*.

109 The classification does not make statements about these strands’ economic policy positions in a more general sense.

this scale come different functions associated with competition, often expressed by the usage of specific competition collocates, i. e. adjectives that accompany the term ‘competition’ (such as ‘perfect competition,’ ‘complete competition,’ or ‘fair competition’); a feature that lends itself to being exploited in a quantitative Text Mining approach (chapter VIII).

Given that there is a lack of theoretical consensus on how to conceptualise it,¹¹⁰ competition can best be understood by defining those functions,¹¹¹ or *efficiencies*, attributed to it by a wide range of authors. The resulting taxonomy can then be used as an ideal-type benchmark for comparisons between different schools of thought and for analysing EU competition law case law. The classic *allocative efficiency* argument compares social welfare under perfect competition with social welfare under monopoly and finds relatively lower output, higher prices, and a ‘deadweight loss’ resulting from the monopoly situation.¹¹² Since the monopoly situation would result in redistribution from consumers to producers, one can also credit the competition process with ensuring *distributional efficiency* for consumers,¹¹³ which has been summarised under the notion of a ‘true’ consumer welfare standard.¹¹⁴ Thirdly, there is a wide range of arguments related to *economic efficiency* that focus on wealth maximisation in the sense of modern welfare theory.¹¹⁵ While these three perspectives have been essentially static, there is also an extensive literature that deals with the effects of competition on innovation under the heading of *dynamic efficiency*.¹¹⁶ Another dynamic argument is that competition law can help avoid *X-inefficiencies*, i. e. the underlying organisational slack that is often ascribed to agent-principal prob-

110 There are many conceptions of competition that have led to ‘various schools of thought and tendencies within them.’ VEIT, ‘Neo-Classical and Austrian Theory of Economic Policy’, 104.

111 BLANKE, SCHERZBERG, and WEGNER, eds., *Dimensionen des Wettbewerbs*, 7.

112 In general, see PEEPERKORN and VEROUDEN, ‘The Economics of Competition’, 9–24; KERBER and SCHWALBE, ‘Economic Principles of Competition Law’; POSNER, *Economic analysis of law*.

113 For recent examples, see Hsu, ‘Antitrust and Inequality’; BAKER and SALOP, ‘Antitrust, Competition Policy, and Inequality’.

114 SALOP, ‘The True Consumer Welfare Standard’.

115 There are different kinds of efficiency criteria on whose basis competition law can pursue wealth maximisation, such as the Pareto criterion or the Kaldor-Hicks-criterion. For an overview, see COLEMAN, *Markets, Morals, and the Law*, 67–94. See also chapter IV.

116 Joseph Schumpeter provides the seminal works on competition and innovation. See VLADOS, ‘Conception of Innovation’. Kenneth Arrow reasoned that monopolists are not as dependent on innovating as firms in a competitive market. SHAPIRO, ‘Competition and Innovation’. Today, it seems that concentration levels below monopoly but higher than perfect competition are best. AGHION et al., ‘Inverted-U Relationship’.

lems within the firm.¹¹⁷ One can also view competition as ‘inherently organic and good,’¹¹⁸ implying that the protection of *competitive efficiency*, or ‘freedom of competition,’ becomes an end in itself, and related arguments typically highlight the role of the entrepreneur.¹¹⁹ Early ordoliberals, as well as modern US authors,¹²⁰ emphasise that the agglomeration of economic power may also have repercussions on the political process by increasing lobbying efforts and biasing policy decisions, which implies that competition can ensure *political efficiency* (chapter I). Finally, a related category for *social efficiency* summarises arguments that posit an inherent relationship between competition and social life.¹²¹

Based on this classification scheme, it is possible to clarify the difference between ordoliberal and neoliberal competition thought, which runs like a thread through the entire study. While early ordoliberals emphasised the *political* and *social efficiency* stemming from competition, neoliberals expound a more narrowly construed perspective based on *economic* and *competitive efficiency*.¹²² Ordoliberal and neoliberal competition thought can thereby be distinguished from both mainstream neoclassical economics, which has dominated the discipline’s post-war development and usually focuses on *allocative* or *dynamic efficiency*, as well as more left-leaning, Keynesian conceptions of competition that zoom in on questions of *distributive efficiency* or argue for its replacement through industrial policy. Tracing how ‘competition’ is conceptualised over time compared to these ideal-type categories allows for an assessment of the proximity of different schools to case law and to detect internal developments of these schools. By pointing to differences *between* strands of liberalism and to changes *within* these schools over time, this study contributes to recent research interested in varieties of neoliberalism in different temporal and spatial contexts.¹²³

117 LEIBENSTEIN, ‘Allocative Efficiency vs. “X-Efficiency”’.

118 STUCKE and EZRACHI, *Competition Overdose*, 144.

119 See CAMPAGNOLO and VIVEL, ‘Theory of Entrepreneurship in Austrian Economics’. For *Wettbewerbsfreiheit*: WEIZSÄCKER, ‘Asymmetrie der Märkte und Wettbewerbsfreiheit’, 237.

120 See PITOFESKY, ‘Political Content of Antitrust’; BAKER, ‘Competition Policy as Political Bargain’.

121 Recent examples for *social efficiency* arguments can be found in: LYNN, *Liberty from All Masters*, 90, 97, 109.

122 Similar: YOUNG, ‘Germany’s and Europe’s Crisis Politics’. Neoliberals, like Richard Posner, typically rely on the Kaldor-Hicks-criterion to promote *economic efficiency* arguments. See AMADAE, *Prisoners of Reason*, 205–223; COLEMAN, *Markets, Morals, and the Law*, 67–150. For a detailed exposition of this argument, see chapters III and IV.

123 See, e. g., OFFNER, *Sorting out the Mixed Economy*; BAN, *Ruling Ideas*; THELEN, *Varieties of Liberalization*.

This methodology can be illustrated using the FAZ articles on economic policy written by Götz. Echoing the opening pages of Eucken’s *Grundsätze*, Götz described the function of competition as ‘reconciling the individual plans’ of households and enterprises in a process that worked ‘more precisely, but also more harshly’ than central economic plans.¹²⁴ But, like Eucken, Götz understood competition not only in this narrow sense of *allocative efficiency* but also more generally as a ‘system that leaves the individual an optimum of freedom’ and is characterised by the absence of ‘exploitation and monopoly profits.’¹²⁵ Fearing ‘massive private interests geared towards market domination,’¹²⁶ he saw competition rules as guaranteeing *political efficiency* in the sense of protecting the emerging European order. As such, competition was said to be at the ‘heart of every market economy’ and, echoing Eucken’s student Leonhard Miksch, a ‘permanent task.’¹²⁷ Götz explicitly reiterated the ordoliberal demand for a free market economy based on ‘genuine performance-based competition’ (*Leistungswettbewerb*).¹²⁸ He used the expression *Leistungswettbewerb* in a normative, specifically German sense that impacted European competition law on Art. 102 TFEU at the time (chapter VI).¹²⁹ Elsewhere, he also alluded to the ordoliberal ‘complete competition’ model,¹³⁰ which equates functioning competition with a multitude of price-taking independent undertakings – and, again, an equivalent understanding of competition can be detected in certain Commission decisions and court judgments on Art. 101 TFEU (chapter VI).

In the introduction to his *Grundbegriffe*, Rudolf Eucken had argued that his proposed analysis of ‘fundamental concepts’ required ‘attention to linguistic expression’ and the specific ‘relationship between content and form of the concepts’, but it also necessitated understanding the concepts ‘according to their

- 124 Hans-Herbert Götz, Systemvergleich als Aufgabe. Ordnungspolitik im Gegensatz zu marxistischem Dogmatismus, FAZ (1.4.1978), p. 15. See also: Hans-Herbert Götz, Agrarpolitik auf falschem Kurs, FAZ (25.1.1975), p. 11.
- 125 Hans-Herbert Götz, Besinnung auf die freie Wirtschaftsordnung. Zu einem Buch der “Ludwig-Erhard-Stiftung”, FAZ (25.4.1981), p. 15.
- 126 Hans-Herbert Götz, Die stillen Europäer. Nützliche Arbeit hinter den Kulissen, FAZ (20.2.1975), p. 11.
- 127 Hans-Herbert Götz, Walter Eucken und die Freiburger Schule, FAZ (21.3.1970), p. 15. For competition as ‘motor of the market economy,’ see Hans-Herbert Götz, Die Axt am Kartellgesetz, FAZ (20.5.1957), p. 11.
- 128 Hans-Herbert Götz, Im Vorfeld der sozialen Marktwirtschaft. Erhards wieder-gefundene Denkschrift aus dem Jahre 1943, FAZ (28.1.1977), p. 10.
- 129 Hans-Herbert Götz, Die Zukunft Großbritanniens. Tagung des Aspen-Instituts Berlin, FAZ (16.11.1976), p. 5.
- 130 Hans-Herbert Götz, Höret die Signale! Gorbatschows Lehren für die DDR, FAZ (9.6.1988), p. 13.