THE CONFLICT BETWEEN ECONOMIC FREEDOM AND CONSUMER WELFARE IN THE MODERNISATION OF ARTICLE 82 EC

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A. INTRODUCTION

The Bundeskartellamt has argued that “the economic freedom model is based on the belief that in the long run both goals [economic freedom and consumer welfare] are not in conflict as safeguarding of a vivid competition process will enhance consumer welfare.” According to the Bundeskartellamt, there is no conflict as both aim at safeguarding a vivid competition process that will enhance consumer welfare. This article does not disagree that both objectives are aiming at protecting a vivid competition process to some extent, or that consumer welfare may be enhanced if the competitive process is protected; but it does argue that the reasons for protecting the competitive process are very different. Economic freedom is understood to be the protection of rivals’ opportunities to access the market and to compete within the market, without being restricted by any other company in order to achieve individual economic freedom. Consumer welfare is explicitly concerned with consumer gain in form of lower prices, high-quality products, a wide selection of goods and services, and innovation. Economic freedom and consumer welfare may not be seen as polar opposites, but the aims of the two objectives are fundamentally different. They are based on different normative values and are pursuing different outcomes. While the two objectives may sometimes coincide, this is not always the case. Economic freedom is a rights-based approach and consumer welfare is a form of

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2 The meaning of economic freedom will be elaborated in section C.


5 Even though they do not necessarily have to be polar opposites to be in conflict.
utilitarianism. Rights have been introduced to protect individuals from the "tyranny of the majority". This article finds that there exists a conflict between the two objectives. This finding does not exclude that the conflict may eventually be resolved in favour of consumer welfare, but the objectives are nevertheless conflicting from the outset.

DG Competition has stated in its Discussion Paper that the main objective of Article 82 is consumer welfare. This statement has made it even more important to acknowledge and solve the conflict, as otherwise Article 82 may not be applied effectively and uniformly by the Member States in the Community. While the Discussion Paper is not an authoritative source, it indicates DG Competition's current thinking on Article 82. This article does not examine which of the two objectives the European Commission or Community Courts (the European Court of Justice (ECJ) and the Court of First Instance (CFI)) should pursue, or whether consumer welfare is the right objective to pursue. It is limited to examining whether the Bundeskartellamt is right in arguing that consumer welfare and economic freedom are not in conflict.

B. THE POTENTIAL CONFLICT

A potential and serious conflict can arise between economic freedom and consumer welfare in at least two situations. First, conflict can arise in protecting effective competition amongst rivals where it does not benefit consumer welfare, for example, by protecting "competitors that are not [yet] as efficient as the dominant company". This may mean that there are more firms in the market and potentially more competition. However, one needs to be careful not to conclude that the larger the number of firms the greater the welfare. If less efficient firms are protected or subsidised, it may prevent market competition from selecting the best firms. By protecting a competitor through the act of curtailing the power of a dominant supplier, the consumer may benefit through increased choice and a reallocation of profits from the dominant supplier to competing suppliers. As these competitors will probably not have the ability to reap monopoly profits, these profits would be expected to be passed back to the consumer through reduced prices. If these effects outweigh the value of any above-cost discount offered by the dominant supplier, consumers would gain from overall price reductions. While the move to protect competitors to the

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6 Supra n 4, para 4.
7 Supra n 4, para 67.
dominant supplier may increase choice and potentially improve allocative efficiency through lower prices, this is not guaranteed; nor is it guaranteed that dynamic movements towards productive and dynamic efficiency will be facilitated best in this way. In some circumstances, it is plausible that the protected market players will become efficient over time. However, it is also possible that the most productive way of supplying customers will be through fewer suppliers, particularly when economies of scale are great. Depending on which of these effects is the greatest, the consumer could then either gain or lose from such measures.

Secondly, an exclusion of some small and medium-sized companies, which lack economies of scale, would not harm consumer welfare if these companies were unable to guarantee consumer welfare in the form of lower prices, better quality and an effective choice. However, it would harm the individual economic freedom of the excluded companies, as they would no longer have access to the market.

By understanding the concept of economic freedom it will become clear, as argued in this article, that economic freedom and consumer welfare are based on different normative values, which conflict. Understanding economic freedom begins by comprehending why economic freedom needs to be protected and how the concept is perceived by ordoliberals. Economic freedom cannot be ignored as it is the primary goal of ordoliberal competition policy, which has had a profound influence on Community competition law. The influence came indirectly via German competition law. The latter was one of the very few conceptually and ideologically developed regimes amongst the founding Member States in the early days of Community competition law.

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9 See generally D Carlton and J Perloff, Modern Industrial Organization (Harlow, Pearson, 4th edn, 2005).
C. Economic Freedom as Understood by Ordoliberals

1. Why Economic Freedom?

The ideas of ordoliberalism, developed by the Freiburg School, took shape in response to the economic, political and social crises starting with the fall of the Weimar Republic in 1933 and the rise of Nazi Germany. One of the consequences of the totalitarian Nazi regime was its ability to turn private economic power into political power by misusing the iron and steel industry (the German Schwerindustrie). Well-run cartels and monopolies resulted in powerful economic concentration in conjunction with great accumulation of political power. This led to the abandonment of democratic principles. Ordoliberalism believed that the accumulation of economic power resulted from the inability of the legal system to prevent the creation and misuse of private economic power. The lack of adequate safeguards against the rise of private economic power and the weakness of the state ultimately replaced economic and political freedom with an unrestrained dictatorship, which became unstoppable and led to World War II. To avoid a repetition of history and to prevent private economic power turning into political power, it was imperative for ordoliberalism to establish an appropriate economic order to protect individual economic freedom. In the ordoliberal view of society, individual economic freedom and competition are the source of prosperity and political freedom. The economic order had to be protected by an appropriate legal framework, “the economic constitution”.

2. How Economic Freedom is Perceived by Ordoliberals

Ordoliberalism was dedicated to achieving an economic order—a competitive order—able to control private economic power and political power. This is because individual economic freedom is an essential accompaniment to political freedom and competition is necessary for the economic liberty of the
individual. A competitive order would ensure a prosperous and humane society which guarantees individual economic freedom and price stability. Economic freedom was necessary both to prevent the accumulation of private economic power and to sustain economic development. Price stability was seen as essential for a society where long-term contracts would act as the cement for civil society.

The economic constitution should include basic principles to counteract any tendencies that could neutralise competition. It should regulate and limit, for example, the emergence of private economic power by prohibiting cartels, the growth of single firm market power and contracts that create unjustified limits on the competitive autonomy of firms. The economic constitution should decide the legal structure of the economic system guaranteeing individual freedom and competition as fundamental rights. The economic constitution should, amongst other things, protect the process of competition. However, it is important to recognise that ordoliberalism wanted to protect the competitive process to guarantee equality of individuals and protect civil liberties:

“Competition policy [ordoliberal competition policy] serves to protect the evolutionary process of competition as such, and to prevent the concentration of private power to the detriment of the competitive and the political processes. Consequently, competition constitutes a value in its own right, which goes well beyond efficiency considerations. In this view, the [ordoliberal] economic constitution serves, first, to guarantee the basic equality of individuals as economic subjects; second, to back up the private law society by public authority; and third, to protect civil liberties.”

According to one of the founding fathers of ordoliberalism, Franz Böhm, “[t]he real motives behind the enactment of antitrust law were . . . not economic efficiency and the effectiveness of economic control, but social justice and civil liberties which were held to be threatened by monopolies”. This does not mean that economic theory does play a role in ordoliberal competition policy. Ordoliberalism uses economics, but only a means to develop a free order (ordnung). The free order should liberate humanitarian values from their

22 See W Eucken, Grundsätze der Wirtschaftspolitik (Tübingen, Mohr/Siebeck, 1952), 290.
24 Individual rights set out in the economic constitution were directly enforceable. See W Sauter, Competition Law and Industrial Policy in the EU (Oxford, Clarendon Press, 2003), 47.
25 Ibid, 47.
27 An ordnung provides a framework for a functional free-market mechanism that not only accommodates development and change, but also ensures human dignity and freedom.
28 See L Miksch, “Walter Eucken” (1950) 4 Kyklos 279.
threatened encirclement by chaotic, anarchic and collectivistic forces. 28 It is imperative to recognise that ordoliberalism is based on humanist values rather than efficiency or other purely economic concerns. Ordoliberalism seeks to combine open markets and individual freedom with social justice. Böhm acknowledged that private law made it possible to assess private economic power from both a macrocosmic perspective29 and a microcosmic one.30 He argued that economic power should be assessed from the macrocosmic point of view.31

The ordoliberal theory is distinct from traditional liberalism in two respects. First, ordoliberalism believes that an unregulated free market is not the most efficient means of allocating resources. From an ordoliberal perspective, Adam Smith’s laissez-faire economy does not ensure a competitive economy. It will evolve into monopolistic practices, interventionism and distortions of price relationships. Instead, structural and regulating principles should facilitate a functionally competitive economy with a compatible social policy, characterised by a flexible price mechanism and stable policies.32

Secondly, individual economic freedom needs to be protected from both political power and the misuse of private economic power. Traditional liberalism maintains that the rule of law is mainly to protect the individual against government coercion (political power).33 However, ordoliberalism attaches equal importance to safeguarding individual economic freedom from intrusion by private undertakings’ economic power.

In summary, the primary goal of ordoliberal competition policy is individual economic freedom in the interest of a free and fair political and social order.34 Individual economic freedom could be achieved by limiting and/or controlling economic power, or at least its harmful effects.35 Competition policy is embedded in the economic order of a free and open society.36 It is shaped by the rule of law rather than by ad hoc political decision-making. The state retains a strong role in protecting the basic parameters of the system of competition. Competition within the economy provides the basis for the economic order they envision: a

28 The macrocosm perspective sees the rise of power within a sociopolitical framework and asks the question: shall we, as citizens of a democratic state and members of a free system of society, embedded in the rights of the individual, hand over the power to serve to our fellow citizens?
29 The microcosm perspective sees the rise of power within the framework of the free market economy and asks the question: does the economic process caused by the emergence of economic power result in plus and minus or just an aliud of economic efficiency?
30 Supra n 26, 32–33.
33 W Moschel, “Competition Policy from an Ordo Point of View”, in H Willgerodt and A Peacock (eds), German Neo-liberals and the Social Market Economy (Basingstoke, Macmillan, 1989), 146.
35 Supra n 34, 142.
free market economy. The free market must be liberated from economic power. Otherwise only a system of anarchic welfare will prevail. 37

D. PROTECTING THE COMPETITIVE PROCESS

The Bundeskartellamt correctly argues that protecting the competitive process can enhance consumer welfare in the long run. 38 However, this is only if the competitive process is protected instrumentally (ie for what it brings) to achieve consumer welfare. As established in the previous section, ordoliberalism protects the competitive process to achieve individual economic freedom. This is linked to social justice and civil liberties, not to consumer welfare. The Bundeskartellamt argues that it is inspired by the economic freedom approach. 39 This is understandable as the German competition law, Gesetz gegen Wettbewerbsbeschränkungen (GWB), is modelled upon the ordoliberal competition model. 40 Given this, it is reasonable to assume that the Bundeskartellamt wants to safeguard the competitive process not to enhance consumer welfare, but to protect economic freedom. This assumption is supported by the examples given by the Bundeskartellamt in the article “A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: a ‘Dialectic’ on Competing Approaches”: 41

“1. Price squeeze: oil companies (B8-77/00). In 2000 the Bundeskartellamt prohibited with immediate effect the major six oil companies in Germany from demanding higher prices (plus a freight surcharge) for supplying independent petrol station operators than they charge final consumers at their own petrol stations. By opening up a price gap and charging small petrol station operators at their refineries higher prices than those charged to consumers at their own petrol stations the large oil companies were unfairly hindering the independent petrol station operators. This pricing policy prevented these operators right from the start from making a profit on fuel sales. Unlike the large vertically integrated six oil companies, small and medium-sized firms did not have the same access to the crude oil market and the financial resources to cushion any losses on the fuel market.”

“2. Predatory pricing: Deutsche Lufthansa/Germania (B9-232/02). In 2002 the Bundeskartellamt prohibited Deutsche Lufthansa AG (DLH) from demanding a price for a

37 Supra n 26, 30.
38 This is supported by L Gyselen, “Rebates—Competition on the Merits or Exclusionary Practice?” in C-D Ehlermann and I Atansiu (eds), The European Competition Law Annual 2003: What is an Abuse of a Dominant Position? (Oxford, Hart Publishing, 2006), 287, 290.
39 Supra n 1, 212.
40 Gerber, supra n 12, 66, argues that the enactment of the GWB probably ranks as the most important political victory for ordoliberalism.
41 Supra n 1, 220–21.
one-way ticket per passenger on the Frankfurt–Berlin route which is not at least €35 above Germany’s price, as long as DLH does not have to charge more than €134 as a result. The Bundeskartellamt saw the pricing strategy of DLH as an attempt to squeeze its new competitor Germania out of the market and feared that emerging competition would be substantially impaired as a result. Germania started operating scheduled flight services between Berlin and Frankfurt/Main in November 2001. The company offered tickets at €99 for a one-way, fully flexible and rebookable flight. The conditions essentially corresponded to DLH’s economy tariffs suitable for business travellers. DLH reacted by also introducing a fully-flexible economy tariff which offered an immense price reduction (up to €485). In January 2002 DLH raised the price to €105, clearly undercutting Germania’s price of €99 as it included services which were not offered by Germania. The price DLH set was clearly below its average operating costs per passenger. The only rational explanation for this pricing strategy was that DLH was attempting to force Germania from this route and to recoup resulting losses at a later stage by discontinuing this price tariff and resorting to previous ones. The Bundeskartellamt therefore protected the newcomer Germania from being hindered by the dominant DLH. The BKA therefore consider that proof of the actual harm on consumers resulting from Lufthansa’s practices would not have given any actual evidence for an intervention of the authority.”

These examples show that the Bundeskartellamt is protecting economic freedom. Pursuing a consumer welfare objective would not have allowed intervention without having undertaken an economic analysis of the likely effects on consumers.42

E. ORDOLIBERAL INDICATIONS IN COMMUNITY COMPETITION POLICY

DG Competition’s Director General, Philip Lowe, has acknowledged that decisional and judicial practice has been influenced by ordoliberalism:43

“The case-law of the European courts and also the decisional practice of the Commission were initially influenced by ordoliberal thought which has its origin in the so-called Freiburg School. Their members advocated a strict legal framework and a strong role for the state in protecting the basic parameters of competition. Competition was understood as a process of economic coordination on the basis of freedom of action. The protection of individual economic freedom—as a value in itself—was regarded as the primary objective of competition policy.”

As correctly highlighted by Lowe, under the ordoliberal model, the aim of competition policy is the protection of individual economic freedom of action as

42 This is supported by the Competition Law Forum, supra n 1, 221 footnote 13.
a value in itself. The rationale is that the economic system should allow all individuals to participate unhampered by the economic power of others, because economic freedom is a fundamental right. As shown in the previous section, ordoliberalism places competition law in a wider, sociopolitical perspective because limitation and control of private power is in the interest of a free and fair political and social order. It is essential to protect the conditions of competition, rather than explicitly focusing on the direct results produced by that process. The main goal is the limitation of private power to guarantee individual economic freedom. While ordoliberalism sees economic efficiency as a generic term for growth and for the encouragement and development of technical progress and for allocative efficiency, it is only an indirect and derived result of individual economic freedom.

This philosophy also underpins Advocate General Kokott’s Opinion in British Airways. This is in particular her reference to the structure of the market and competition as an “institution”. In her view, the primary beneficiaries of Article 82 are other firms. While consumer welfare may be expected to flow from economic freedom, this is not, as highlighted by Advocate General Kokott, the aim. Nor is it always the result. Priority is given to the process of competition. If this indirectly protects consumers, then it is a bonus, but not an aim. This was reiterated by the ECJ in its judgment in British Airways. By pursuing an objective of economic freedom, it is believed that the benefit of competition is a market characterised by a desirable process, and competition is an end in itself. This is because ordoliberalism sees competition as a necessity for the economic liberty of the individual.

According to Lowe, the aim of Article 82 is to ensure that the remaining competitors in the market are not prevented from competing on the merits. This is taken to mean that the economic freedom of rivals must be protected against abuse from dominant undertakings. This is to protect rivals’ ability to compete on the merits. In this sense, economic freedom is protected only where it benefits consumer welfare. While Lowe acknowledges that decisional and

44 This is supported by W Moschel, “The Proper Scope of Government Viewed from an Ordoliberal Perspective: the Example of Competition Policy” (2001) 157 Journal of Institutional and Theoretical Economics 3.
46 Supra n 35, 244–51.
47 Supra n 34, 146.
49 Ibid, para 68.
50 Case C-95/04P British Airways plc v Commission, para 66.
51 Supra n 45, 49.
52 Supra n 21.
judicial practice has been influenced by ordoliberalism and economic freedom, he argues that the new guiding principles are consumer welfare and efficiency:

“[C]onsumer welfare and efficiency are the new guiding principles of EU competition policy. Whilst the competitive process is important as an instrument, and whilst in many instances the distortion of this process leads to consumer harm, its protection is not an aim in itself. The ultimate aim is the protection of consumer welfare, as an outcome of the competitive process.”

If these are new guiding principles, they must replace some older principles. Lowe has argued that economic freedom has influenced decisional and judicial practice previously. In that case, consumer welfare and efficiency are presumably replacing economic freedom. This would not be necessary if economic freedom and consumer welfare are not in conflict.

Whether DG Competition agrees with Lowe is questionable. In its Discussion Paper, DG Competition remarks that “it may sometimes be necessary in the consumers’ interest to also protect competitors that are not (yet) as efficient as the dominant firm.” Potentially, this could mean more competition in the long run, driving prices down and increasing allocative efficiency to the benefit of consumers. However, it may involve a loss of economies of scale, which is inefficient from an economic efficiency point of view. Protecting competitors not yet as efficient as the dominant company signals that DG Competition is keen to increase the opportunities for other competitors in the market. It is questionable whether these not yet efficient competitors will actually generate any efficiency to the benefit of consumer welfare. A practical problem is that it would require competition authorities to produce a timeframe for the period that they are willing to protect these not yet as efficient competitors. It would also have to establish a strategy for the various ways of protecting competitors.

As well as Lowe, Hawk has argued that some decisional and judicial practice of the Community relating to Article 82 reflects the ordoliberal approach, which takes a long-term perspective with an emphasis on rivalry without any inquiry at all into their relative efficiency. The following section will discuss this point.

54 Supra n 43, 2.
56 Supra n 4, para 67.
57 Not only is this a complicated analysis, however, but the concept “not yet as efficient competitor” also gives the competition authority huge discretion in assessing whether and when a company will be “as efficient” as the dominant company.
59 Hawk, supra n 12, 253.
Certain cases decided under Article 82 have been interpreted in the ordoliberal framework. This can be seen from a line of cases where conduct that hinders the production of competitors constitutes an abuse. In addition, firms seeking to use their economic power to undermine the market’s competitive structures would also fall foul of this head. This understanding of protecting competition may be viewed as protecting rivals from the aggregation of economic power.

In Continental Can, Hoffmann-La Roche, United Brands and Michelin I, the Commission and the ECJ have equated an abuse with a restriction on the rights and opportunities of market operators. For example, in United Brands, the ECJ held that United Brands Company was allowed to protect its own commercial interests by taking reasonable steps. However, such steps could not interfere with the independence of “small and medium-sized firms in their commercial relations with the undertaking in a dominant position”. In Michelin I, the ECJ held “the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply”. Moreover, in Hoffmann-La Roche, the ECJ said that a weakening of the structure of competition can constitute an abuse.


61 See L Lovdahl Gormsen, “Article 82 EC: Where are We Coming From and Where are We Going To?” (2005) 2 Competition Law Review 5, 8.


67 Supra n 64, para 193.

68 Supra n 65, para 73; similar language was used in Hoffmann-La Roche, supra n 63, para 106 and in Continental Can, supra n 62, para 29.

69 Supra n 63, para 125.
“[T]he course of conduct [rebates] under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of application of Article 86 [Article 82] any further weakening of the structure of competition may constitute an abuse of a dominant position.”

Perhaps the Court was pursuing economic freedom only to promote consumer welfare. However, there was no serious analysis of consumer welfare loss in any of these cases. If the Court pursued economic freedom as a means to an end of consumer welfare, then it ought to have assessed whether the conduct in question would likely have led to a decrease or an increase in consumer welfare. For example, would the alteration of the market structure likely have resulted in consumer welfare loss in the form of less choice, an increase in price and/or lowering of quality?

In addition, prohibiting conduct where firms are seeking to use their economic power to undermine the market’s competitive structures, without considering whether such behaviour is likely to harm consumer welfare, may be viewed as nothing more than protecting smaller competitors from aggregation of economic power.70 For example, in _France v Commission_, the ECJ held:71

“It should be observed that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.”

Part of this message was reiterated by the Commission in _DSD_:72

“An undertaking in a dominant position can obstruct its competitors by binding its customers de jure or de facto to its services and thereby prevent them from using competing suppliers. The Court has stated on this matter that ‘system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators’. Such equality of opportunity is particularly important for new market entrants on a market on which competition is already weakened by the presence of a dominant undertaking and other circumstances. In particular, small competitors should not be the victims of behaviour by a dominant firm, facilitated by that firm’s market power, which is designed to exclude those competitors from the market or which has such an exclusionary effect.”

It is not only the ECJ, but also the CFI that focuses on the market’s competitive structures. For example, in *Michelin II* the CFI held:

“For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.

...it is necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition...”

The CFI upheld the Commission’s finding of dominance and its finding that competitors were unable to compete with British Airways. Thus, there was no need to show actual effects. The CFI further held:

“[W]here an undertaking in a dominant position actually puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse of a dominant position within the meaning of Article 82 EC.

Moreover, the growth in the market shares of some of BA’s airline competitors, which was modest in absolute value having regard to the small size of their original market shares, does not mean that BA’s practices had no effect. In the absence of those practices, it may legitimately be considered that the market shares of those competitors would have been able to grow more significantly...”

74 *Supra* n 73, paras 239–40.
75 *Case T-219/99 British Airways plc v Commission*.
76 *Ibid*, para 293.
77 *Supra* n 75, para 297–98.
The CFI retained its focus on the structure of competition in its recent Microsoft judgment. It referred to earlier case law, such as Hoffmann-La Roche and Irish Sugar, and held:

“[I]t is settled case-law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure... In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.”

These few examples highlight the concerns for the economic freedom of rivals and the structure of competition more than consumer welfare. Some may argue that an ordoliberal approach can only be read into decisional and judicial practice if cases are read out of context. A contextual reading of the judgments would make clear that the Community Courts were not trying to protect economic freedom, but consumer welfare. However, in the absence of any theory on how consumers will be harmed, directly or indirectly through an alteration of an effective competitive structure, will look like nothing more than a protection of economic freedom. It is hard to find a coherent theory on consumer harm in any of the decisions and judgments mentioned.

G. IMPLICATIONS

One can only wonder why the Bundeskartellamt is arguing that there is no conflict between economic freedom and consumer welfare. Without knowing the answer, one can assume that the Bundeskartellamt is trying to support DG Competition’s move to consumer welfare. Moreover, the Bundeskartellamt would have to change its economic freedom approach if it conflicts with consumer welfare. A move to consumer welfare is a departure from the jurisprudence, which fully or partly embraces economic freedom. Therefore, it would be more convenient if there were no conflict between the two objectives. A departure from jurisprudence requires support from the ECJ. Only the ECJ can decide whether its jurisprudence is in need of a change. Only if the ECJ decides to support DG Competition’s move away from economic freedom and overrule earlier case law will this happen.

79 Hoffmann-La Roche, supra n 63, para 125.
81 Supra n 78, para 664.
82 Although the CFI talked about effects and efficiencies in the Microsoft judgment, supra n 78, it is still unclear whether the legal test is harmful effects on consumers or on competitors.
83 Supra n 4, para 4.
84 Eg Continental Can, supra n 62; Commercial Solvents, supra n 60; United Brands, supra n 64; Hoffmann-La Roche, supra n 63; Michelin I, supra n 65.
It is unlikely that earlier case law will be overruled, to the effect that those who would like to see a reorientation of the law were disappointed, as the Community Courts did not take the opportunity in British Airways\textsuperscript{85} and Michelin \textit{II}.\textsuperscript{86} The ECJ’s judgment in British Airways and the CFI’s judgment in Microsoft do contain some promising indications. For example, the Community Courts indicated that there is a need to establish some form of competitive impact and an appreciation of economic benefits. However, these judgments confirm that reform of Article 82 is not going to happen immediately.

\section*{H. Conclusion}

A one-dimensional view focusing on maximising consumer welfare and efficiency excludes a focus on, for example, the non-efficiency objective of economic freedom. Consumer welfare takes a neoclassical position which values welfare without any consideration of the position of individuals in its utilitarian calculus.\textsuperscript{87} According to this utilitarian majoritarian value,\textsuperscript{88} safeguarding economic freedom is not a relevant consideration.\textsuperscript{89} Instead, the test of legality is whether the effects of the undertaking’s behaviour contribute to improving consumer welfare. This is contrary to the ordoliberalists’ understanding of competition law. Ordoliberalists believe that competition is best protected by protecting individual economic freedom in the market as a fundamental right.

It is paramount to understand that consumer welfare is not a motivation for economic freedom in the slightest degree. Likewise, consumer welfare does not care about economic freedom unless it has an impact on consumer welfare. The outcome of a case pursuing economic freedom may not always conflict with the outcome of a case pursuing consumer welfare. However, this is different from arguing, as done by the Bundeskartellamt, that economic freedom and consumer welfare are not conflicting because both objectives protect the competitive process to enhance consumer welfare.

\textsuperscript{85} Supra n 50.
\textsuperscript{86} Supra n 73.
\textsuperscript{87} Supra n 34, 148–49.
\textsuperscript{88} The rule of utility is that good is whatever brings the greatest happiness to the greatest number of people. Since utilitarians judge all actions by their ability to maximize good consequences, any harm to one individual can always be justified by a greater gain to others. This is true even if the loss for the one individual is large and the gain for the others is marginal, as long as enough individuals receive the small benefit. Some critics reject utilitarianism on the basis that it seems to be incompatible with human rights. For example, if slavery or torture is beneficial for the population as a whole, it could theoretically be justified by utilitarianism. Utilitarian theory thus seems to overlook the rights of the individual. See J Waldron, “Rights”, in R Goodin and P Pettit (eds), \textit{A Companion to Contemporary Political Philosophy} (Oxford, Blackwell Publishing, 1995), 581.
\textsuperscript{89} This excludes consumers gaining separate utility from, for example, preferring small corner shops to bigger supermarkets.
To defend DG Competition’s commitment to consumer welfare, it is not unthinkable that some are tempted to argue that the Commission and the Community Courts have been protecting the competitive process to protect consumer welfare. This argument is difficult to follow, given the lack of efficiency analysis in cases pursued under Article 82. It is, however, tempting, given what is now considered (by some) as disappointments in past jurisprudence.

If the Commission and the Community Courts never intended to protect the competitive process to protect economic freedom, but only to protect consumer welfare, then it is paramount that the underlying methodology is changed. It must be changed to incorporate an analysis of efficiencies as suggested by DG Competition. Otherwise, the legitimacy of decisions and judgments is undermined. In the Article 82 debate, some argue from a policy point of view, ie from what they would like the law to be. This is sometimes far removed from what the law actually is. This article suggests avoiding employing policy considerations in a way that manipulates the evolution of the legal principles.

90 See, eg N Kroes, “European Competition Policy in a Changing World and Globalised Economy: Fundamentals, New Objectives and Challenges Ahead”, speech given at the GCLC/College of Europe Conference on “50 years of EC Competition Law”, Brussels, 5 June 2007. This is, however, contradicted by Lowe, who argues that case law and decisional practice have been influenced by ordoliberalism, supra n 43, 2.

91 Supra n 4.