

**PHD THESIS SUMMARY:**  
**The Making and Unmaking of Ordoliberal Language:  
A Digital Conceptual History of European Competition Law**

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*PhD in History, June 2022*

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The historical existence of different schools of competition analysis is well established, ranging from the Freiburg School's ordoliberalism to the various versions of the Chicago school.<sup>1</sup> However, what is less clear is these schools' actual relevance to influence on European policy over time. My dissertation addresses this gap in the historiography of EU competition law by reviewing the negotiations and initial conceptualisations of the critical rules, by analysing relevant case law and a large set of primary sources—ranging from academic journals, oral history interviews, and *Festschriften* to private papers by Franz Böhm, Walter Eucken, and Heinrich Kronstein—and by applying novel text mining methods (published as Küsters, forthcoming). While the negotiations on the Founding Treaties were still dominated by linguistic misunderstandings and different normative conceptions of what competition was and what role it should play in future Europe, several scholars and advisors close to ordoliberalism soon started to popularise the Freiburg School's distinctive conception of competition when the new competition rules needed to be applied in the 1970s and 1980s. It was not until the reforms under the More Economic Approach, implemented by the Commission in the early 2000s, that this

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<sup>1</sup> Thinking in terms of 'orders' has a long tradition in German economic thought but reached a distinctive manifestation in the 1920s and 1930s when a group of economists and lawyers at the University of Freiburg called for increased competition, monetary stability, and the rule of law. Their ideas later became known as ordoliberalism and were associated with Ludwig Erhard's social market economy (see Biebricher, Bonefeld, and Nedergaard 2022 for an overview). Despite many similarities, the Chicago School, founded around the same time, adopted a much looser competition law stance, particularly after the Second World War, as it focused on maximising economic efficiency to the detriment of aspects like the individual freedom of small businesses and the reduction of concentrated power, which had been essential to the early ordoliberals.

ordoliberal language was replaced by other concepts and semantics borrowed from the classical Chicago school and the new Industrial Organisation literature, ushering in a neoliberal period.

In the Introduction, I point out that a fundamental problem in this literature is that ordoliberalism itself is a heavily contested concept. To remedy this situation, in chapter 1 I provide a historical account of the early Freiburg School, which is interpreted as a paradigm change concerning the prevailing competition thinking and language. The competition understanding espoused by first-generation ordoliberals went beyond classic *allocative efficiency* considerations, encompassing *political* and *social efficiencies*.

I discuss in chapter 2 how the first two decades of West Germany's social market economy provided the quickly consolidating school with an institutional backdrop and the possibility to influence policy, such as the country's first strict competition law enacted in 1957. Ordoliberals contributed through various draft laws and consultations, ensuring that their competition model and key concepts like *Leistungswettbewerb* (competition on the merits), *vollständiger Wettbewerb* (complete competition), and *Wirtschaftsverfassung* (economic constitution) were ingrained into the political and academic discourse of the day.

In chapter 3, I describe how the ordoliberal school subsequently experienced a Hayekian moment from the late 1960s onwards that shifted attention away from the problem of accumulated economic power toward competition distortions brought about by the state. Chapter 4 provides a comparison with the Chicago school, which experienced such a 'neoliberalisation' much earlier, despite similar initial interests. From the 1950s onwards, it developed a 'consumer welfare standard' and an *economic efficiency*-based understanding of competition that differed from the ordoliberal theory.

On this basis, my dissertation turns to these two schools' influence on the emergence and application of European competition law. I describe in chapter 5 how, contrary to the standard account, the early Europeans who convened in Paris, Rome, and other negotiation venues did not form an epistemic community that applied a commonly shared ordoliberal value system. The different expressions and functions that contemporaries associated with competition echoed the *Begriffswettbewerb* (competition of concepts) seen in other fields of early European integration (Mangold 2011, 444-448) and reflected diverging traditions of economic

thought, whose tense coexistence was further complicated by partly incompatible translations. Given this ambivalence, one cannot emphasise enough that the European competition discourse was soon shaped by ordoliberal semantics introduced by Hans von der Groeben, Alfred Müller-Armack, Walter Hallstein, and the *Wissenschaftlicher Beirat* (Scientific Advisory Board at the German Ministry of Economics).

In chapter 6 I trace the legal effects of this rhetorical strategy by analysing the emerging case law. The Commission initially focused on targeting vertical restraints via Art. 85 EEC Treaty (known today as Art. 101 TFEU), in line with post-war ordoliberals' priorities. In its case law under Art. 86 EEC Treaty (Art. 102 TFEU), the Court followed ordoliberal recommendations by defining dominance as the position of an undertaking that can hinder effective competition through its distortion of the market structure and its resulting ability to compete through measures that do not classify as *Leistungswettbewerb*. In the 1970s and 1980s, ordoliberals watched with delight how the Court implemented their holistic understanding of a European 'economic constitution'. Afterwards, the Commission's attention shifted to state aid and, in the 1990s, also to merger control, but this was still in line with ordoliberal priorities. In this sense, the 'neoliberal shift' often linked to this period did not differ from contemporary ordoliberalism, which experienced its own 'neoliberalisation' at the time.

As I explain in chapter 7, the unmaking of this ordoliberal regime only occurred in the 2000s, when the Commission proposed a set of reforms known as the More Economic Approach (MEA). Ordoliberals framed competition as a rule-based legal system that focuses on legal forms, accepts possible false positives, and is amenable to basic democratic decision-making regarding the framework rules, with the ultimate goals being the protection of consumer choice, *political* and *competitive efficiency*, and human freedom. By contrast, the MEA approach, being based on both Chicago and Post-Chicago elements, understood competition as an econometric trade-off exercise that focuses on a conduct's predicted or testable economic effects, relies heavily on technocratic economic expertise, and aims to avert false negatives so that consumer welfare and *economic efficiency* can be maximised.

From a semantic perspective, as I show in chapter 8, this neoliberal period was marked by an increasing divergence from ordoliberal language, as evidenced by the development of crucial competition expressions, a rise in Chicago-style vocabulary, and quantified merger control

techniques, as well as a more positive language reflecting the ‘effects’ analysis typical for welfare economics. Tellingly, this development also impacted the usage of the ordoliberal concept of an ‘economic constitution’, since I find in chapter 9 that shifting the ordoliberal economic constitution from the level of the Prussian *Gewerbeordnung* (trade act) to a European and later even a global level eventually went hand in hand with a specific ‘conceptual overreach’.

Overall, the qualitative and corpus-linguistic evidence presented in my dissertation provides nuance to the ordoliberal ‘constitutionalisation’ argument initially put forward by Gerber (1998), according to which an ordoliberal understanding of competition was reflected in the European Treaties and the Court’s jurisprudence from the very beginning. Instead, I argue that the ordoliberalisation of European competition language was not a given but had to be *made*; it was a conscious process that only acquired normative power from the 1960s onwards. I also propose that the subsequent ordoliberal period of competition policy ended abruptly in the early 2000s when a neoliberal vocabulary was consciously introduced to *unmake* the previous regime. Both content and timing of this neoliberalisation, which this study links for the first time to quantifiable semantic trends, differ from the neoliberal turn depicted in the literature, which is typically located between the 1973 oil crisis and the 1986 Single Act and connected with de-regulation and actions against state aids (Warlouzet 2017, 225; Baccaro and Howell 2017). The results also differ from the accounts of legal scholars who assume that European case law is highly resilient and argue that economic thinking was primarily driven by the Court (Ibáñez Colomo 2018, 329).

By tracing the making and unmaking of ordoliberal language at the European level both qualitatively and quantitatively, my dissertation illustrates the extent to which traditional economic and legal research can be enriched with the interdisciplinary toolbox of the *Digital Humanities*. To do so, I manually created several large-scale corpora via web scraping and OCR that captured, respectively, all articles published in *ORDO* between 1948–2014, all *Journal of Law and Economics* articles between 1958–2015, all *Common Market Law Review* articles between 1963–2000, all speeches on EU competition policy held between 1995–2020, and, most importantly, the roughly 11,000 decisions and judgments given in the field of EU competition law between 1961–2021. By exploring these digital corpora with different text mining methods, ranging from word frequency analysis to theoretically more demanding methods like *Topic Modelling*

or sentiment analysis (see Grimmer and Stewart 2013 for an overview), I detect significant semantic correlations that support the overall argument. In particular, the ordoliberal period between 1960–1990 was characterised by the dominance of the ‘effective competition’ collocate over other expressions that would have been semantically closer to the Treaty text, by the quantitative role of Arts. 101 and 102 TFEU case law, by a harsh language legitimising ‘by object’ restrictions, and by the presence of merit-based imagery.

In this way, my dissertation illuminates a vital channel for how ordoliberal ideas formulated during the interwar or early post-war years could still influence law and politics later—namely by shaping the competition discourse with concepts like *Leistungswettbewerb*, *vollständiger Wettbewerb*, and *Wirtschaftsverfassung*. Due to its ahistorical self-perception and inclination to keep existing doctrines alive, emerging European law provided a fertile ground for preserving this ordoliberal language. The implicit vision of an atomistic market characterised by many suppliers, akin to the ordoliberal ‘complete competition’ model, influenced the Court’s language since *Geitling*. Similarly, merit-based rhetoric conveying the ordoliberal conviction that businesses must adhere to the same ‘rules of the game’ and an ethical form of *Leistungswettbewerb* on a ‘level playing field’ guided Art. 102 TFEU cases. Another example concerns the ordoliberal reasoning about an ‘economic constitution’, which was not only echoed in ordoliberal discussions of Germany’s Basic Law and Competition Act but also in the interpretation of the Treaties by the European Courts. As a result, the ordoliberal school of competition thought can be understood as a distinct linguistic community whose conceptual and semantic influence went beyond Germany and eventually shaped the European legal order.

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