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and Economic Freedom –  
On the Normative Foundations  
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# Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy\*

by

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## 1. Introduction

The debate about the ‘more economic approach’ and its role in the so-called ‘modernization of European competition law’<sup>1</sup> centers around two principal issues. One issue concerns the normative foundations of competition policy, the question of what should be considered its proper goal. The controversy here is essentially about whether competition policy should seek to advance consumer welfare or total welfare, or ought to aim, instead, at protecting ‘Wettbewerbsfreiheit’ or the ‘freedom to compete,’ a goal that has been notably stressed in the German *ordo-liberal* tradition. The other issue is about how economics as an empirical science can help to improve the effectiveness of competition policy in achieving its presumed goal. The controversy here is about whether competition policy should adopt an “effects-based approach” that takes account of the specific effects in each particular case as opposed to the conventional “form-based approach” that works with general prohibitions of certain types or forms of business practices (Schmidtchen 2007a: 96ff.).<sup>2</sup>

In the ongoing debate on the merits and demerits of the ‘modernization of European competition law’ the two issues are usually not explicitly separated from each other, and they are, to be sure, interdependent. They are, however, analytically distinct and the failure to carefully distinguish between them is a major source of ambiguities in the arguments that have been exchanged between critics and advocates of the ‘more economic approach.’ The present paper seeks to clarify some of these ambiguities by approaching the debate from the perspective of *constitutional economics*, a perspective that has two principal ingredients. This is, on the one hand, its systematic distinction between the *constitutional* and the *sub-*

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<sup>1</sup> Röllner (2005: 37), the Chief Competition Economist of the European Commission from 2003 to 2006, speaks of the “strengthening and modernization of the economic foundations” of competition policy.

<sup>2</sup> Schmidtchen (2007b: 1): “A more economic approach to the application of competition law means that the assessment of each specific case will not be undertaken on the basis of the form or the intrinsic nature of a particular practice (form-based approach) but rather will be based on the assessment of its anti- and pro-competitive effects (effects-based approach).” – According to Schmidtchen (2007a: 96) the ‘effects-based approach’ is at the heart (“das Herzstück”) of the ‘more economic approach.’

*constitutional* level of choice, i.e. the distinction between choices *within* rules and choices *among* rules. And this is, on the other hand, its *contractarian* outlook, i.e. the premise that mutual benefit is the criterion against which the ‘efficiency’ or ‘goodness’ of social transactions or arrangements should be judged, and that voluntary agreement among the individuals involved is the ultimate test for such mutual benefit.<sup>3</sup>

The paper will focus primarily on the issue mentioned first, namely the *normative foundations* of competition policy. My main purpose is to show that constitutional economics can answer the question of what goal competition policy ought to pursue in ways that are more in line with the legitimizing principles of a democratic society than the answer provided by its paradigmatic counterpart, conventional welfare economics. In its later part the paper will also address the issue of the ‘effects-based’ versus ‘form-based’ approach.

## **2. Science and Politics: Economics as Applied Science**

As empirical science economics is supposed to make factual statements, judgments about *what is*. The question of which goals competition policy should pursue is about *what ought to be*, and to answer it requires a value judgment. This raises the issue of what economics can contribute to a discussion on the proper goal of competition policy without transgressing the limits of its domain as empirical science. In dealing with this issue the distinction, familiar to philosophers, between two kinds of ought-statements, namely between *categorical* and *hypothetical* imperatives, can help to avoid unnecessary confusion.

Imperatives or should-statements are always addressed to someone who is called upon to do something, as in the case of prescriptions, or to refrain from doing something, as in the case of proscriptions. Categorical and hypothetical imperatives differ in terms of the grounds on which addressees are asked to comply. Categorical imperatives are ought-statements for which *categorical* or *unconditional* authority is claimed in the sense that compliance is demanded no matter what the addressees might prefer to do. By contrast, hypothetical imperatives are ought-statements for which only *hypothetical* or *conditional* authority is claimed in the sense that they tell their addressees what they should do *if* they wish to achieve certain goals or solve certain problems. By contrast to the unconditional demands of categorical imperatives, hypothetical imperatives provide only prudential advice for what are suitable means to achieve certain purposes. They inform addressees about how they can pursue their interests more effectively.

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<sup>3</sup> For a more detailed discussion of the constitutional economics perspective and for further references see Vanberg 2005.

The important difference between the two kinds of ought-statements is that hypothetical imperatives can be rationally examined in ways that categorical imperatives cannot. Whether addressees should in fact do what a hypothetical imperative or conditional ought-statements tells them to do depends on, firstly, whether they are actually interested in achieving a presumed purpose, whether, secondly, the prescribed action is indeed a suitable instrument for achieving the purpose, and, thirdly, whether or not some preferable alternative means exist for achieving the purpose. Categorical imperatives do not expose themselves to such critical scrutiny. They cannot be objected to in terms of the addressee's opposing interests and they cannot be criticized on instrumental grounds because they claim an authority that is neither contingent on the addressee's interests nor contingent on their suitability to achieve stated purposes.

Empirical sciences do not have arguments in their legitimate repertoire that allow them to issue categorical imperatives, but they surely can support hypothetical imperatives. In fact, issuing hypothetical imperatives is the ordinary business of any applied science, such as engineering or medical science. This applies no less to economics. In its application to matters of competition policy – or of other areas of politics – economics can, like other applied sciences, issue hypothetical imperatives without transgressing the limits of its domain as an empirical science. And this is how, based on its theoretical and empirical insights into the working properties of alternative rules, constitutional economics can provide advice for how groups of individuals may improve the socio-economic-political games they are engaged in by adopting better 'rules of the game.'

Welfare economics has traditionally served as the applied branch of economics that seeks to translate its insights into how the 'economic world' works into policy advice. As an offspring of utilitarianism welfare economics has sought to serve this function by presuming that to promote or, ideally, to maximize 'social welfare' – as measured by an appropriately specified social welfare function – is the unquestionable and self-evident goal that politics ought to pursue. The utilitarian approach of welfare economics has long been the subject of extensive discussions that have mostly focused on technical issues, in particular the measurability and inter-subjective comparability of the utilities that the social welfare function is supposed to aggregate, issues that the Paretian and New Welfare Economics have sought to answer. In the present context my interest is not so much in these issues but rather in conceptual difficulties the social welfare construction faces even if a cardinal measurement of utilities and their inter-subjective comparability were possible. These difficulties become apparent when the question is asked to whom welfare economists mean to address their

advice, and what kinds of arguments they can offer to the intended addressees for why they should heed the advice.

If welfare economics is, as we may suppose, not meant to issue categorical imperatives its statements on what economic policy ought to do must be interpreted as hypothetical imperatives. This means, however, its statements must have addressees whom they tell what, in light of the knowledge that economics can provide, they should prudently do if they wish to achieve certain purposes. It is exactly in regard to the questions of whom it means to speak to, and in what sense the advice it offers appeals to the addressees' interests, that conventional welfare economics remains fundamentally ambiguous. Welfare economists are typically not very explicit about whom, exactly, they mean to address with their advice, nor do they, as a rule, provide any arguments for why their policy recommendations can be expected to serve purposes that the addressee might pursue. It is this very fact that has prompted the ironic critique of public choice theorists that welfare economists seem to address their advice to some 'imaginary benevolent dictator' (Buchanan 1999: 456), a charge to which I shall return in the next section.

By contrast to welfare economics, constitutional economics leaves no doubt about the intended addressees of its advice or about the nature of the arguments by which it supports its recommendations. According to its contractarian outlook, constitutional economics regards the individual members or constituents of groups that are to arrange their common affairs, such as the citizens of a polity, as the sovereigns with whom the ultimate decision making authority resides – 'ultimate' because they may have delegated such decision making authority to agents who are supposed to act on their behalf – and who are, accordingly, the ultimate addressees of advice in constitutional matters, even if their agents or representatives may be the proximate addressees. The principal task of constitutional economics as applied science is to use its insights into the working properties of alternative rules in order to provide advice about how the citizens of polities – or the members-constituents of other kinds of groups – can realize mutual benefits by adopting rules that serve their common interests (Vanberg 2005: 26ff.). This concept of policy advice fits, as I shall argue in the next section, very well with the constitutional principles of democratic politics.

### **3. Policy Advice in a Democratic Society**

From a contractarian constitutionalist perspective a democratic polity can be described as a *citizen co-operative* or, in the words of John Rawls (1971: 84), as "a cooperative venture for mutual advantage." Co-operatives in the standard sense of the term are member-owned

enterprises that serve to generate common benefits for their members. It is the central message of James M. Buchanan's founding contribution to constitutional economics that collective arrangements, private and public, can be examined from a generalized exchange paradigm.<sup>4</sup> In analogy to simple bilateral exchanges that standard market economics focuses on, collective cooperative enterprises can, so Buchanan argues, be looked at as multi-lateral exchange arrangements to which the contracting parties promise to contribute their share on the condition that all others contribute their share as well, and from which all participants expect net benefits.

The principal problem that individuals face in forming a cooperative enterprise is how to organize its operation so as to enhance the prospects for mutual gains and to reduce the risks of damages to their interests. This problem arises in particular where, as is the rule in groups beyond a minimal size, for reasons of practicability decision making authority must be delegated to agents who manage the day to day affairs of the enterprise on behalf of its members-principals. To provide advice to cooperative enterprises therefore means, to inform its members about ways and means for how, in light of the noted problem, they can protect and advance their common interests. It means, in particular, to inform about organizational devices that can help to solve the principal-agent problem and about potential enterprise activities that promise to create mutual benefits.

Democratic polities as citizen cooperatives differ, of course, in important regards from 'ordinary' private cooperative enterprises that individuals form within an existing legal-institutional order, an order that defines and secures their respective rights and enforces contracts that they conclude among themselves. Notwithstanding their differences, the analogy to private co-operatives is, however, useful for highlighting attributes of democratic polities as 'cooperative ventures for mutual advantage' that are of relevance in the present context. Just as the members of private co-operatives are the owners and ultimate sovereigns with whom the authority to decide on common affairs resides and who, accordingly, are the ultimate addressee for advice on how the enterprise may be operated to their common benefit, so the citizens of democratic polities are the ultimate sovereigns from whom all decision making authority originates and who, accordingly, are the ultimate addressees for policy advice that informs about opportunities for mutual improvement.

Advice to democratic polities as citizen co-operatives must, just as advice to ordinary private co-operatives, be supported by arguments that are capable of convincing the respective

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<sup>4</sup> Buchanan (1991: 121f.): "Contractarianism ... can be interpreted as little more than an extension of the paradigm of free exchange to the broader setting. ... By shifting 'voluntary exchange' upward to the constitutional level of choices among rules, the consensual or general agreement test may be applied."

members-sovereigns that following the advice serves their *common* interests and, by implication, the interests of each single member. Constitutional economics explicitly submits its arguments to such constraint. Its ambition as applied science is to identify opportunities for advancing members' *common constitutional interests*. In other words, it explores opportunities for constitutional choices, or changes in the rules of the game, that promise benefits for all persons involved. As noted before, where decision making authority is delegated to a representative body a distinction must be made between the ultimate addressees of such policy advice, the citizens-principals, and the proximate addressees, the representatives or agents who manage the public affairs on the citizens' behalf. In the limiting case of a political order that perfectly aligns agents' interests and principals' interests there is no difference between advising citizens and advising political agents. The hypothetical imperatives that inform citizens about opportunities for mutual improvement are, in this limiting case, identical with hypothetical imperatives that help political agents to successfully pursue their own aims. The less effective the institutions of politics are in aligning the common interests of citizens and the interests of political agents the more the advice that politicians are interested in for their purposes may diverge from advice that helps citizens to realize mutual advantages.<sup>5</sup>

The diagnosis that, as a matter of fact, the institutions of politics are typically more or less deficient in the noted sense is behind the above quoted charge of public choice theorists that welfare economists, with their advice about welfare improving policies, seem to speak to an 'imaginary benevolent despot.' The charge is that welfare economists ignore the factual dynamics of real world politics in which the policies that they recommend as 'welfare improving' need not at all be the kind of policies that help politicians to be successful in the competition they are involved in. In other words, public choice theorists accuse welfare economists of producing policy recommendations that a 'benevolent despot' may be expected to listen to, but that fall on deaf ears with real world politicians who are interested in advice for how they can more successfully pursue their own ambitions.

The public choice critique asserts that real world politicians cannot be expected to be receptive addressees of the advice that welfare economists offer. This leaves open the question of whether not, alternatively, the ultimate democratic sovereigns, the citizens, may

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<sup>5</sup> For a detailed discussion of this issue see S. Cassel 2001. – For practical purposes advice about measures that advance citizens' common interests will often be directed at political agents as proximate addressees. This serves to inform them what they should do if they wish to live up to their official mandate, namely to operate the polity as a 'cooperative venture to the mutual advantage of its citizens.' Even if such advice may not directly appeal to the agents' interest in learning about ways to advance their own purposes, it can serve as a constraint that helps to better align their interests with those of the citizens whom they are supposed to serve.

be the proper addressees who can learn from welfare economics about policies that advance their common interests. In order to qualify as such advice the policy proposals that welfare economists produce would have to be supported by arguments that are capable of convincing citizens that they can expect mutual advantages from the proposed measures. This would be the case if welfare economist would argue in terms of benefits that accrue to *all* citizens of the respective polity. This is, however, not how welfare economists typically phrase their advice. They argue in terms of *aggregate welfare effects* rather than in terms of *common benefits* that all members of the respective polity may expect to share. Citizens have, however, little reason to welcome policies that are predicted to improve an aggregate social welfare measure as long as they are not told how they can expect to benefit, *individually and jointly* (Vanberg 2005: 32ff.).

Welfare economists, this is the upshot of the above arguments, appear to produce advice for which a receptive addressee is difficult to identify. Their policy proposals appeal neither directly to purposes that political agents may be presumed to pursue, nor do they appeal to the interests of citizens in projects of mutual advantage. One is tempted to conclude that welfare economists speak to each other rather than to any interested addressee in real world politics.

#### **4. Private Autonomy and Market Competition**

Our concern in this paper is with the question of what kind of competence economists can legitimately claim in advising competition policy. Before addressing this question within the specific context that is of interest here, namely the discussion on a ‘modernization’ of EU competition policy, it is useful to recall some basic insights on the nature of *market competition*.

Competition in the most general sense of the word is an inescapable fate in a world of scarcity in which the means available to satisfy human wants fall notoriously short of these wants because what humans desire always moves ahead of the means at their disposal, no matter how successful they are in expanding them. As Armen Alchian has succinctly put it, in a world of scarcity where conflicts of interest among advantage seeking individuals are omnipresent we do not have the option to live without competition, we can only choose between alternative ways in which competition is carried out.<sup>6</sup> A feudal or mercantilist

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<sup>6</sup> A. Alchian (1977: 127): “In *every* society conflicts of interest among members of that society must be solved. The process by which that resolution (not elimination!) occurs is known as *competition*. Since, by definition, there is no way to eliminate competition, the relevant question is what kind of competition shall be used in the resolution of conflicts of interest.”

system, a socialist economy and a market economy differ in this sense not in the presence or absence of competition but in the different nature of their respective ways of organizing competition. To compete for rents to be reaped from privileges in a mercantilist world (Ekelund and Tollison 1982) or to compete, in a socialist economy, for desired consumer goods by spending time in waiting lines are no less methods of competition than the competition in markets. By adopting a market order as its economic constitution a society chooses a particular way of organizing competition. That this method makes for a far more productive economy than any other known method has been the principal message of modern economics since Adam Smith. There is no need to recount this message here.<sup>7</sup> Suffice it to say that it provides a solid basis for advising the citizens of a democratic polity that it is in their common interest to opt for a market order when deciding on the economic constitution under which they wish to live. The member states of the EU have made this choice.

How market competition works through the market-price mechanism has been extensively detailed in economics textbooks. What, from a legal perspective, its fundamental characteristics are has been superbly stated by the co-founder of the *ordo-liberal* Freiburg School, Franz Böhm, in his classic article on “Private Law Society and Market Economy” (1966). As Böhm explains, market competition is the kind of economic dynamics that results within a private law order from the ways in which individuals exercise their private autonomy, i.e. the individual liberty that they enjoy within a legal order that protects their property rights and freedom of contract.<sup>8</sup> A market economy is in this sense, so Böhm argues, nothing but the twin sister of a private law society. Adopting a private law order and adopting a market economy are not two separate things. The second results as a consequence of individual choices when the first is established.

Individual liberty as private autonomy is constituted by, and at the same time limited by, an effectively enforced legal framework<sup>9</sup> that defines mutually compatible private domains within which individuals are free to act, protected from encroachment by other private law subjects as well as from government intervention. Liberty within a private law system means, as F.A. Hayek (1960: 155) puts it, “that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that

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<sup>7</sup> Alluding to F.A. Hayek’s well known argument on “the use of knowledge in society” E. Hoppmann (1988: 73) notes that the economic efficiency of the market order can be explained by the fact that it utilizes far more knowledge than any other known economic system.

<sup>8</sup> In the same spirit E.-J. Mestmäcker (2005: 23) notes: “Wettbewerb entsteht aus der Ausübung von Freiheitsrechten: der Gewerbefreiheit, der Vertragsfreiheit, des Eigentums und anderer Vermögensrechte. Solche Rechte hat es im Privatrecht seit jeher gegeben.” – W. Möschel (2008: 386) echoes: “Wettbewerb ... erwächst aus der Interaktion individueller Handlungsfreiheiten.” – See also E. Hoppmann (1988: 359).

<sup>9</sup> Mestmäcker (2005: 24): “Das Recht erweist sich damit nicht nur als eine Schranke der Freiheit, sondern als ihre Voraussetzung.”

apply equally to all.” The rules that constitute such liberty or private autonomy are proscriptive as opposed to prescriptive rules, they exclude or prohibit certain types of actions but otherwise leave an open-ended range of behavioral options from which individuals are free to choose.<sup>10</sup> It is the essence of a private law order and the market economy that emanates from it that the activities of the participants are coordinated by negative or prohibition rules (Hoppmann 1988: 262, 273, 305) that leave scope for individual adaptation and explorative search for new and potentially better ways of doing things.

Freedom to compete in a private law based market economy means the ability to exercise one’s private autonomy and to freely choose from the range of behavioral options that are not prohibited by the ‘rules of the game.’ And to protect such freedom to compete means nothing other than to protect the individual liberty that a private law system provides for.

### **5. Freedom to Compete: The Constitutional and the Sub-Constitutional Level**

In the controversy between advocates and critics of the ‘more economic approach’ a principal issue is whether ‘freedom to compete’ or ‘economic efficiency’ should be the guiding goal that EU competition policy is supposed to promote (Hellwig 2006; Budzinski 2007; von Weizsäcker 2007; Schmidtchen 2008). The emphasis on ‘Wettbewerbsfreiheit’ – or ‘freedom to compete’ – as the principal goal of competition policy has been the trademark of German *ordo-liberalism* (Vanberg 2001a). A prominent advocate of this concept among economists has been Erich Hoppmann<sup>11</sup> who has even claimed that the freedom to compete must, as a manifestation of individual economic freedom, be regarded as a “goal in itself” (Hoppmann 1967: 79).<sup>12</sup> It is in particular this claim that is at issue in the ongoing debate on the ‘more economic approach.’ My purpose in this section is to show that by distinguishing more carefully between the constitutional and the sub-constitutional level of competition policy than is typically done by advocates on either side ambiguities that have plagued the debate can be avoided.

The claim that the ‘freedom to compete’ is a goal in itself seems to imply that, in terms of the above distinction between hypothetical and categorical ought-statements, it is meant to be a *categorical* imperative for competition policy. This must provoke, of course, the question

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<sup>10</sup> Hayek (1960: 19): “Liberty is ... a condition in which all is permitted that is not prohibited by general rules.”

<sup>11</sup> Hoppmann (1988: 87): “Die Wettbewerbspolitik hat ... als Ziel die Wettbewerbsfreiheit.”

<sup>12</sup> According to Hoppmann (1988: 199) the freedom to compete is “ein Ziel in sich selbst, weil sich in ihm wirtschaftliche Freiheit manifestiert.” – *Ordo-liberal* jurists like Möschel (1989: 147) argue likewise: “The actual goal of the competition policy of *ordo-liberalism* lies in the protection of individual economic of action as a value in itself.”

of what arguments economics could master to support such a claim without transgressing its limits as an empirical science. It is in answering this question that the distinction between the constitutional and the sub-constitutional dimension of competition policy is of critical importance. What needs to be considered here is the difference between the what competition policy should do *within a given legal-institutional framework* and what its goal should be in *shaping this framework*.

As argued above, a society's choice to opt for a market economy presupposes the adoption of a private law order that defines and protects private domains within which individuals are free to choose and to enter into voluntary contracts with each other. Accordingly, the demand that within a market economy competition policy ought to secure the freedom to compete is equivalent to the demand to respect and protect the individual liberty that the respective private law order provides for. And this demand is, indeed, a categorical imperative once the constitutional choice in favor of a private law society with its market economy has been made. It is simply a matter of consistency, since it would be inconsistent to choose, at the constitutional level, rules of the game that – by prohibiting certain types of actions – negatively circumscribe the domain of individual freedom of choice and then, at the sub-constitutional level where the rules are to be enforced, not to respect and protect this freedom of choice.

When critics such as D. Schmidtchen (2008: 160ff.) and C.C. von Weizsäcker (2007) charge that the goal of protecting the freedom to compete is, in effect, an “empty formula” that per se, without the assistance of economic efficiency considerations, cannot provide guidance for competition policy, they can surely not mean to say that competition authorities or courts that are in charge of enforcing the ‘rules of the market game’ cannot know what this goal requires them to do. Within an established private law order what individual liberty and, hence, freedom to compete means is explicitly defined even if on occasion courts may have to decide how, exactly, the existing rules should be interpreted. At the sub-constitutional level, in its role of monitoring the ongoing market game, competition policy can surely be guided by the goal of protecting the freedom to compete. It would be a violation of individual rights if competition agencies would prohibit actions that the existing rules of the game permit or would permit actions that are prohibited by these rules, on account of the economic inefficiency or efficiency of the overall consequences that the respective actions are presumed to produce. It is the essence of a rule-based system of liberty that individuals are protected in their freedom to act as long as they do so within the limits set by the rules of the game, that their responsibilities are limited to respecting the rights that others enjoy under these rules. It

is the principal reason for the productivity of such a rule-based system that individuals, within these limits, are free to pursue their own purposes, that they may concentrate their attention on matters under their control, and that they are relieved from responsibility for the overall welfare consequences that their rule-abiding actions may have.<sup>13</sup> The problem of assuring that the rule-conforming pursuit of individual interests results overall, even if not in every single case, in ‘efficient’ patterns of outcomes is the ‘responsibility’ of the rules of the game. It is a problem that has to be solved at the constitutional level by choosing adequate rules.

What critics can only have in mind when they classify the goal of economic freedom or Wettbewerbsfreiheit as an ‘empty formula’ is that, even if at the sub-constitutional level it is meaningful, this goal can no longer be of help at the *constitutional level* where the very rules that define what economic freedom or Wettbewerbsfreiheit entails are to be chosen.<sup>14</sup> Concepts such as private autonomy, individual liberty or economic freedom have a definite meaning *within* a legal-institutional framework that defines and protects private domains within which individuals are entitled to freely pursue their own ends. To have meaning at all they presuppose, to be sure, the existence of a system of negative or prohibition rules that leave room for free individual choice.<sup>15</sup> But what the concepts of individual liberty and freedom to compete specifically entail is necessarily relative to how they are defined by the existing system of rules.<sup>16</sup> Their content depends on where the dividing line between the public realm and the private domain – i.e. between what is subject to collective, political control and what is subject to individual, private choice – is drawn, and on how the rules of the private law system define individual rights and responsibilities. And in different private

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<sup>13</sup> As Mestmäcker (quoted from Möschel 2008: 386) puts it: “Regeln, die autonomes, individuelles Handeln ermöglichen und legitimieren, sollen den Einzelnen verantwortliches Entscheidungen in den eigenen Angelegenheiten ermöglichen, ohne ihnen die Haftung für die gesamtgesellschaftlichen Folgen ihres Tuns aufzuerlegen.”

<sup>14</sup> C.C. von Weizsäcker (2007: 1084) glosses over the critical difference between the constitutional and the sub-constitutional level when he notes: “Es gibt nicht die Wettbewerbsfreiheit. Gesetzgeber, Behörden und Gerichte stehen immer vor der Aufgabe, sich für bestimmte Varianten der Wettbewerbsfreiheit und damit automatisch gegen andere Varianten der Wettbewerbsfreiheit zu entscheiden. Bei der Abwägung zwischen verschiedenen Varianten der Wettbewerbsfreiheit gibt es keine Kriterien, die es einem erlaubten, allein aus dem Begriff der Wettbewerbsfreiheit die eine der anderen Variante vorzuziehen.”

<sup>15</sup> Hoppmann (1988: 85): “Die Spielregeln können sich nur auf das Verhalten der Wettbewerber beziehen. Aus der Zielsetzung der Wettbewerbsfreiheit ergibt sich jedoch, dass den einzelnen Marktteilnehmern nicht positiv vorgeschrieben werden kann, wie sie handeln müssen. ... Es darf ihnen nur vorgeschrieben werden, dass sie gewisse Handlungen *nicht* vornehmen dürfen. Die Spielregeln müssen also negativ formuliert sein.” – See also (ibid.: 93): “Wettbewerb als Norm ... wird wirtschaftspolitisch verwirklicht, indem man Spielregeln aufstellt, die anordnen, was die Marktteilnehmer nicht tun dürfen.”

<sup>16</sup> Hoppmann (1988: 84, 85f.): “Wettbewerbsfreiheit ist relative Freiheit im Rahmen der Marktprozesse. ... Jedoch geht es bei der Formulierung von Spielregeln ... um die Frage des konkreten Freiheitsspielraumes ... Spielregeln müssen also im einzelnen festlegen, durch welche Handlungen die Wettbewerbsfreiheit unzulässig eingeschränkt wird.” – Hoppmann (1967: 80): “Da aber der Freiheitsbereich des einen im Freiheitsbereich des anderen seine Grenze findet, kann Freiheit zu Wettbewerb nur in einem relativen Sinne verstanden werden.”

law societies with their market economies this line can be drawn differently and the rules of private law can be defined differently.

Reversely, when advocates of the goal of economic freedom or *Wettbewerbsfreiheit* want to employ this goal as guideline for competition policy, not only at the sub-constitutional level but at the constitutional level as well, it can surely not have the same meaning at both levels. ‘Economic freedom’ as defined *within* a system of rules can, quite obviously, not at the same time provide the criterion for judging the very rules by which it is defined.<sup>17</sup> If it is to serve as a standard for judging alternative systems of rules, a standard that can inform constitutional choices in a democratic polity, it must be meant as a *meta-criterion* that allows one to compare the different ways in which these systems specify the ‘economic freedom’ that they protect.<sup>18</sup> However it may be specified at the constitutional level, whether as a general preference for rule systems that provide more scope for individual autonomy or otherwise, as a goal for competition policy at this level it cannot claim the same *categorical* authority as its sub-constitutional counterpart.<sup>19</sup> In a democratic polity it must be argued for in terms of reasons for why the citizens-sovereigns should adopt it as a criterion in choosing the rules under which they wish to live. And the reasons that economics as an empirical science might provide can only be those that appeal to citizens’ common constitutional interests and are capable of convincing them that adopting the recommended criterion will be to their mutual advantage. In other words, the goal of economic freedom or *Wettbewerbsfreiheit* can, at the constitutional level, only be postulated as a *hypothetical* imperative.

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<sup>17</sup> Hoppmann (1988: 299) refers to the constitutional level when he notes: “Wettbewerbspolitik hat es de lege ferenda mit der Neuformulierung derartiger Verhaltensregeln oder mit der Anpassung bestehender Regeln zu tun.”

<sup>18</sup> Schmidtchen (2008: 160) argues similarly without, however, explicitly recognizing the need to distinguish between the sub-constitutional and the constitutional level: “Wer aus dem Ziel der Wettbewerbsfreiheit (oder der Festlegung ‘des’ Wettbewerbs als Schutzobjekt) Kriterien für die Abgrenzung individueller Handlungsrechte ableiten will, der muss entweder auf einen von den individuellen Freiheiten abgesonderten Meta-Freiheitsbegriff zurückgreifen (der Kriterien für die Definition individueller Handlungsfreiheiten in Konfliktsituationen bereitstellt) oder aber eine Leerformel benutzen.” – Schmidtchen’s ‘Leerformel’-charge may indeed be provoked by statements like the following: “Wettbewerb als Norm der Wettbewerbspolitik ist jener Marktprozess, in dem sich Wettbewerbsfreiheit ... manifestiert” (Hoppmann 1988: 83f.).

<sup>19</sup> Hoppmann (1988: 72) seems to suppose that economic freedom may also serve as a constitutional criterion when he argues: “Die Wettbewerbsordnung stellt insofern ein System rechtlich verfasster Freiheiten dar. Daraus ergeben sich Rückschlüsse für die Ausgestaltung der Privatrechtsordnung. Wenn die Freiheitsverbürgungen des Rechtsstaates ihren Platz auch in der Privatrechtsordnung finden sollen, dann sind der Vertragsfreiheit gewisse Grenzen gesetzt.” – The difficulty with this argument is that in defining the limits of the freedom of contract the legal framework defines what ‘freedom to compete’ means, and that, if ‘freedom to compete’ is to be a criterion that helps to decide how the freedom of contract should be limited, the concept must have two different meanings, one for the sub-constitutional and one for the constitutional level.

## 6. The Goal of Competition Policy in a Democratic Society

The market game – or, in Hayek’s (1976: 115) terms, the “game of catallaxy” – can be played according to different rules, and with systematically different rules the market process will result in different patterns of outcomes. As Hayek (1960: 229) has put it: “How well the market will function depends on the character of the particular rules. The decision to rely on voluntary contracts as the main instrument for organizing the relations between individuals does not determine what the specific content of the law of contract ought to be; and the recognition of the right of private property does not determine what exactly should be the content of this right in order that the market mechanism will work as effectively and beneficially as possible.” The choice of its specific rules – what the German *ordo-liberals* have called *Ordnungspolitik* – is the principal method by which the general working properties of the market process can be deliberately shaped.

The fact that markets can be framed by different rules means that we must distinguish between the fundamental or primary constitutional choice of adopting a market economy, based on a private law order, and the secondary constitutional choice among potential alternative rules for the market game.<sup>20</sup> Accordingly, economic policy choices – and the advice that economists may provide to citizen cooperatives facing such choices – can be located at three levels, at the fundamental constitutional level of deciding on the general type of economic order, at the secondary constitutional level of deciding on the specific legal-institutional framework for the market game, and, lastly, at the sub-constitutional level of choosing policies within the existing system of rules that frame the ongoing market process.

As has been argued above, advocates of *Wettbewerbsfreiheit* as a ‘value in itself’ are right when they insist that at the sub-constitutional level protecting the private autonomy and hence the freedom to compete is a categorical imperative for competition policy in a market economy, a duty that cannot be abrogated on grounds of promoting ‘economic efficiency’ or for other reasons.<sup>21</sup> Yet, the same authority cannot be claimed for *Wettbewerbsfreiheit* as a normative standard at the constitutional level. However ‘freedom to compete’ may be specified as a goal for a polity’s choice of its economic constitution, at this level it cannot be claimed to be a ‘value in itself’ but must, instead, be argued for in terms of reasons that appeal

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<sup>20</sup> Hayek (1948: 111) points in effect to this distinction when he notes: “Where the traditional discussion becomes so unsatisfactory is where it is suggested that, with the recognition of the principles of private property and freedom of contract ... all the issues were settled, as if the law of property and contract were given once and for all in its final and most appropriate form, i.e. in the form which will make the economy work at its best. It is only after we have agreed on these principles that the real problems begin.”

<sup>21</sup> Mestmäcker (2008: 13) points this out when he argues: “Die Wohlförderung ist ein Produkt des Wettbewerbsprozesses, ohne zum Tatbestand der Normen zu gehören. Es ist der Zweck dieser Normen, die Unternehmen vorab darüber zu informieren, welcher Einsatz im Wettbewerb aus Rechtsgründen ausgeschlossen sein soll.”

to the interests of those who are the sovereigns for making this choice, i.e. the members of the citizen cooperative. In other words, the advice to adopt Wettbewerbsfreiheit as guiding standard in choosing the rules for their economy can only be presented as a hypothetical imperative, i.e. in terms of arguments for why with such guidance citizens can expect to advance their common interests.<sup>22</sup>

Surely, there is scarcely any disagreement between the advocates on either side of the current debate on the ‘more economic approach’ in EU competition policy about the prudential reasons that can be given to citizens for why opting for a private law order with its market economy is to their mutual advantage. Ordo-liberals will, no less than their counterparts, emphasize that its superior economic efficiency speaks for choosing a market order,<sup>23</sup> even if they will put additional emphasis on the intrinsic value of individual liberty and the non-economic benefits that a liberal order promises. Such difference in emphasis does not alter the fact, though, that ordo-liberal advisors no less than advocates of a ‘more economic approach’ need to support their case by arguments that appeal to the interest of the citizens who are to choose the economic constitution under which they wish to live. The same is true for the ‘secondary constitutional choice,’ the choice among potential alternative rules for the market game. However the goal of Wettbewerbsfreiheit may be specified at this level, it must be argued for in terms of reasons that tell citizens why choosing the rules of the market according to this standard promises to serve their common interests.<sup>24</sup> The concept of *Leistungswettbewerb* that plays a central role in the ordo-liberal tradition (Vanberg 1997: 718ff.; 2001: 3f., 46f.) lends itself to be interpreted, and to be argued for, in just this sense.

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<sup>22</sup> In a defense of the ‘economic approach’ von Weizsäcker (2007) discusses a number of issues – such as retail price maintenance or patent law – where competition policy must de facto choose which type of competition, and thereby which form of Wettbewerbsfreiheit, it wants to permit, and he argues that for this choice the concept of Wettbewerbsfreiheit cannot provide guidance. As he puts it: “Ich glaube nicht, dass es möglich ist, allein aus dem Begriff der Wettbewerbsfreiheit abzuleiten, welcher der beiden Varianten von Wettbewerbsfreiheit der Vorzug zu geben ist. ... Was liegt dann näher, als eine Abwägung der Vor- und Nachteile der beiden Formen von Wettbewerbsfreiheit unter dem Kriterium der Konsumentenwohlfahrt vorzunehmen” (ibid.: 1079). – Von Weizsäcker is not explicit about whether his argument is meant to apply only to the constitutional of choice or to the sub-constitutional level as well. He notes, though, that his examples are “primarily but not exclusively a matter of legislation” (ibid.: 1080). If it is meant to be about the constitutional choice of rules of competition von Weizsäcker’s argument is surely right, but it is equally surely wrong at the sub-constitutional level where the rules of the market game have to be enforced and adjudicated.

<sup>23</sup> Hoppmann (1988: 307): “Im Rahmen einer marktwirtschaftlichen Ordnung sind Wettbewerbsfreiheit und ökonomische Vorteilhaftigkeit zwei Aspekte des wettbewerblichen Prozesse.”

<sup>24</sup> Hoppmann (1967: 78f.): “Wettbewerbspolitik ist Wirtschaftspolitik zur Gestaltung von Marktprozessen. ... Von den zahlreichen möglichen Ausprägungen der Marktprozesse sind einige erwünscht, andere sind es nicht. ... Mit Hilfe der Wettbewerbsdefinition sollen bestimmte gesetzliche Vorschriften, die sogenannten Spielregeln, geschaffen werden, um die Marktprozesse in die gewünschten Bahnen zu lenken.” – When Hoppmann argues that the rules of the market game serve to give the market process a “desired course,” the “desired” must refer to somebody who is considered the relevant judge in this matter. In a democracy this can only be the citizens with whom the ultimate authority for choosing the rules resides.

*Leistungswettbewerb* denotes the ideal of a market order framed by rules that aim at making producers responsive to consumer interests or, as Wilhelm Röpke (1960: 31) put it, that seek to assure “that the only road to business success is through the narrow gate of better performance in service of the consumer.”<sup>25</sup> To establish an order of *Leistungswettbewerb* means to adopt rules for the market game that make consumer preferences the ultimate controlling force in the process of production.<sup>26</sup> As a constitutional ideal for framing market processes the concept of *Leistungswettbewerb* has apparent affinity to the principle of *consumer sovereignty* that – even if not under this name – has been cherished by economists, since Adam Smith argued that, because we only produce in order to consume, we should give priority to consumer rather than to producer interests when choosing the rules of the economic game.<sup>27</sup> William H. Hutt (1943: 660) who appears to have coined the term notes that the notion of “consumers’ sovereignty” is meant to indicate “that ultimate power to determine the use of resources which are ‘scarce’ ... shall be vested in the people. It implies that the goodness or success of productive effort can be judged only in the light of consumer preferences.” To implement this idea, so Hutt (ibid.) emphasizes, requires deliberate “institutional planning” by contrast to “*laissez-faire* in the *popular* sense,” it requires the “fashioning of a framework” that is conducive to this purpose.<sup>28</sup>

To Adam Smith (1981: 660) the maxim of *Leistungswettbewerb* or consumer sovereignty appeared “so perfectly self-evident, that it would be absurd to attempt to prove it.” Since the advent of utilitarian welfare economics what was self-evident for Adam Smith is no longer taken for granted in the academic profession that he helped to create. There has been, and continues to be, controversy about whether or not total welfare, i.e. the sum of consumer and producer surplus, is a more adequate measure of economic efficiency than

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<sup>25</sup> Mises (1981: ) : “The only way to acquire wealth and to preserve it, in a market economy not adulterated by government-made privileges and restrictions, is to serve the consumers in the best and cheapest way.”

<sup>26</sup> As Franz Böhm (1980: 90) put it metaphorically, it means to place “the consumer directly at the manual of the economy-organ.”

<sup>27</sup> A. Smith (1981: 660): “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it.” – In similar words Ludwig von Mises (1981:400) notes about the market: “People produce, not for the sake of production, but for the goods that may be consumed. As producer in an economy based on the division of labor, a man is merely the agent of the community and as such has to obey. Only as a consumer can he command.”

<sup>28</sup> It is the task of ‘fashioning a framework’ that gives the competitive market process desirable working properties that, as Mestmäcker (2008: 13) puts it, makes it possible and necessary, “Normen gegen Wettbewerbsbeschränkungen in Auseinandersetzung mit tradierten öffentlich-rechtlichen und privatrechtlichen Vorgaben als eine selbständige wirtschaftsrechtliche Disziplin zu entwickeln.... Die mit diesen Normen notwendig verbundenen Eingriffe in die Handlungs- und Vereinigungsfreiheiten, aus denen der Wettbewerb entsteht, dessen Funktionsfähigkeit im öffentlichen Interesse zu gewährleisten ist, erklären die wichtigsten Eigenarten dieser Normen. ... Es sind die Verbraucher, die von der Freiheit der Konsumwahl Gebrauch machen, von deren Entscheidungen Erfolg oder Misserfolg im Wettbewerb wesentlich abhängen.”

consumer welfare alone.<sup>29</sup> From a constitutional economics perspective there is a clear answer to the question of how this dispute ought to be decided.<sup>30</sup> Interpreted as alternative hypothetical imperatives the opposing views on what should be the guiding principle in framing market processes should be judged in terms of how well they can be supported by arguments that appeal to the common interests of their ultimate addressees in a democratic polity, the citizens.

The advocates of a total welfare standard may seek to support their case by reminding citizens of the fact that they take part in the economy not only as consumers but on the producer side as well – be it as employees, as investors or in other capacities – and that, accordingly, giving priority to consumer sovereignty would mean to neglect an important part of their more inclusive economic interests. If advocating the principle of *Leistungswettbewerb* would indeed amount to an arbitrary preference for a partial interest, Adam Smith's claim that it is a "perfectly self-evident" maxim would be difficult to defend. Yet, neither Adam Smith nor other advocates of the principle of consumer sovereignty have simply ignored the obvious fact that people are concerned about their interests as producers as well. Their case must rest on the claim that, considering their encompassing interests and notwithstanding their double affectedness, citizens can expect to be better off overall by adopting an economic constitution of *Leistungswettbewerb*, even if being exposed to such competition as producers may be an unwelcome burden.<sup>31</sup> The essential, if rarely explicitly stated argument supporting this claim is that citizens' interests as producers in escaping the burden of competition do not qualify as common interests that they share across different producer groups, but are sectional interests that are in conflict between different groups. Producers in industry A who are on the demand side for products of industry B are harmed by restraints of competition in the latter, and vice versa. By contrast, in their capacity as consumers citizens are not separated by sectional divides but share a common interest in a regime of *Leistungswettbewerb*. That they are consumers as well as producers means that citizens are facing a trade-off between, on the one side, the advantages they can expect as consumers and the burden they have to carry as producers in a regime of *Leistungswettbewerb* and, on the other side, the benefits they can

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<sup>29</sup> See Hellwig (2007: 32) for references to this controversy.

<sup>30</sup> For a discussion of the 'total welfare versus consumer welfare' issue from a constitutional economics perspective that differs somewhat from the line of argument developed here see W. Kerber (2008: 17ff.).

<sup>31</sup> Hutt (1990: 257f.): "In regarding the individual as consumer, we do not see him in his full relationship to society. He is usually also a producer. But as a producer he is the servant of the community. ... As a 'consumer', each directs. As a 'producer', each obeys." – Referring to the fact that in their capacity as producers individuals may be negatively affected by competition Hayek (1976: 121) asks the question: "Does this mean that something is disregarded that ought to be taken into account in the formation of a desirable order?" His answer is that these disadvantages are compensated by the benefits effects of a competitive order. As he (*ibid.*: 122) notes: "And though in the short run the unfavorable effects may out-balance the sum of the indirect beneficial effects, in the long run the sum of all those particular effects ... are likely to improve the chances of all."

expect in a producer-friendly regime from restraints of competition in their own industry and the disadvantages that will result from restraints of competition in other industries whose products they consume or need as inputs for their own production.

While it may be tempting for any single group of producers to seek protection from competition in an otherwise competitive environment, to opt for an economic constitution that assures Leistungswettbewerb rather than one that gives room to anticompetitive producer interests can be recommended to citizens, because they can expect to be compensated for the disadvantages they suffer as producers from their exposure to competition by the far greater advantages they will realize as consumers because other producer are exposed to the discipline of Leistungswettbewerb as well.<sup>32</sup> In other words, adopting rules for the market game that promote consumer sovereignty is to the mutual advantage of citizens because, even though there will always be occasions in which they will be harmed in their interests as producers, the benefits they will realize as consumers over the course of the market game will assure them “*general compensation*” (Fehl and Schreiter 1997: 220; Vanberg 2001a: 53).

### **7. Consumer Welfare, Economic Freedom and the ‘More Economic Approach’**

What has been said at the outset of this paper about the general controversy around the ‘more economic approach’ can be said as well about the debate on whether total welfare or consumer welfare is the more adequate measure of economic efficiency. Ambiguities that have plagued this debate can be avoided if more attention is paid to the distinction between the constitutional level at which the rules of the market game are chosen and the sub-constitutional level of policy choices within a given legal-institutional framework. When the task is to advise citizens in matters of economic policy this distinction is critical, because there is a categorical difference between assessing the welfare consequences of alternative options at the constitutional level by contrast to the sub-constitutional level.

When the focus is on assessing the welfare consequences of policy measures in particular instances advising citizens to consider only their interests as consumers and to ignore their interests as producers must, indeed, seem arbitrary and the addressees of such advice may well doubt its wisdom. To make a convincing argument to citizens why, at the sub-constitutional level, a competition policy that, for instance, prohibits and penalizes cartel agreements is in their *common interest* is hardly possible because the negatively affected

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<sup>32</sup> Hoppmann (1967: 80): “Wenn ein dauernder Anreiz zur Leistungssteigerung beispielsweise unter den Anbietern wirksam ist und die Leistungsfähigsten zum Zuge kommen, dann ist das für jeden einzelnen Nachfrager ökonomisch vorteilhaft. Das gleiche gilt, mutatis mutandis, für jeden Anbieter im Hinblick auf die Nachfrageseite. Jeder Marktteilnehmer erzielt also einen ökonomischen Vorteil.”

cartelists cannot be expected to agree that such policy is serving their interests. It is, however, an entirely different project, and one that is more likely to succeed, to provide arguments to citizens for why it is in their common interest to accept rules of the game that prohibit cartels. This can be argued on the ground that the pattern of outcomes that the market game promises to produce under such rules will be more beneficial to all of them even if there will be instances where they would prefer not to be subject to these rules.

Advising citizens from constitutional economics perspective means to alert them to the advantages of a constitutional regime that prohibits cartel agreements – or, more generally, of a regime of *Leistungswettbewerb* – compared to alternative regimes, and to point out that, if they choose to adopt such a regime for its advantages, they are necessarily bound by its rules at the sub-constitutional level. Accepting the burdens that a regime of *Leistungswettbewerb* imposes on producers is a categorical duty that citizens must accept if they choose, at the constitutional level, to adopt such a regime.<sup>33</sup> The advice to adopt the regime can only be stated as a hypothetical imperative that appeals to citizens interests. The demand to honor its rules, once it is chosen, is a categorical imperative.

Apart from the fact, discussed above, that conventional welfare economics lacks clarity about the intended addressee of its advice, it is its failure to be explicit about the level at which its welfare calculus is meant to apply that causes the disagreement on whether consumer welfare or total welfare should be given priority. It is with its sub-constitutional focus on the welfare effects of particular policy measures that Paretian welfare economics faces what Martin Hellwig (2006: 240) calls “the embarrassing question of a potential compensation of cartelists and dominant firms for the consequences of competition policy.” It faces this “embarrassing question” because – by contrast to constitutional economics – it has no arguments in its repertoire for why cartelists could be requested to tolerate the burden that anti-cartel policies impose on them.<sup>34</sup> If it were to apply its logic consistently to the constitutional level, Paretian welfare economics would converge with constitutional economics because its search for rules that make at least one person better off without making

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<sup>33</sup> Mestmäcker (2005: 25): “Der Wettbewerb selbst, der aus der Gewährung umfassender Freiheitsrechte entsteht, bedeutet für diejenigen, die sich daran in Ausübung ihrer Autonomie beteiligen, auch die Hinnahme der sich daraus ergebenden Widrigkeiten. ... Das impliziert ein wichtiges wettbewerbsrechtliches Prinzip. Schäden, die sich Wettbewerber im redlichen Wettbewerb zufügen, sind nicht rechtswidrig.”

<sup>34</sup> Hellwig (2007: 33f.): “Das Wettbewerbsrecht beschränkt die Handlungsspielräume von Unternehmen, potentiellen Kartellisten und Marktbeherrschern, ohne dass die Unternehmen und ihre Eigentümer dafür kompensiert würden. Solche Eingriffe sind mit dem Pareto Kriterium nicht zu begründen. ... Meines Erachtens muss eine normative Grundlegung der Wettbewerbspolitik auch ... erklären, warum ein Kartellverbot ohne Kompensation von den Betroffenen zu akzeptieren ist. Ein reines Effizienzziel ist dafür nicht geeignet.”

anybody else worth off would lead to the same result as the constitutional economist's search for rules that promise mutual benefits to the parties involved.<sup>35</sup>

The failure to be explicit about whether welfare assessments in a market economy have their proper place at the constitutional or the sub-constitutional level is not only the source of confusion in the 'consumer welfare versus total welfare' issue it is also the principal source of confusion in the controversy on the relation between 'economic freedom' and 'economic efficiency' as criteria for guiding economic policy. Arguments on welfare effects are surely arguments that the members of a citizen cooperative have reasons to consider in choosing their economic constitution, and advocates of the ideal of economic freedom or *Wettbewerbsfreiheit* would obviously miss something important if they would not include such arguments in their advice. The relevant issue is, therefore, not about whether economic efficiency arguments have a role to play in advising competition policy. It is, instead, about the proper level at which they have to play their role.<sup>36</sup> The advocates of economic freedom and *Leistungswettbewerb* have no reason to deny that comparing the prospective welfare effects of alternative rules of the market game is an essential prerequisite in choosing an economic constitution, and that economics can provide an important service by informing about the working properties of potential alternative systems of rules. What they reject is the claim that a 'more economic approach' can help to improve competition policy by informing about the specific welfare effects in particular instances. In other words, the relevant controversy is about whether economic efficiency arguments have their proper place at the constitutional level, i.e. in providing advice for the choice of rules, or at the sub-constitutional level, i.e. in advising competition policy in its day-to-day operation.<sup>37</sup>

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<sup>35</sup> Traditional welfare economics can, as Hellwig (2006: 238) argues, not explain which policy interventions are commensurate with a free society, and cannot answer the question of what legitimizes coercive measures of competition policy that make cartels and dominant firms worse off. – Hellwig accuses German ordo-liberalism of being subject to the same charge insofar as they posit that cartels and monopolies impair the working of the market system (ibid.: 239). With such critique Hellwig ignores that the ordo-liberal anti-cartel and anti-monopoly argument is explicitly, and emphatically so by Franz Böhm, made at the constitutional level. It has to be admitted, though, that by employing the outcome-oriented criterion of 'complete competition' in addition to the procedural and rule-oriented criterion of *Leistungswettbewerb* ordo-liberal authors have introduced ambiguity in their argument that invites the kind of critique that Hellwig voices. On a careful study of the ordo-liberal research program it should however be apparent that the criterion of *Leistungswettbewerb* is the one that is in line with the fundamental logic of this approach and that the criterion of 'complete competition' can be ignored without any loss in its explanatory power (Vanberg 1997: 719f.).

<sup>36</sup> Mestmäcker (2005: 29): "Transaktionen, die Teil des Wettbewerbsprozesses sind, können nicht anhand ihrer Ergebnisse beurteilt werden. Normen gegen Wettbewerbsbeschränkungen müssen vielmehr in Übereinstimmung mit dem System ausgelegt und angewendet werden, das sie sichern sollen. ... Es geht nicht um eine Analyse mit oder ohne Wirtschaftswissenschaften. Es geht um die Vereinbarkeit des Effizienzkriteriums mit dem vor Beschränkungen und Marktbeherrschung zu schützenden Wettbewerb."

<sup>37</sup> Mestmäcker (2008: 14): "Es gibt keine Meinungsverschiedenheit darüber, ob die Wettbewerbsfreiheit einen 'Economic Approach' verlangt. Es gibt aber Meinungsverschiedenheiten darüber, ob der 'More Economic Approach' der EG-Kommission ... der einzig richtige Economic Approach ist. Dazu gehört, dass er auch mit den Wettbewerbsregeln des Rechts vereinbar ist."

As has been indicated above, the principle reason for advocates of the goal of economic freedom or *Wettbewerbsfreiheit* to reject an ‘effects-based approach’ that applies efficiency considerations at the sub-constitutional level is that such guidance for competition policy is in conflict with the requirements that follow from adopting a market order and the private law system on which it is based. Whatever efficiency arguments may legitimately inform the choice of rules that are to frame the market process, within the rules chosen the private autonomy that they provide for must be respected and the freedom of choice that is the substance of private autonomy cannot be made contingent on assessments of the welfare effects that result from its use. There is no conflict between using consumer sovereignty as a criterion in choosing the rules for the market game, but it would be inconsistent with a private law system to allow actions that it prohibits or to prohibit actions that it permits because of the positive or negative welfare effects they are predicted to produce in particular instances.

The consistency argument is about the level at which economists *should* apply their advice, considering the fundamental legal properties of a market economy. From a constitutional economics perspective there is, though, a second kind of argument that can be made against an ‘effects-based approach,’ an argument that is about the level at which economists *can* competently provide advice, considering the limits of knowledge that their discipline is subject to. In the controversy on the ‘modernization’ of EU competition law this second argument is usually not clearly separated from the first, but it is of a different nature and deserves separate consideration. The next section will take a brief look at this argument.

## 8. The Reason of Rules and the Rule of Reason

The principal claim made by the advocates of an ‘effects-based approach’ is that, compared to the traditional ‘form-based’ or rule-oriented approach, it allows competition policy to be more accurate in discriminating between business practices that promote economic efficiency – or consumer welfare – and those that do not.<sup>38</sup> In cases where the pro-competitive or efficiency effects of business practices are found to outbalance their anti-competitive effects, so the advocates argue, competition policy should adopt a ‘rule-of-reason’ standard instead of following per-se-rules (Schmidtchen 2007a: 97).<sup>39</sup> Critics have charged that the downside of

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<sup>38</sup> According to Schmidtchen (2007a: 96f.) an ‘effects-based approach’ that judges business behavior and government actions in light of its effects in each particular case (“anhand einer Einzelfallanalyse”) has the advantage of distinguishing more accurately pro-competitive and efficiency promoting practices from anti-competitive behavior than legal per se rules.

<sup>39</sup> Schmidt and Voigt (2007: 34f.): “Die angestrebte stärkere Einzelfallbeurteilung soll durch eine Aufwertung der ‘rule of reason’ erfolgen. Im Umkehrschluss bedeutet das somit eine Abwertung von ‘per se’ Regeln. ... ‘Per se’-Regeln grenzen erlaubte von verbotenen Handlungen ab. Erlaubnis bzw. Verbot gelten prinzipiell ... . Unter der ‘rule of reason’ wird hingegen versucht, die Vor- und Nachteile einer Handlung im spezifischen

the approach is a loss in legal certainty because market participants can no longer tell from the rules of the market game what strategies are prohibited, and among which options they are free to choose, but that what they may do or not do depends on how the competition agencies, informed by their economic advisors, will assess the welfare consequences in particular instances. This charge has triggered a debate on an alleged trade-off between accuracy and legal certainty (*Treffsicherheit* und *Rechtssicherheit*) and on how a ‘modern’ competition policy ought to position itself in light of such a trade-off.<sup>40</sup>

There is no need here to comment on the charge that an ‘effects-based approach’ that seeks to decide each individual case ‘on its own merits,’ i.e. in light of its particular welfare effects, is inimical to the principal of legal certainty, because this charge is directly related to the problem, extensively discussed in previous sections, that such sub-constitutional ‘welfarist instrumentalism’ is in conflict with the essential ingredient of a market order, namely that as private law subjects market participants are constrained in their choices only by negative rules that prohibit certain types of actions but are otherwise free to exercise their private autonomy.<sup>41</sup> What deserves to be commented upon, however, is the fact that some authors in speaking of a trade-off between accuracy and legal certainty appear to take it for granted that an ‘effects-based approach’ is indeed capable of improving the accuracy or *Treffsicherheit* of the decisions that competition agencies are called upon to make, and that the advantages that come from such improvement in decision quality can outbalance the disadvantages from a loss in legal certainty or *Rechtssicherheit*.<sup>42</sup> There are reasons to doubt that this implicit claim is well grounded.

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Entscheidungskontext einzeln zu bewerten – und dann ein Urteil über die Rechtmäßigkeit einer bestimmten Handlung zu treffen.”

<sup>40</sup> In their comment on this controversy Schmidt and Voigt (2007: 36ff.) point out that an adequate account of the trade-off between a ‘form-based’ and an ‘effects-based approach’ has to include such things as the additional administrative costs that the latter involves and the greater scope it allows for interest-group lobbying. They arrive at the conclusion: “Ob der ‘more economic approach’ tatsächlich ökonomisch ist, ist zu bezweifeln, da der zusätzliche Nutzen in der Form besserer Entscheidungen mehr als vage ist. Dem stehen jedoch die zusätzlichen Kosten in Form höherer Rechtsunsicherheit, höherer Verfahrens- und Entscheidungskosten sowie die Gefahr von Wohlfahrtsverlusten durch wachsende Möglichkeiten der Einflussnahme auf die jeweiligen Entscheidungen gegenüber.”

<sup>41</sup> To characterize the issue that is raised by an ‘effects-based approach’ in terms of the trade-off between accuracy and legal certainty is in effect misleading because it distracts from the much more important problem that the nature of the ‘economic game’ is fundamentally changed if the ‘players’ can no longer trust that their actions will be measured against general rules but must expect that what they may do or not do will depend on how the welfare consequences of their choices will be assessed in particular instances. The trade-off perspective implicitly supposes that the economic agents’ behavior remains essentially the same and that the only question is whether competition agencies or courts assess their actions more or less accurately. This supposition is, however, clearly false.

<sup>42</sup> Hellwig (2007: 16f.): “Eine solche Per-se-Regel hat den Vorzug, dass die Betroffenen wissen, woran sie sind. ... Diesen Vorzügen steht der Nachteil gegenüber, dass die Normierung eines Gefährdungstatbestandes naturgemäß nicht den Umständen des Einzelfalls Rechnung trägt. Dadurch geht Information verloren. ... Grundsätzlich ist davon auszugehen, dass die *Rechtssicherheit* bei einer Per-se-Regel mit einer Einbuße an *Treffsicherheit* der Wettbewerbspolitik erkauft wird. Im konkreten Einzelfall steht mehr Information zur

The general argument that throws doubt on the claim that by deciding each case on its own ‘welfare-merits’ competition policy can improve the ‘accuracy’ of its decisions can be found in Hayek’s writings, and it has been worked out in more detail by Ronald Heiner.<sup>43</sup> In brief, and applied to the case of competition policy, the argument is as follows. If competition agencies, informed by their economic advisors, were perfect in predicting the welfare consequences of business practices in each and every case, their decisions would obviously be more ‘accurate’ under an ‘effects-based approach’ than the decisions at which they would arrive in following a ‘form-based approach’ and judging cases according to general rules. This is, however, no longer assured when competition agencies and their economic advisors are not perfect and subject to errors in their attempts to assess the overall welfare consequences in particular instances. What needs to be compared in this case is the *pattern* of decisions that will result from a ‘form-based approach’ on the one side and from an ‘effects-based approach’ on the other, or, more precisely, the rate of errors that will occur under either regime. Whether an ‘effects-based approach’ will produce relatively less errors than a ‘form-based approach,’ or the other way around, will depend on the fallibility or error-proneness of the competition agency compared to the ‘fallibility’ or imperfectness of the rules that are applied.<sup>44</sup>

Advocates of the ‘effects-based approach’ are obviously quite optimistic that the analytical and statistical tools of modern industrial economics are capable of increasing the decision-competence of competition agencies sufficiently to surpass the decision-quality that can be expected from the guidance of general rules.<sup>45</sup> Their critics doubt that such optimism is justified if we consider the enormous complexity of socio-economic systems that severely limits our capability to predict the overall, direct and indirect consequences that particular

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Verfügung als bei der Normierung eines Gefährdungstatbestandes. Bei Anwendung einer Per-se-Regel wird diese Information nicht genutzt. ... Aus der allgemeinen Theorie der Entscheidung bei unvollkommener Information wissen wir, dass es immer besser ist, zusätzliche Information zu nutzen.”

<sup>43</sup> Vanberg (1994: 176ff., 181ff.).

<sup>44</sup> What A.P. Lerner (quoted in Hayek 1960: 428 fn.) has said in reference to the free-trade doctrine applies as well to competition policy: “As with all general rules, there are particular cases where, if one knew all the attendant circumstances and the full effects in all their ramifications, it would be better for the rule not to be applied. But that does not make the rule a bad rule or give reason for not applying the rule where, as is normally the case, one does not know all the ramifications that would make the case a desirable exception.”

<sup>45</sup> Advocating an “effects-based approach” Röller (2005: 40) notes about the problem of merger control: “Mit einer einfachen Regel kann es somit passieren, dass ein Zusammenschluss untersagt wird, obwohl der die Konsumentenwohlfaht erhöhen würde. Das ist der Fall, wenn es sehr hohe Effizienzvorteile gibt und gleichzeitig wettbewerbliche Beeinträchtigungen zu erwarten sind, insgesamt aber die Konsumenten von diesen Effizienzvorteilen profitieren.” – In reference to such claim Möschel (2008: 387) comments: “Ohne entsprechenden Wettbewerbsdruck gibt es für Unternehmen in aller Regel – man kann Ausnahmemodelle konstruieren – keinen Anreiz, Effizienzvorteile, die aus einem Zusammenschluss erwachsen, an die jeweilige Marktgegenseite weiterzugeben. Da Marktbeherrschung gerade das Dementi solchen Wettbewerbsdrucks ist, ... erscheint die klassische Auffassung, Effizienzüberlegungen angesichts deren spekulativen Gehalts nicht im Einzelfall zu berücksichtigen, sondern abstrakt-generell durch eine Vorweganhebung der Eingriffsschwelle in der Fusionskontrolle ... als das vorzuzugewürdigte Konzept.” – On this issue see also Mestmäcker (2005: 31).

measures will produce in an intricate network of interdependent individual choices and in a dynamic process that is driven by the creativeness of adaptive human agents.<sup>46</sup> As Hayek has insisted, it is because of the inescapable limits of our knowledge that in a complex environment we need – at the individual level as well as on the level of collective, political choices – the guidance of rules that relieve us from the need ‘to consider everything’ and focus our attention on selected criteria for our decisions.<sup>47</sup> Such rules that make us selectively attentive to particular features of a choice situation can, to be sure, not guarantee optimal choices in every instance, but they can help us to do better overall than if we would attempt to ‘optimize’ in a discretionary case-by-case manner.<sup>48</sup> Hayek’s central message is that in economics like in other sciences that deal with complex open systems our ability to predict is limited to “explanations of the principle” and to “pattern predictions” (Hayek 1967). We can aim, so Hayek argues, at explaining and predicting the general effects that result from systematic changes in the boundary conditions under which the system operates, but the complexity and multitude of specific circumstances that work in particular instances make it impossible for us to fully explain single events or to predict the specific consequences that particular interventions will produce. An ‘effects-based approach’ that seeks to apply the efficiency test to particular cases needs to rely on the latter kind of prediction. A ‘form-based approach’ can work with pattern predictions.<sup>49</sup>

The essential issue of whether an ‘effects-based approach’ can improve the decision praxis of competition agencies compared to a ‘form-based approach’ has been clouded by being confounded in the ongoing debate with other, separate and different issues, in particular

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<sup>46</sup> Schmidt and Voigt (2007: 40f.): “Industrieökonomische Modelle bilden die theoretische Basis der Wettbewerbspolitik, fraglich ist nur, ob das Treffen von Einzelfallentscheidungen auf der Basis spezifischer industrieökonomischer Modelle zu einer Erhöhung der Entscheidungsqualität führt. ... Hierbei ist kritisch zu fragen, inwieweit modellbasierte Simulationsanalysen überhaupt in der Lage sind, dynamische Wettbewerbsprozesse abzubilden.”

<sup>47</sup> There is no room here to go into the details of Hayek’s argument on the limits of our knowledge and the reason of rules or of his related argument on the limitation of sciences of complex phenomena to explanations of the principle and to pattern predictions. For a more detailed discussion see Vanberg (1994: 111ff.;2001b: 77ff.).

<sup>48</sup> The thrust of Hayek’s argument is directly opposed to Hellwig’s (2007: 17) claim “that it is always better to use additional information.” It is, so Hayek (1964: 11) insists, the essence of rules that they require us to “systematically disregard certain facts which we know,” and he explains: “It may sound paradoxical that rationality should thus require that we deliberately disregard knowledge which we possess; but this is part of the necessity of coming to terms with our unalterable ignorance of much that would be relevant if we knew it.”

<sup>49</sup> Schmidten (2007a: 98) is surely right when he argues that “traditional competition policy” must also rely on predictions. Yet, the need to rely on pattern predictions is critically different from the predictive power that an ‘effects-based approach’ must rely on. – Budzinski (2007: 16): “Wettbewerbsfreiheit als wettbewerbspolitisches Leitbild geht also davon aus, aufgrund von prinzipiellen Wissensmängeln nicht endgültig festlegen zu können, welche Wirkungen aus einer isolierten Handlung resultieren und wie die Akteure im Wettbewerb handeln sollten, um die Konsumentenwohlfaht zu maximieren. Stattdessen wird erheblich bescheidener nur in Anspruch genommen, bestimmte Handlungsweisen als normalerweise (Musteraussage!) wohlfahrtsschädlich identifizieren zu können (bspw. mit Hilfe der Industrieökonomik), mit der Konsequenz, diese durch die Wettbewerbsregeln allgemein zu unterbinden.”

with the issue of whether competition agencies may need to rely on economic expertise in applying the existing competition law to particular cases, and with the issue of whether economic expertise may be needed in specifying existing competition laws that are too simple. As far as the first of these separate issues is concerned, it is surely true that applying legal rules – whether in competition law or otherwise – is not a purely mechanical act but often a complex process of interpretation that has to use theoretical and empirical knowledge. It is entirely uncontroversial that, in this sense, competition agencies in enforcing the rules of the market game may need to rely on knowledge about factual matters that only economics can provide, especially in cases where the rules include general clauses that need to be interpreted in light of the particular facts in a given case. There is, however, a categorical difference between, on the one side, the entirely uncontroversial claim that economists can provide valuable assistance to competition agencies for deciding how existing legal rules are to be applied to particular cases and, on the other side, the claim that competition agencies should make their decisions to permit or prohibit certain business practices contingent on how economists assess their welfare effects in particular cases. If the ‘effects-based approach’ were only about the first claim the whole controversy about ‘economizing’ EU competition policy would be no more than a superfluous storm in a teacup. It is only the second claim that qualifies the ‘more economic approach’ as a relevant subject of controversy.

The second separate issue that tends to be confounded with the issue of whether a case-by-case assessment of welfare consequences should guide competition policy is the question of whether economic expertise can help to refine competition law. Even though there is a categorical difference between them, advocates of an ‘effects-based approach’ are not always unambiguous about which of the two claims they wish to make.<sup>50</sup> It is one thing to claim that economics can help to improve competition policy by providing knowledge on how competition laws can be drafted in ways that more reliably differentiate welfare-enhancing from detrimental business practices.<sup>51</sup> It is an entirely different thing to claim that competition policy can be improved by judging each individual case on the basis of its predicted welfare

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<sup>50</sup> On the one hand Röllner (2005: 39) argues that the “effect based approach” emphasizes the necessity, “in allen Fällen ebenfalls die Auswirkungen ... auf den Konsumenten zu untersuchen, on the other hand he notes about the purpose of the efforts to ‘modernize’ EU competition policy: “Dabei geht es nicht um eine übertriebene Verkomplizierung der Regeln durch eine falsch verstandene ‘Ökonomisierung’ der Missbrauchsaufsicht. ... Ziel eines modernen ökonomischen Ansatzes ist es, klare und transparente Regeln zu erstellen, welche einer fundierten ökonomischen Betrachtungsweise von Märkten besser standhalten“ (ibid.: 42).

<sup>51</sup> It is certainly legitimate to ask, as Schmidtchen (2007a: 98) does: “Welchen Nutzen hat die Gesellschaft aus der sicheren Anwendung von Regeln, die ineffiziente Ergebnisse liefern?” But the critical question is whether the remedy is seen in replacing ‘inefficient’ rules by more appropriate rules – based on what Schmidtchen (ibid: 98) calls a “comparative institutions approach” – or in an ‘effects-based approach’ that judges each case on its own merits, aiming at “Einzelfallgerechtigkeit” (ibid.).

consequences.<sup>52</sup> Again, if the ‘effects-based approach’ were only about the first claim it would not be worthwhile to quarrel about it. Advocates of a ‘form-based’ or rule-governed approach have no reason whatsoever to deny that economics has an important role to play in informing about the prospective working properties of alternative rules. On the contrary, it is their principal message that economists’ advice about welfare effects has its proper place at the constitutional level where the rules of the market game are chosen rather than at the sub-constitutional level where competition agencies face the task of deciding what the rules imply for particular cases.<sup>53</sup> In other words, there is no controversy at all about the need for competition policy to consider the economic effects of its measures or about the obvious fact that economics is the natural discipline to inform about such effects.<sup>54</sup> What makes the ‘effects-based approach’ controversial is the tendency of its advocates to ignore the critical difference between the roles that economics can play in this regard at the constitutional and at the sub-constitutional level.<sup>55</sup>

In a number of recent papers Wolfgang Kerber (Kerber 2007; Christiansen and Kerber 2006; Kerber, Kretschmer, von Wangenheim 2008) has made an effort to reconcile the two sides in the controversy on the ‘more economic approach’ by suggesting that attention should be shifted away from the “outdated dichotomy of ‘per-se rules vs. rule of reason’” to the more productive issue of “optimally differentiated rules.”<sup>56</sup> Competition policy can indeed, so

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<sup>52</sup> In light of Hayek’s arguments on the ‘reason of rules’ in a complex world it is surprising when Hellwig (2007: 17) argues: “Der Zielkonflikt zwischen Rechtssicherheit und Treffsicherheit der Wettbewerbspolitik kann durch eine stärker ausdifferenzierte Formulierung von Regeln zwar gemildert, aber nicht gänzlich aufgehoben werden. ... Unsere Fähigkeiten zur Formulierung von Regeln sind begrenzt, und die Wirklichkeit ist zu komplex, als dass wir allen relevanten Eventualitäten und Kriterien schon auf der Ebene der Regelformulierung Rechnung tragen könnten.”

<sup>53</sup> Christiansen and Kerber (2006: 237): “Thus there is no trade off between ‘more economics’ and a rule-based competition policy, rather competition rules should be grounded in economics. Since the optimal rules are the result of a comparison of alternative rules in regard to their average welfare effects (including decision errors and regulation costs), a rule-based competition policy is also based on an ‘effects-based approach’.”

<sup>54</sup> Controversial are, therefore, neither Hellwig’s (2007: 20) argument that competition policy must be based on “eine angemessene Analyse der Wirkungszusammenhänge” nor his demand, “dass Jurisprudenz als die für die Norminterpretation zuständige Wissenschaft und Wirtschaftstheorie als die für die Sachzusammenhänge zuständige Wissenschaft zusammenarbeiten” (ibid.: 39).

<sup>55</sup> As Schmidt and Voigt (2007: 47) argue: “Die Umsetzung des ‘more economic approach’ sollte daher nicht bei der Regelanwendung ansetzen, sondern vielmehr bei der Regelsetzung. Hierin ist der Konstruktionsfehler des ökonomischeren Ansatzes auf der europäischen Ebene zu sehen. ... D.h. die Erkenntnisse der ökonomischen Theorie sollten sich bereits in den Wettbewerbsregeln widerspiegeln und nicht der Rechtsauslegung durch die Kartellbehörden bzw. die Gerichte unterliegen.”

<sup>56</sup> Kerber (2007: 3): “The debate about per se rules vs. rule of reason does not reflect sufficiently that there is in fact a continuum between a simple per se rule and a full-scale market analysis of all effects in a specific case.” – Christiansen and Kerber (2006: 216): “Starting with the traditional, but outdated dichotomy of ‘per se rules vs. rule of reason’, we elaborate the notion of a continuum of intermediate solutions between those two extremes and ask for the conditions and the determinants for optimally differentiated rules.” – It is, in fact, somewhat misleading to speak of “differentiated” rules as if they were located between “two extremes” of which “per se rules” represent one endpoint. There is indeed a dichotomy between a competition policy that is guided by rules and one that is based on case-by-case decisions, but ‘differentiated rules’ are clearly located on one side and not between the two. In the context of Christiansen’s and Kerber’s argument ‘per se rules’ must apparently be

Kerber argues, benefit from a ‘more economic approach’ that informs about how competition law may be specified in ways that reduce the risk of prohibiting business practices that are in fact welfare improving, i.e. serving the common interests of the individuals involved. In speaking of “*optimally* differentiated” rules Kerber refers to the trade-off between the degree of specificity of rules and the reliability with which they can be applied. To increase the specificity of rules means to increase the number and variety of circumstances that they account for. While this may improve their accuracy or *Trefferlichkeit*, it increases the difficulty of their reliable application. As in the limiting of the contrast between rule-following and case-by-case choice, whether adopting more differentiated, and hence more complex, rules is preferable over following simpler rules is a matter of comparing, on the one side, the fallibility or error-proneness of imperfect, simpler rules that can be more reliably applied with, on the other side, the fallibility or error-proneness of imperfect agents in applying less imperfect, but also more complex, rules, combined with the additional costs of administering such rules.<sup>57</sup>

How receptive the two sides in the ongoing controversy will be to Kerber’s project of reconciliation remains to be seen. One should expect, though, that it is a much smaller step for advocates of the goal of economic freedom and *Wettbewerbsfreiheit* to concede that competition laws may well benefit from being more differentiated than they currently are, than it is for advocates of the ‘more economic approach’ to concede that the way to improve competition policy is not to rely on a case-by-case welfare assessment but to reform the general rules according to which the economic system operates. In terms of the title of this section, what is needed in order to reconcile the two sides is to recognize the ‘reason of rules’ at the sub-constitutional level of competition policy and the role that reason – or the ‘rule of reason’ – has to play at the constitutional level in drafting competition law.

## 9. Conclusion

In a recent contribution in defense of the ‘more economic approach’ Martin Hellwig (2006: 260f.) has noted that the controversy surrounding the ‘modernization’ of EU competition policy has suffered from a failure to adequately distinguish between three separate questions,

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interpreted as ‘most simple rules.’ As Kerber (2007: 4) recognizes: “The need for more differentiation in competition policy does not lead to the necessity of a case-by-case analysis of the effects of business behavior. A rule-based application of competition law might still be appropriate, but perhaps the development of new differentiated competition rules might be necessary.”

<sup>57</sup> Christiansen and Kerber (2006: 236): “We cannot assume that competition authorities or courts dispose of the knowledge base for avoiding decision errors, i.e. a certain share of decisions will be wrong ... . In terms of our analysis, we cannot assume that the marginal benefit of additional differentiation will always be positive. It can even be zero or negative. ... This is a logical consequence of having reached the boundaries of our general knowledge of competition and/or our case-specific knowledge.”

namely, firstly, whether certain types of behavior should be prohibited *per se* or be judged on a case-by-case basis, secondly, whether potential positive competition-effects of the respective behavior should be considered and, thirdly, whether in addition to its competition effects its potential efficiency effects should be taken into account by competition agencies. The purpose of the present paper has been to show that approaching the issue from the perspective of constitutional economics can help to sort out these and other questions that have been confounded in the debate.

The specific focus of the paper has been on the role that economists can play as advisors in matters of competition policy in a democratic polity. It has been argued that as an empirical science economics can provide advice only in the form of hypothetical imperatives, and that in a democratic polity the citizens are the natural ultimate addressees of such advice. This implies the requirement to support whatever policy advice is given by arguments that appeal to the citizens' common interests, a requirement that is perfectly in line with the theoretical perspective of constitutional economics but that has not been recognized by traditional welfare economics. It has further been argued that with opting for a market economy, based on a private law order, a polity commits to respecting the economic freedom or *Wettbewerbsfreiheit* that is part of the private autonomy that is constitutive of such an order. This implies that competition policy cannot make the right of private law subjects to exercise such freedom contingent on how economic advisors assess the welfare effects in particular instances, and that welfare considerations can have their legitimate place only at the constitutional level where the rules of the economic game are chosen. It is at this level, but not at the sub-constitutional level that an 'effects-based approach' can help to improve competition policy.

If a clear distinction is drawn between the role that economic advice can play at the constitutional level by contrast to the sub-constitutional level Hellwig's three questions find a straightforward answer. The answer to the first is that the inherent logic of a private law society as well as the 'reason of rules' in a complex world speak against a case-by-case approach and for a rule-based competition policy. The answer to the second and the third question is that at the constitutional level, in drafting competition law, it is a matter of prudence to take advantage of whatever knowledge economics can provide, in terms of pattern predictions, about the competition effects and efficiency effects of different kinds of behavior.

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# Freiburger **Diskussionspapiere** zur Ordnungsökonomik

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