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## **‘There's a brand new talk, but it's not very clear’: can the contemporary EU really be characterized as ordoliberal?<sup>1</sup>**

Paul James Cardwell and Holly Snaith

Ordoliberalism has undergone a dramatic resurgence as a characterisation of the contemporary EU and its economic dimensions. Commentators have pointed to the ‘ordoliberalisation’ of EU economic policy with Germany at its core, albeit taking the role of a ‘reluctant hegemon’. Perhaps as a result of this pervasive influence, some have claimed that the EU is itself ordoliberal, resting on a particular understanding of the relationship between ordoliberalism and an ‘economic constitution’. For this claim to be substantiated, the characterisation of ordoliberalism needs to persist across time and the EU’s law and policy-making spaces. In this article, we examine this proposition, and argue that the influence of ordoliberalism can help a richer understanding of the contemporary EU beyond the confines of the economic constitution and into its evolving legal system(s).

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## Introduction

Ordoliberalism has come back into fashion as a means of characterising the EU and European integration. Recent commentary revisits their assumed strong connection as inextricably linked since the outset of the integration process (Siems and Schnyder, 2014). Somma (2013, p.105), for example, claims that the EU was conceived as an ordoliberal construct from the outset. Moss (2000, p.251) describes the Treaty of Rome as representing, 'a triumph of German ordoliberalism, a market philosophy that recognized the need for regulating laws and institutions'. Whilst these risk being seen as reductive views that obscure a significant amount of debate about the form and normative purposes of the EU, it is a defensible proposition that the EU exhibits characteristics which can be traced to the 'Ordoliberal School' of German economists beginning in the 1930s (Nedergaard and Snaith, 2015, p.1096). Nevertheless, the extent to which ordoliberalism exerted itself as a foundational concept in EU integration is contested (Akman, 2014; Montalban, et.al., 2011). Given the enduring crisis of confidence engulfing the EU stemming from the euro crisis, Brexit, and the re-emergence of populism in electoral politics, returning to the questions posed and assumptions made at earlier stages of EU integration is pertinent.

Ordoliberalism is at its heart a credo about the creation of an economic constitution, which is market-supporting rather than market-distorting, and is enforced through a system of law. We argue however that the influence of ordoliberalism can help a richer understanding of the contemporary EU *beyond* the economic constitution's confines. We do so for two reasons. First, because recent commentary on ordoliberalism reveals

that it is a very broad church, and can be taken to inspire a wide range of outcomes (Jacoby, 2014, p. 73). Thus, we return to the core tenets of ordoliberalism, whilst recognising that these are not the subject of universal agreement. Second, the EU's crisis of confidence does not stem merely from the state of its economic constitution but spans across the EU's spheres of activity, bringing into question the means of integration during the Union's 60 years.

### **Ordoliberalism as a descriptor**

Ordoliberalism does not consist of a fully-fledged set of principles, values or conditions that enable it to be easily distinguished from other macroeconomic approaches (such as Keynesianism or (neo-)liberalism) (Nedergaard and Snaith, 2015, p.1097). Its content can be briefly summarized as follows: efficient markets do not arise spontaneously; making markets function requires 'constitutive rules'; these rules involve an onus on price stability; law (particularly competition/anti-trust regulation) is necessary to ensure enforcement; and lastly that the 'social' function of ordoliberalism is served by the stabilisation of market functions rather than by redistribution.

The sense that a liberal market order requires the active regulation of potentially monopolistic actors in order to better locate it within society has led authors such as Bonefeld (2012) to emphasize the role played by the 'strong state' in ordoliberalism. This is not an uncontested characterisation. In detailing the historic evolution of the

Freiburg School's philosophy, Berghahn and Young posit that the core of ordoliberalism lies in 'the creation of a competitive market economy in which the state did not play a major role, but merely set a constitutional framework, an *ordo*, within which the economy could freely unfold' (2013, p.771). Thus, the state is not 'strong' in the sense of autocratic or overbearing, but rather is a disciplined *enforcer* of the *ordo*, particularly as it pertains to enforcing business adherence to these rules. Young (2014, p.277-278) for example states that 'Ordoliberalism...calls for a political-economic order (*Ordnungspolitik*) which organizes competitiveness and competitive markets in such a way to prevent private power (in the form of industrial cartels and labor unions) and public power (socialist nationalization)'.

We first trace the emergence of ordoliberalism. In distilling the varieties of ordoliberal thought, we distinguish the coexistence of two possible, broad readings: one specifying a minimalist form of economic constitutionalism (prescribing the least law possible to guarantee macroeconomic stability), and the other a more maximalist form, entailing a particular *type* of socio-economic policy (typically enforcing market competition and monetary discipline). We suggest that conflict between these two readings is responsible for the disagreements amongst observers of ordoliberalism. For example, if initiatives such as the European Banking Union (Siems and Schnyder, 2014, Young, 2014) are *ordo* or not. In determining whether the contemporary EU is *ordo*, we therefore seek evidence of both a general system of law structuring economic competition (for which we look towards the legal order(s) of the EU) and more specific economic policies aimed at fostering competition. Furthermore, the concept of *ordoliberalisation* supposes that these logics are *more* present now than previously. We

consider whether these two logics are entirely consistent: in particular, whether differentiated integration is an example of ordoliberalisation or not (as it is an example of minimalist regulatory law, but potentially not of economic harmonisation). We find here that ordoliberal ideas may help to describe the constitutional logic of the EU, but cannot explain the trajectory of integration, not least because of the competing understandings of what it serves to do.

### **Ordoliberalism and the German experience**

The upsurge in using ordoliberalism as an explanatory factor in the construction of, in particular, the euro crisis, has resulted in some thoughtful articles detailing its intellectual lineage (Bonefeld, 2012, Bergahn and Young, 2013, Ryner 2015). Although falling out of favour during the 1990s and 2000s, ordoliberalism never fully disappeared. Many of the seminal works on its evolution considerably pre-date its resurgent popularity. The influence of ordoliberal ideas was particularly strong during the founding period of the *Bundesrepublik*, when there was an urgent need for a workable constitutional philosophy in order to rebuild the economy. For similar reasons, it also gained in political significance during the period of German reunification (Grossekettler, 1994).

Unifying the different readings of ordoliberalism is a strong notion of the role of law in regulating the relationship between state, market, and society. The historical backdrop of the Freiburg school, located in the catastrophes of Weimar Germany and

the descent into war, make this focus on 'constitutionalising the economy' (Gerber, 1994) unsurprising. The term 'ordoliberalism' was first used in a 1950 edition of the journal *ORDO*, but many of its core insights were already in existence by that point (Siems and Schnyder 2014, p.379). Eucken, Erhard, Röpke, Böhm and other adherents of the Freiburg School saw, to varying degrees, the unfettered concentration of economic power in the hands of monopolistic or oligopolistic organisations as a social ill, and thus something that ought to be designed out of the system.

Yet, there remain disagreements over the form of ordoliberalism in Germany and beyond. This can be traced to its Janus-faced characterisation as both a sociological and economic theory. Sally (1996) argues that there are, plausibly, two distinct schools of thought subsumed within it. The first consists of the legal and economic approaches of the Freiburg School (Eucken, Böhm) and the second a more sociological interpretation (Müller-Armack, Röpke, Rüstow). Young (2014) posits that the more sociological 'version' enabled those on the German left to appropriate ordoliberal ideas whilst implementing social welfarist policies, which can be considered ordoliberal only to the extent that they are not market-distorting. The two approaches cannot be fully disentangled, but the former is the strain usually selected for analysis in the EU context (see e.g. Grossekketter, 1994). Sally quotes the 'ordo manifesto', which claims that the bedrock of ordoliberalism 'consists of viewing individual economic questions as constituent parts of a greater whole' (1996, p.234).

Though having some influence on the 'Chicago School' of neoliberalism and developments in other countries (Ban 2013), ordoliberalism's principal contribution

has been largely confined to Germany. However, even within Germany, the role of ordoliberalism is disputed. For instance, Dullien and Guérot (2012, p.5-7) argue that ordoliberalism penetrated various sectors of German society, including (to admittedly very different extents) the five main political parties. Young (2014, p.284) however contends that Germany's behaviour in EU negotiations owes little to the practices that have structured the domestic economy, and instead functions as a form of discursive myth-making (Joerges, 2010a, 2010b). The risks in associating contemporary German and EU decision-making with ordoliberalism lie in assuming an unbroken lineage between 'original' ordoliberal thought and the way in which it has transformed, particularly in Germany (Lorch, 2013, p.70), or in assuming that contemporary German ordoliberals do not themselves disagree (Jacoby, 2014, p.71). Nevertheless, both approaches accept that ordoliberalism has structured German political thought, and we proceed on the basis that Germany's long history of ordoliberalism had some impact on the EU's own evolution.

## **Ordoliberalism and the EU**

Given the continuing context of the euro crisis and the (perceived) role of Germany as an economic, and even a political, hegemon (Paterson, 2011; Bulmer and Paterson, 2013) it is unsurprising that a school of thought grounded so squarely in the German political experience should be once again invoked as an explanatory factor in the EU's political actions. In this vein, Dullien and Guérot (2012, p.1) argue that crisis moves such as the signing of the Fiscal Compact in 2012 reflect 'German positions rather than

collective compromise' and that this is grounded in an 'ideological edifice behind German economic orthodoxy with which Germany's partners must engage', namely ordoliberalism and its prioritisation of 'stability' over 'solidarity' (Crespy and Schmidt, 2014, p.1097). Schäfer (2016, p.962) finds in relation to the banking union that it was not material interests but ordoliberal ideas that provided the primary source of the German government's preferences. Repeated references to Germany and ordoliberalism have become commonplace (Jacoby, 2014, p.1), placing the responsibility for EU outcomes not only on Germany, but also more fundamentally on German political thought. This is also reflected in the representation of German thinking in the European media (Ojala and Harjuniemi, 2016).

The focus of ordoliberalism on the role of the market economy in society and how it could be better embedded through constitutionalisation in order to prevent conflict, is a characterisation that bears at least superficial similarity to the initial goals of the European Economic Community (EEC). For ordoliberals, the role of government is to intervene in a 'market conforming' direction in order to bolster the activities of free enterprise (Snyder and Siems 2014). This is where the roots of the European project lie: as Robert Marjolin surmized in his memoirs, 'who would have thought during the 1930s...that European states...would form a common market intended eventually to become an economic area that could be linked to one great dynamic market?' (quoted in Dinan, 2005, p.35).

Ordoliberalism's association with the idea of a 'social market economy' (Bonefeld, 2012, p.634) is a significant link. This phrase was written into the first part of the Treaty

on European Union (TEU) at Maastricht, illustrating a concurrence between the values of ordoliberalism and the policy orientation of the EU. László Andor, Commissioner for Employment (2010-2014), has specifically pointed to the origins of the term with the Freiburg school and with post-war Germany's needs (2011). He thus finds it to be no coincidence that the concept of the social market economy should accompany the single market. Dale and El-Elany (2013) express scepticism about the 'social' dimension, arguing (through a Marxist analysis) that the development of a socially just Europe has been impeded by a reliance on ordoliberal ideas of the absolutism of law, rather than democratic pluralism.

In the EU context, work on ordoliberal influences usually coalesce around two policy areas: competition (Gerber 1994) and economic and monetary union (EMU) (Dyson and Featherstone, 1999). Both of these 'function in the operation of economic processes' (Walters and Haahr, 2005, p.47) and provide the economic constitution where ordoliberal influence can most obviously be perceived. Authors operating across the different traditions of ordoliberalism have suggested that its institutional influence over the EU is long-standing and more fundamental than on these two policy fields. Rose and Ngwe (2007, p.8) point to the influence of two prominent German ordoliberals, Walter Hallstein (first president of the Commission) and Hans von der Groeben (co-author of the Spaak report) in shaping the early evolution of the European integration project. In our analysis, we accept that the importance of the success of the European project in the early years, and the centrality of Germany to it, make it highly likely that ordoliberalism provided a synergy between the organisation of both the German economic constitution and that of the EU.

For many the 'German consensus' finds itself uploaded through the ideological culture of the *Bundesbank* (Dyson, 2009) to European institutions (Young 2014) and thus constitutes an 'ordoliberalisation of Europe' (Biebricher, 2014, p.17). Others however argue that we ought to be sceptical about the extent to which recent EU policy-making has really fitted this bill, and about whether even Germany itself is so ordoliberal in practice (Siems and Schnyder 2014). We agree with this scepticism, insofar as we look beyond the (economic) fields in which the culture of the *Bundesbank* might be uploaded. The differences within ordoliberal thought, and the limitations of policy prescriptions outlined in the 1950s, entail that it is hard to infer a singular 'ordoliberal' or German position on many contemporary policy issues, or to reconcile differences between German and EU policy directions (Anderson, 2005, pp.90-91).

We noted above that ordoliberalism may have become more dominant in recent epochs than was the case in the past. As Anderson (2009, p.65) has claimed, it may have been over time 'somewhat a recessive gene in the makeup of the Community, latent but never the most salient in its development'. The European Central Bank (ECB), for example, is a more recent creation and is often portrayed as an ordoliberal institution, with one Board Member (Otmar Issing) explicitly describing Walter Eucken as a key 'intellectual antecedent' of it (Issing, 2004). But as Bibow demonstrates (2012, p.5-7), Eucken's own views were aligned more closely with a Friedman-esque automatic monetary stabiliser that would not possess the right to challenge government policy, than with an all-powerful discretionary and independent central bank. Whilst the ECB is widely regarded as a 'made in Germany' product (Bibow,

2009, p.6), drawing a consistent and singular lineage from ordoliberal thought to the institutional settlement of EMU is a more challenging task, but one achieved in the seminal work by Dyson and Featherstone (1999). For the purposes of the argument advanced here, we thus accept that there is a relationship between ordoliberalism and the EU which has been maintained, whether or not this is by design or merely because of the importance of the (institutional) actors involved.

Returning to the central concern of ordoliberalism, which we regard to be the creation and enforcement of an economic constitution, it is relatively straightforward to envisage how the EU fits within this frame and the roles played by law and legal dynamics. Throughout the integration process, though not always with sustained vigour, the EU institutions have made extensive use of the 'Community method': producing regulations and directives which through their volume and technicality have put in place a legal framework which is not merely economic but also social (Weiler, 1999; MacAmhlaigh, 2011). However, despite the surface synergy between both this type of framework and ordoliberalism, Joerges has suggested that ordoliberalism was not a strong force at the outset of the EU, but only visible when European competition began to focus on anticompetitive state activities and regulatory practices (Joerges, 2010c, p.69). Thus, we need also to consider governance capacity in determining the ordoliberal quality of the EU: without a strong roster of competences, it was practically unable to display ordoliberal tendencies. The regulatory instruments that can be viewed as according with ordoliberalism remain the primary mechanism for EU integration, despite the emergence of 'new modes' of governance (characterized by the Commission's White Paper on Governance (2001) as

a variation on the 'Community method', rather than replacing it) and in more recent years a lower number of actual or planned legislative proposals (Cardwell and Hervey, 2015, p.77), especially in the field of 'Social Europe' (Armstrong, 2010). However, the legal-institutional set up of the Union is largely a product (without a parallel elsewhere in the world) of the need for policies that are capable of regulating Member States in the most logically pragmatic way. Thus, it may be that ordoliberalism in the EU is more the outcome of *compromise* than *ideology*, a point to which we return later.

Nonetheless, a reading of the EU that emphasizes only economic policy appears reductive since the Treaty does not convey a purpose focussed only on economic integration ('The Union's aim is to promote peace, its values and the well-being of its peoples', Article 3(1) TEU). Further, the overall increase in volume of law and policy-making in fields that serve purposes other than economic regulation (such as the environment, development, justice and home affairs, and some aspects of foreign policy) raises questions about whether ordoliberalism remains relevant. Certainly, if the original ordoliberal ideals were adhered to, in the sense that the economic and non-economic matters were 'decoupled' (Parker, 2013, p.59) then there would be little place in the EU's order for consideration of, for example, citizens' rights beyond those which applied to the economic foundation of the free movement of *workers*. Issing (2002, p.347) warned of the theoretical and practical risks associated with pursuing enhanced macroeconomic policy coordination alongside fiscal and wage policies. As Ryner and Cafruny (2016, p.62) have argued, the TEU's post-Maastricht pillar structure kept the main innovations deliberately separate from the 'core' integration of the single market.

Yet over time (particularly in the field of justice and home affairs) they have found their way into the core competences of the former 'first' pillar. By extension, ordoliberalism would seem to have little application to policies that have no, or very little, market-correcting function but which the EU has vigorously pursued, including environmental and consumer law. Thus, although the 'long shadow of ordoliberalism' (Dullien and Guérot, 2012) might be witnessed across the EU polity, its usual analytical application is in fact much more narrow and based on studies of specific policies.

We suggest in the rest of the article that despite these obfuscations, ordoliberalism can serve as a means for understanding EU integration if it is treated as a *descriptive* rather than *explanatory* concept: in other words, the 'how' rather than the 'why'. Using ordoliberalism in this way helps clarify how the term can be appropriately applied to contemporary integration. The value in doing so is to avoid the temptation to identify ordoliberalism as the main or partial motivation for particular outcomes. Rather, its *descriptive* qualities help further an understanding of how different aspects of European integration correspond to different varieties of ordoliberalism rather than predict certain outcomes or developments. This approach must take into account a presumed ordoliberal preference for top-down regulation (Siems and Schnyder, 2014, p.387) and bring to the fore the economic and political reasons for doing so which, returning to the limitations identified above, may differ from the earlier days of the EU. The prism through which we take this approach is the relationship between ordoliberalism and the EU's legal order(s).

## Governing through law?

The most obvious way in which ordoliberalism can be seen is through the structuring effects of law. Since law sets the 'rules of the game', it comprises the 'ordo' and defines the economic constitution. For most lawyers, ordoliberal philosophy is most commonly associated with EU competition law. Competition law became synonymous with a doctrinal legal approach, given the density of legal decision-making and relationship to state-like functions. Gerber (1994, p.49) describes competition law as the 'keystone of the ordoliberal programme' aimed at 'constitutionalizing the economy', but competition law is arguably unrepresentative of the EU's functioning. On the one hand, competition law is typical of EU law and its reach: it affects private, economic entities directly, as well as the Member States, and has enforceable effects. On the other hand, competition law is an area in which, unusually, harmonisation does not appear to be the appropriate characterisation. Many Member States had no competition law prior to joining the EU and yet the *enforcement* of EU competition law occurs at the national level (see, for example, Baudenbacher, 2016). Since competition law exists of course in states outside the EU, it is not a product of ordoliberalism itself. But the way in which competition law operates in the EU is different. It is unusual in terms of the role and powers of the Commission, which come much closer to those that we expect of an Executive in a nation-state context. Investigations of large, household-name companies, and the process of doing so (such as dawn raids) gives the Commission a very public and politicised role, and much more so than in other areas of its activity. Competition law appears to balance free market thinking combined with market-correcting, consumer

protection goals: both of which are contained within the Treaty preamble. It is also a policy area which is strongly affected by beliefs about economic structuring and organisation, of which ordoliberalism is only one (Bartalevich, 2016, p.268).

The 'conventional' characterisation of competition law as an ordoliberal construct has been subject to challenge, in particular by Akman (2009; 2014). She contends that competition law's ordoliberal origins are a myth, bolstered by a stream of literature supporting a particular reading of its core provisions (Articles 101-102 TFEU). She attributes the myth to the historical context and individuals involved in the Treaty negotiations (Akman and Kassim, 2010, p.127). Instead, she contends that an ordoliberal reading of the competition provisions cannot render their objectives 'welfarist' or efficiency-based (p.127) and that the target of lawmakers was *inefficient* market power and its abusive exercise (see also, Mestmäker, 2011), rather than market power *per se*.

Regardless, the development of EU competition law (which directly interacts with and impacts on private economic actors) demonstrates the importance of legal measures, and particularly EU law, to the governance of non-state actors. Taking a wider view, we can accept that the origins of ordoliberalism and the EU's legal structure are contested, but focus on whether the contemporary EU has come to reflect some of ordoliberalism's tenets via alternative routes.

In the contemporary context, it is possible to detect ordoliberalism in EU governance beyond the 'Community method'. Indeed, much of the 'steering' qualities of law

operate through legal, or quasi-legal instruments such as ‘pacts’, which apply across various different policy sectors and which are not legally enforceable in the same way (Cardwell, 2016, p.372). It is equally not difficult to find evidence for these processes occurring within sectors conventionally associated with ordoliberal ideas, such as economic constitutionalism (in the form of the Stability and Growth Pact). For example, Siems and Schnyder (2014, p.388) note the openness of contemporary ordoliberals towards the proliferating measures on international economic regulation, which was (unsurprisingly) not a point of consideration for the original ordoliberals. In the EU context, they particularly emphasize the moves made in financial regulation, such as the establishment of the European Supervisory Agencies in 2011, and the partial institution of Banking Union, which are arguably more in line with ‘supervisory’ governance than traditional regulation. (Young (2014, p.278) however disagrees that the Banking Union is an *ordo* creation, stating that ‘the ordoliberal economists saw this as a ploy to introduce a mutualization of the Eurozone peripheral debt. The Keynesian reply was adamant in rejecting these charges’). We may therefore detect *ordo* blueprints in these initiatives, but only through dynamics which differ from what we traditionally conceive as ‘law’.

Moving away from this more ‘traditional’ terrain for ordoliberalism, it is possible to find regulatory styles that fit a market-conforming regulatory paradigm in other areas, such as justice and home affairs. Nonetheless, not all policy areas are as susceptible to this analysis and we recognize the danger of categorising *any* use of modes of governance related to economic or social constitutionalism, as necessarily being ordoliberal. As Chalmers and Szyszczak (1998, p.42) have pointed out, ‘the language

of individual freedoms marginalizes collective interests such as environmental policy or economic and social cohesion' and cannot explain special regimes for agriculture, public undertakings, and non-EU trade relations. Yet, in Foucault's perhaps unorthodox rendering, ordoliberalism is 'both in practice and theory, the most clearly stated liberal governmentality. A governmentality that regulates the behavior of subjects between each other: the behavior of the governed among themselves, as well as their behavior towards the government' (Goldschmidt and Rauchenschwandtner, 2007, p.2). As such, it is not inherently incompatible with the idea of the state providing collective security in certain areas. The more obvious tension occurs where these measures are explicitly market distorting ('nonconforming intervention') such as the Common Agricultural Policy (Dale and El-Enany, 2013, p.621).

However, it is not only the content of the law that is important, but also its implementation and institutional context. The 'new legal order', as distinct from both national law and 'classic' international law, was recognized by the Court of Justice in *van Gend en Loos* as early as 1963. But here, the Court was primarily responsible for forging a constitutional template, rather than legislative arrangements. In later cases, the Court found that EU law enjoyed 'primacy' over national law (*Costa v ENEL*, 1964; *Internationale Handelsgesellschaft*, 1971) despite the absence of such a formulation in the Treaty. In this respect, the Court arguably behaved much more like a law-making court familiar to common lawyers than those in continental Europe. Understanding the legal system of the EU cannot therefore be restricted to legislative outputs but must appreciate the role of the Courts, which includes national courts, all of which are responsible for applying EU law. A wealth of literature has focussed on the Court of

Justice's 'activism' (see, for example, Hartley, 1996; Arnall, 1996) but the important point to draw here is that national law and EU law cannot be considered as separate, hermetically sealed legal orders with no influence on each other.

Whilst the possibility of transmission of ordoliberalism from the German system to the EU via some of its institutions is supported, describing the Court's innovations (insofar as it has embedded the importance of EU law in national systems) as ordoliberal in character is much more difficult unless it is assumed that the text of the Treaty that the Court is applying is, in itself, ordoliberal. We do not support this position, but rather (as the points we make later in this article demonstrate) that the emergence of differentiated integration challenges the characterisation of the EU as the product of continued, strong ordoliberal influence.

Shifting the focus from the Court, the key question of who enforces EU law was resolved at the outset by allowing the Commission multiple roles of 'motor of integration' *and* enforcer. Regardless of policy area under examination, none of these forms of organisation could work in contexts other than the EU because of the nature of 'voluntaristic agreements among sovereign states' (Siems and Snyder, 2014, p.388). The operation of legal principles, including primacy and the Commission as 'guardian' suggests that only in the EU is supranational authority able to guarantee ordoliberal aims in conjunction with national (legal) authority.

Whilst there is a legitimate case to be made that the EU consists of a constitutionalized system, there is still a difference in describing it as a fully ordoliberal system. This is

not least because ordoliberalism suggests an ideological and constitutional order designed principally to regulate economic affairs in a certain way, whilst the EU is not merely focussed on economic integration. As Walker (2016) has noted, the constitutional pluralism of the EU's legal system continues to eschew singular or federalist alternatives. Stating that there is such a thing as a legal or constitutional system of the EU suggests that it is possible to regard the EU's policies as fundamentally 'ordered', if we take for granted the roles of the institutions in making the rules, even when done so by the Court (for example, the *Cassis de Dijon* principle of mutual recognition).

But to do so does not take into account the multiplicity of legal orders operating within the contemporary EU, which have increased to the extent that it is more difficult to speak of the EU's 'legal order' in the singular (Cardwell and Hervey, 2015, p.82). As the possibility of increasing differentiated integration has begun to find (reluctant) acceptance within even the Commission (Commission, 2017), we need therefore to consider how this phenomena fits with the narrative of an ordoliberal 'economic constitution' in the EU.

### **Differentiated integration and ordoliberalism**

The European integration process has shown more evidence of fragmentation in the post-Maastricht period, as the EU has expanded into 'newer' spheres of integration, such as justice and home affairs. In the past, differentiated integration was very limited: the Luxembourg compromise arising from the mid-1960s 'empty chair' crisis

(Teasdale, 1993) suggested that national vetos were (in theory) still available, there were few examples of where some were further down the path of integration than others. Now, the 'variable geometry' includes Member States that do not apply parts of EMU, Schengen, aspects of foreign/defence policy or the Charter of Fundamental Rights (Avbelj, 2013, Dyson and Sepos, 2010).

The lengthy process which eventually led to the Treaty of Lisbon revealed the extent Member States were keen to have national-focussed provisions. The high number of protocols (37) and declarations (65) added to the Treaty are evidence of this. Calls for enshrining differential integration have become more prominent and the institutions have begun to drop long-standing resistance (Piris, 2012, Commission, 2017). The view of the EU as a single legal order following a singular path of integration starts to become more problematic, in turn challenging the characterisation of the EU as an ordoliberal enterprise. Parts of the EU are undoubtedly subject to a set of regulations that are, at the very least, compatible with ordoliberal ideas (Nedergaard and Snaith, 2015), such as EMU. But, in creating these more ordoliberal spheres containing only some members (by choice), the rest of the EU is becoming comparatively fragmented.

Thus, a central conflict at the heart of the economic constitutionalism as a meeting point between law and political economy is whether the idea of an ordoliberal EU is challenged by differentiated integration, or whether a rule-based framework that specifies only minimum levels of convergence is actually quite an *ordo* construction? After all, in as much as ordoliberalism serves as a model to regulate the relationship between state and society, a minimalist framework built around effective co-operation

*seems* quite ordoliberal in character, even if the result is an uneven framework. It would be defensible to suggest that if the 'core' of integration was composed of the ordo-inspired economic aspects, with a 'periphery' of non-economic areas which were the subject of differentiated integration, then the EU could be most easily categorized as ordoliberal. But we do not argue this here, since (and referring to the discussion above), the EU's activities cannot be so easily divided in legal or institutional terms. Indeed, legal scholars have puzzled over the seemingly established terms of legal 'order' or 'system', which now appear inappropriate to capture the EU's complexity. This can explain the alternative uses of legal 'space', 'architecture' or 'pluralism' (MacCormick, 1999, De Búrca and Weiler, 2011, Walker et.al., 2011, Walker, 2016).

Within a differentiated integration process, we find that ordoliberalism may be an appropriate characterisation in some areas but is futile to suggest a strict separation between ordo and non-ordo areas. Rather, the examples of Member States opting out of aspects of the integration process (or at the very least, seeking to do so) reflect the EU's organisational structure as one that we suggest is premised on institutional compromise. Furthermore the very procedures of negotiation as part of the integration process may be significant in determining the 'ordoliberalisation' of the outcome or the influence of Germany as a central, ordoliberal player. It is on this that we focus the final part of the discussion: the idea that ordoliberalism in the EU can be described as a fundamental outcome of compromise; both by virtue of the capabilities of the nation-state actors involved, and because ordoliberal outcomes represent minimal acceptable scenarios for all.

## **Ordoliberalism as constitutional compromise?**

In examining the (re)emergence of ordoliberalism, we encounter the independent variable problem: even if it *looks* like ordoliberalism, it does not necessarily mean that it *is* ordoliberalism. We examine three possible readings of the EU's 'ordoliberalisation'. The first is that ordoliberalism is an inevitable consequence of the increased role of German power politics in the contemporary EU. Second, that ordoliberalism arises as the outcome of ideological compromise. Third, that ordoliberalism is a reflection of the type of economic integration that has been recently pursued. In the interests of avoiding overclaiming, we incorporate into these readings the chance that phenomena and outcomes *appear* to be ordoliberal without actually being so. The readings are also an attempt to tackle the implicit problem of agency and intentionalism that is wrapped up in any attempt to read ordoliberal 'uploading' to the EU level, hence our emphasis on ordoliberalism's descriptive qualities.

The first reading reflects a conscious strategy on the part of German policy-makers to reshape the EU in its own image. It is sometimes claimed within the more critical literature that ordoliberalism in Europe arises due to the conscious strategies of actors, usually understood to be German negotiators intending to create a Europe in their own image (for example, Dale and El-Enany, 2013). The perception of Germany as a self-consciously domineering actor has increased as a result of the eurozone crisis, although the extent to which Germany has ever been willing to accept the mantle of a regional hegemon is disputed (McNamara, 1998, Bulmer and Paterson, 2013, Matthijs, 2016).

Likewise, Young (2014) suggests that German strategy in promoting ordoliberal outcomes at the EU level has less to do with its own commitment to strict ordoliberalism in the domestic arena, and more to do with the desire to guard against the negative externalities of other countries' deficits. Thus, the projection of ordoliberalism as an ideal type organisation owes to myths about Germany's own economic model, together with self-protection rather than power politicking. Therefore, something empirically akin to ordoliberalism instead arises as a deliberative compromise between actors pursuing disparate economic agendas that are otherwise completely removed from it (Schneyder and Siems, 2013, Ito, 2012). As Jones (2013, p.150) suggests, in the context of EMU, '(ordoliberalism's) rule-based framework should be interpreted as an agreement to disagree and not as the imposition of German norms on the rest of Europe.' Moreover, economic integration has over time been considered one of the *more* obvious examples of German norm imposition (for example, McNamara, 1998, Maes, 2004).

Second, we consider the possibility that the EU's ordoliberal order is less a coherent ideological position uploaded from Germany to the EU, and more the outcome of clashes between Keynesian and neoliberal viewpoints in European negotiations, which approximates an ordoliberal constitutional settlement. For this we return to Nedergaard and Snaith's description of ordoliberalism as situated somewhere between Keynesianism and neoliberalism, approximating some aspects of neoliberal market prioritisation, and some aspects of Keynesian state intervention, without being ideologically in agreement with either (2014, p.1098). In other words, ordoliberalism appears to emerge as a credible compromise position when these two oppositional

views are contested within Europe. Differentiated integration fits as one aspect of this picture, but we can also make the suggestion that ordoliberalism describes the fundamental *character* of this tension between minimalism and effectiveness. This analysis is supported by Seikel's (2016) analysis of the EU's institutional balance of power as a result of the euro crisis. In terms of nation-state politics, France has long been characterized as fundamentally interventionist (*dirigiste*), if not outright Keynesian (Howarth, 2007). By contrast, Member States including the UK have pushed deregulation as an EU policy priority. In this sense, an interpretation of ordoliberalism as situated somewhere between these poles becomes attractive as a credible compromise, allowing for only as much regulation as is necessary but retaining a meaningful role for state intervention. Therefore, the outcome can be described as one that has all the hallmarks of ordoliberalism, but without ordoliberalism *per se* having provided the theoretical or practical underpinnings.

Third, ordoliberalism may appear to characterize contemporary integration, somewhat as a matter of coincidence, because of the *type* of steps that have been taken since the economic crisis of 2008. In other words, the concentration of measures in the field of economic integration largely fits with the conventional terrain of ordoliberalism we explored above. As suggested above, ordoliberalism can certainly be expanded beyond the spheres of economic regulation, but when this is where the majority of crisis measures are being taken, it is much more credible that ordoliberalism will enter the frame as a means of prescribing regulation. The idea that ordoliberalism has 'returned' is supported by comparing crisis measures with, for example, the Lisbon Strategy, which does not seem to be the product of ordoliberal

thinking but rather a more neoliberal market-making strategy, and which was adopted in a period absent of major economic crisis. Likewise, the focus on EU negotiations has been almost entirely on the creation of rules (such as the fiscal compact), a form that bears similarity to the idea of the economic constitution to regulate government(s). However, caution should be exercised regarding this explanation, by emphasizing that much of the international regulation that has recently occurred falls outside the scope of what the original ordoliberalists considered necessary, and thus are necessarily a matter of imputation.

## **Conclusion**

In this article, we have looked at the interplay between law and political economy in a contemporary EU increasingly comprised of a 'multiplicity of legal orders'. We posit ordoliberalism as a way into this analysis, and as a model that has witnessed a recent resurgence. We have argued that the original tenets of ordoliberalism continue to be observable in the contemporary EU and, therefore, understanding ordoliberalism is at the very least one way in understanding the EU. Nonetheless, in tracing the divergences between readings of ordoliberalism, we do not fully subscribe to the view that the EU as a whole should be characterized as an ordoliberal enterprise in the narrow sense. We find that accounts that do so are flawed in that they do not recognize that the EU is, and does, more than an 'economic constitution' would suggest. Rather, we emphasize aspects of ordoliberalism as a social and economic order that are rarely brought to the fore in the bulk of analysis focussing on competition law or economic

regulation. We find a need to continue to look for ordoliberal qualities across the EU rather than merely viewing it as a system that facilitates policy-making in certain (largely economic) spheres.

We suggest that the ideology of ordoliberalism has been successful less because it is appropriate and more because it is German, and thus tied to the nation that has been historically by far the most powerful actor in the EU's economic policy-making negotiations. Furthermore, the revival of ordoliberalism since the advent of the euro crisis cannot be seen in isolation from the central role played (or at the very least, perceived as being played) by Germany as a legal, political and economic rule setter. Note that this is a very different argument to the one we critiqued of Germany 'pushing' an ordoliberal agenda as part of a conscious strategy; this represents instead the idea of Germany filling a vacuum exposed by economic weakness. In this sense, we argue that ordoliberalism is the result of compromise rather than specific design.

The evolving legal-institutional dynamics in European integration need also to be accounted for. Differentiated integration here is key: whilst it is untrue that the legal, political and economic systems of the EU have only ever been unitary, it is only much more recently that the possibilities of a 'multi-speed' Europe have been seriously considered as a way forward in the integration process. Therefore, we suggest that ordoliberalism serves as a convenient meta-theory to *describe* conventional integration. But this does not extend to *explaining* future differentiated integration, since the 'multi-speed' Europe is in evidence in some areas which have little in common with ordoliberalist thought, past or present. In our emphasis on using ordoliberalism as a

means of describing contemporary European integration, the usefulness of the model is more apparent whilst recognising its limitations.

Of the three readings of ordoliberalism we identified, none can fully explain the totality of the EU as an ordoliberal construct unless large swathes of EU law and policy are omitted or the same (ordoliberal-inspired) logics occur across different policy areas. And doing so would render any account of the EU overly simplistic and incomplete. Rather, describing the EU as ordoliberal allows us to maintain the connection between some of the key economic areas in contemporary integration with the origins of the EU. This avoids the assumption that the *whole* of EU law and policy necessarily operates according to the most obviously ordoliberal-inspired areas. As a result, we find that ordoliberalism, in its original and contemporary forms, can continue to help us understand the EU as it faces a prolonged and serious crisis of identity.

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