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Part One: Economic Policies of the Past

How can a functioning and humane order be given to the modern, industrialized economy? This question is asked from a totally different position today than it was by those men asking the same question at the beginning and in the middle of the 19th century¹ This was the time when industrialization began. The liberals living in the middle of the century or Sismondi or the St. Simonists or Marx or Proudhon—in short all thinkers of those times—lived in a different economic and social world than we do today. The issue of an industrial workforce was already becoming heated, but this issue was a totally different issue then to what it is now. At that time the only experience was of the pre-industrial economy, and the onset of the great revolution. “Society today is subject to totally new conditions of existence, of which we have no experience,” Sismondi wrote in 1827.

At that time corporate groups, cartels, credit banks and trade unions either did not exist at all or were only just starting to develop. There was no experience (which we have today) of a central direction of the industrial processes of the economy. However, it was in these past times that doctrines were developed which determine society today, and in which definitions such as that of socialism and capitalism were created, which most people still use today. In the meantime, however, industrialization in the old industrial states has passed through manifold stages and spread massively throughout the world. We could and should

¹ See my essay “Das ordnungspolitische Problem” in ORDO, volume 1.

leave the stage of speculation in order to enter the stage of experience-based economic policy. We can draw upon considerable experiences in the areas of monetary policies, crisis policies, agricultural policies, cartel policies, trading policies, tax policies and the like. Indeed these experiences ought to be exhausted; selective descriptions are not sufficient.

In the 1870s, Hippolyte Taine abandoned his studies of literature, art and philosophy to devote himself to the current problems of economy, administration and law as he recognized their vital importance. For years, he locked himself away and concentrated passionately on his new task. He did not arrive at any definite result, however; he found no simple solution and no general principle. In these matters, he advised—as his dependents wrote—that one should “proceed tentatively, accepting the irregular and the incomplete, initially making do with partial solutions and continuing to work on ascertaining the laws and establishing the general provisions, that render this or that result possible or impossible.” With his sharp eye for reality, Taine correctly identified the situation at that time. In those days, people did not know enough about the industrial and technical economy in order to provide it with a sufficient constitution. Today, this is different. The last half-century, in particular, with its rapid changes in economic policy, with interventionism, full-employment policy, experiments involving the centrally administered economy and the fast pace of industrialization, has taught us a great deal. Today, Taine could obtain much more specific results. The fundamental questions of the world and of mankind are not endemic to any particular period: the sages of yore tell us as much as Kant or Goethe. But new problems of economic policy were created with mechanization, industrialization, de-individualization and urbanization and it is only now with the experience of history that people are equipped to deal with these problems. Now is the time, however, as otherwise man will be crushed by the industrial machine.

We should thus familiarize ourselves with the economic experiences of the last one and a half centuries, in order to find a basis for solving the large order-based, policy-related problems of the industrial economy. Perhaps it is expedient to divide the economic policy from former industrial ages into two eras: the long era of “laissez-faire politics” and the subsequent shorter era of “economic experimentation.” It may then become necessary to enter a new, third era.

CHAPTER 1: THE POLICY OF LAISSEZ-FAIRE

1. What was the basis of this economic policy? The answer is usually: It was the time of a “state-free economy.”

A short glance at the historical reality would have shown that this answer is incorrect. It was precisely during this period that the state created a strict law of ownership, contract law, company law, patent law, etc. Every business and every household was subject to these state-made laws on a daily basis, whether it

wished to buy or sell, take out a loan, or carry out any other commercial activity. In this situation, how can one speak of a “state-free economy”?

In this case, what was, in fact, the policy of *laissez-faire*? In this period states created *governmental* orders or constitutions for themselves, in order to introduce a functioning state apparatus and to protect the freedom of the individual. In the same way, they created *legal* systems by comprehensive codifications. However, the *economic* order and its development were not regarded as a particular task for the state. There was a conviction that a sufficient economic order would automatically develop within the scope of the law.

2. We know that at all times and in all places, everyday processes of the economy take place within the framework of particular forms. *The economic order is the sum of the forms that are realized in a particular country and at a particular time.* Because in industrial nations, which have an economy based on the intensive division of labor, the entire everyday economic process takes place in millions of separate households and businesses, but forms a single unit, in the Industrial Age it is necessary for the economic order to have a uniform controlling instrument to reliably control the overall process.

The economic policy of *laissez-faire* was originally based on the conviction that reasonable forms, i.e. a practicable general economic order, will develop of their own volition from the spontaneous forces of society if freedom exists and the principle of the rule of law is observed. Only in certain contexts—such as in note-issuing banks or the system of trade treaties—was the attempt made to shape parts of the economic order, but in general, the state left the forms of business to the private sector.

3. The policy of *laissez-faire* essentially dominated for over a hundred years. Broadly speaking, it was the economic policy of the 19th century. Its successes were significant. Industrialization established itself in Europe during this period and the supply of goods to a population which had more than doubled reached a level that had never been attained before. At the same time, an international economic order developed which functioned in a relatively rational way.

Yet, at the same time, significant damage was done: one need only think of the crises and the social tension. The freedom that the law-based state intended to guarantee was in practice threatened by the formation of factions of economic power. Employees became dependent upon employers, consumers upon monopolists, dealers upon groups of companies and cartels. The problem of distribution was not sufficiently solved and the kind of solution applied stirred up resistance among broad groups within society.

Criticism of the economic policy of *laissez-faire* is often oversimplified. Some fad word, such as “capitalism” or “Manchester capitalism,” is presented and it is then reported what shameful acts were committed by this creature. Magical thought has supplanted observation and analysis in this area. Marx’s criticism is

often reiterated, yet it is antiquated, uses observations from the early period of industrialization and fails to take account of developments thereafter; not even the differences between market forms and monetary systems, without the application of which criticism is useless. Even Keynes' criticism is global and oversimplifies the task.² More incisive criticism is possible, and is necessary. It is necessary because it is particularly the economic policy of *laissez-faire*—that formed the basis for the further development of economic policy—which offers an abundance of detailed economic experience.

4. The economic policy of *laissez-faire* was originally based on the conviction that competition would arise ubiquitously where it was applied, and that in a competition situation the workforce and the flow of goods could be expediently distributed among the businesses and households in order to satisfy demand in the best possible way. Now, however, the following could be seen:

Firstly: The supplier and the customer always—wherever possible—seek to avoid competition and to acquire or assert monopolistic positions. There is an omnipresent, strong and irrepressible urge to eliminate competition and to acquire a monopolistic position. Everyone spies possibilities of becoming a monopolist. Why should three bakers in a 13th century town compete with one another? They could simply come to an agreement and create a monopoly. This was the situation earlier and the same applies today. The employers on the labor market, the suppliers on the goods markets and the workers aim for monopolistic positions. As soon as this aspiration succeeds, and monopolies, partial monopolies or even oligopolies become established in a market, the control mechanism of the prices, in an industrialized economy in particular, no longer functions sufficiently. The prices do not accurately express the shortage of goods. Monopolies make the shortage of goods appear greater than it actually is, as can be seen from the destruction of stored goods or from a reduced use of an existing production apparatus. At the same time, however, an aspiration for power and for monopolistic positions can also give rise to markets without equilibrium: two-sided monopolies or two-sided partial monopolies or even oligopolies. Strikes or lockouts are clear signs of such a lack of equilibrium in the labor markets.

Secondly: The prices partly failed to direct the economic process because the monetary systems were inadequate. In a modern economy, money is predominantly created through the granting of loans by banks, and disappears through the repayment of such loans. This fact is extremely important for the development of the economy in the 19th and the start of the 20th centuries. It has been decisive in promoting industrialization. However, the connection between credit volumes and the amount of money has led to an instability of money, to expansions and to contractions, which prevented the price mechanism from working reliably.

2 For a review of the economic policy of *laissez-faire* and its theoretical decline: A. Rüstow, "Das Versagen des Wirtschaftsliberalismus als religionsgeschichtliches Problem," 1945.

These two factors had a combined effect: the creation of pressure groups in the form of cartels, trusts, corporate groups, employer associations, trade unions and the instability of money. The extremely difficult task of providing millions of businesses and households with the correct production factors or goods in the correct proportions in due time, and of directing the entire interconnected economic process of the people towards the meeting of demands, and of selecting the correct investment possibilities in balanced proportions from the infinitely large number of possibilities available, is not possible if the prices arise within the scope of a power struggle between concentrated groups of industry, agriculture and workforce.

5. This was the mistake made in the principles and policies of the laissez-faire society or the free economy in the old style: It left both the battle for establishing the rules of the game, the framework and the forms of the economy, as well as the daily struggle for quantities and prices, up to the individual. It allowed this free battle for the forms of order, as long as certain legal principles were adhered to. Little regard was paid to the fact that this had the effect of creating pressure groups and allowing the establishment of monetary systems which did not fully function. It was hoped that the “invisible hand” mentioned by Adam Smith would create a successful system, and that the daily economic process would proceed in this system without friction. One did not distinguish between the different forms of economy and the daily economic process. *Perhaps* it is possible that in certain forms of a transaction economy the daily process may function without friction. However, the possibility that viable systems would arise by themselves was overestimated.

As soon as pressure groups came into existence, a *circulus vitiosus* became apparent. The pressure groups gained influence in economic and legal policy. They implemented, for example, trade policy measures which consolidated their positions. Their “general terms and conditions” excluded a large part of the law enacted by the state.³ The economic policy of laissez-faire thus slid into an economic policy of interventionism. Interventionism is a continuation of and increase in the politics of laissez-faire. Because the pressure groups were supported by the state, they acquired a new power—which could also extend to the legal decision-making within the state. In a system of interventionism, the state supported the individual interested parties in their aspiration to secure certain positions of power or markets. However, it did not aspire to produce the conditions for a sufficient economic order.

6. Experiences with the economic policy of laissez-faire thus show:

Firstly: Prices and price ratios have not proved suitable to direct the daily process of the industrialized economy in all market forms. It is true that this finding cannot be grossly exaggerated. If the price system in the age of laissez-faire did not fully function, this does not mean that, for example, the price mechanism is

3 See note 39.

generally incapable of directing the economic process. The time of laissez-faire has merely shown that within the scope of certain market forms and monetary systems, the price mechanism does not sufficiently solve the problem of direction.

These difficulties have also become evident within the scope of distributing the social product.

Secondly: Based on the economic experiences of this era, the creation of the economic orders cannot be left to its own devices.

On the other hand, it would be rash to conclude from the experiences of this era that it is necessary to transfer the direction of daily processes of the economy to central bodies. It is the creation of the forms, of the framework and of the economic order as a whole, which clearly cannot be left entirely to the discretion of private entities.

In contrast to the policy of the laissez-faire, the central task of the economic policy is the creation of conditions within an industrialized economy which allow the development of functioning and humane economic orders.

IN CONTRAST TO THE POLICY OF THE LAISSEZ-FAIRE, THE CENTRAL TASK OF THE ECONOMIC POLICY IS THE CREATION OF CONDITIONS WITHIN AN INDUSTRIALIZED ECONOMY WHICH ALLOW THE DEVELOPMENT OF FUNCTIONING AND HUMANE ECONOMIC ORDERS.

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Part Two: The Decision

CHAPTER 1: THE POSSIBILITIES

How can there even be an order for the economic process of the industrial world? What are the possibilities?

Their number is low. This was already evident from the historical overview. The deeper the analysis of reality, the clearer it becomes: there are economic orders dominated by a central administration of the economic process, and orders in which the plans and decisions of many businesses and households are decisive for directing the economic process. This means that either the economic system of a central administration, the “centrally administered economy,” dominates; or the directional methods of the transaction economy are decisive for the order of the industrial economic process.⁴ It is true that these methods of a transaction economy are totally different depending on whether or not the individual actors are combined into monopolistic, partly monopolistic or similar groups. One can—roughly speaking—distinguish between three methods which come into

⁴ For more information, see my “Grundlagen der Nationalökonomie,” in particular part 3.

question for directing the industrial economic process: control by state central bodies, control by groups, or control by competition.

1. Those living in the 20th century have come to know the extraordinary disadvantages associated with a centrally administered economy. A form of order which the 19th century regarded as ideological has become reality. We must now draw the consequences from this experience. The concentration of economic power, its association with political power, the uncertainty and the insufficient supply of consumer goods, the increase in social dependence, the threat to the law-based state and freedom—we do not need to read about this in books; we experienced and experience it on an everyday basis. And there is another factor as well, namely the failure of the methods of a centrally administered economy in structuring international trade. Necessarily associated herewith are the transfer of exports and imports to central planning offices, which—in the absence of a precise costs calculation—introduce a strong element of arbitrariness and uncertainty into international trade and are not in a position to sufficiently control the finely differentiated world trade of the processing industries. The industrial economy encourages larger markets and the international division of labor; but economic orders of the central administration type were and are not in a position to provide these global economic relations with a firm foundation. In reality a conflict is breaking out. This also demonstrates a strong historical bias against the realization of a centrally administered economy.

2. Keynes said:⁵ “I believe that in many cases the ideal size for the unit of control and organisation lies somewhere between the individual and the modern State. I suggest, therefore, that progress lies in the growth and the recognition of semi-autonomous bodies within the State—bodies whose criterion of action within their own field is solely the public good as they understand it, and from whose deliberations motives of private advantage are excluded, though some place it may still be necessary to leave, until the ambit of men’s altruism grows wider, to the separate advantage of particular groups, classes, or faculties—bodies which in the ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy expressed through Parliament.”

This statement puts forward a specific form of the widespread theory that the direction of the economic process should be transferred to autonomous associations, professions and similar mandatory corporations. We do not want to discuss here whether such proposals revive medieval forms or not. However, it is surprising that Keynes even dared suggest such forms of order, which science has long recognized as only achieving a fragile equilibrium of the economy, tending towards disequilibrium. Experience has confirmed this on numerous occasions. If in the coal the mining, the iron, the cement or the potash industries, the trade or the workforce are combined in autonomous groups, group anarchy arises—

5 See Keynes, “The end of the Laissez-faire,” 1926, p. 31 et seq.

with struggles between these groups, embargos, lockouts and strikes. Neither are the individual interests muted in such corporations; rather, group egoism tends to proliferate, as the groups possess power. These groups—even if they call themselves professions—have no intention of serving the common good. Their functionaries merely support the interests of their own groups, or that which they deem to be their interests, in the battle with other groups and with the state: whether American trade unions, international raw material cartels or national syndicates, and even if employee representatives are involved in the management of these groups. The direction of the processes of the economy by “professions” is not capable of reconciling own interests and common interests, it means group anarchy. The unbalance of market forms comprising two-sided monopolies or partial monopolies or oligopolies triggers a tendency towards centrally administered interventions. Think of the development of the German labor markets between the wars, where, in the battle between the groups of employers and employees, state mediation was increasingly required to establish labor conditions. A permanent solution to the problem of the economic order is not offered by coexisting or competing pressure groups. It is only possible to have sympathy for professions being the guiding force in the economy in a situation where the difficulty of the direction of the modern economic process and the character of economic power are not recognized.

3. This leaves the third type of economic order in which the market form of complete competition dominates.

This is a market form which was often partly realized in the industrialized economy; however, it was not universally realized and it lacked an adequate monetary order. Classical and—far more precisely—modern economic theory have shown⁶ how a strict control of the economic process is fulfilled in a complete competition situation, and how the consumers direct the process.

This is how the principle of the competitive order arose. It emerged from daily life and academic experience.

4. The diversity of commercial phenomena and the magnitude of economic tendencies and cults shows that there are only very few possibilities for an economic order in which the modern economic process *can* be directed. In reality, this fact is fundamental. Every decision in economic policy should proceed from this starting point. This is an either-or situation. As the group-anarchistic, corporate or professions-based solutions to the problem of order-based policy can only exist temporarily, ultimately there is only a choice between a centrally administered control of essential parts of the economic process and the competitive order. It is time to examine this latter alternative.

6 The modern analysis of the process of control (Lenkungsprozess) in a completely competitive form of market has been considerably refined since the works of Menger, Walras, Jevons, Böhm-Bawerk, Marshall. The current status of research: G. J. Stigler, “The Theory of Price,” 1947, p. 63-196. H. v. Stackelberg, “Grundlagen der theoretischen Volkswirtschaftslehre,” 1948.

CHAPTER 2: WHAT IS THE COMPETITIVE ORDER?

1. If, for example, the cotton spinning works of a particular country have formed cartels, or if the market is dominated by a few independent yarn affiliates, or if numerous spinning works compete with each other for the sale of yarn to many dealers and weaving mills, this is important for price formation and for the direction of the economic process in the supply of yarn and beyond. Further questions that are obviously important for the general economic process are how banknotes or the deposit money of private banks are created, whether and to what extent credit is granted for this purpose, whether in a monopoly or in competition. Also: whether trade unions or employers' associations exist and how powerful these are. Production and distribution differ depending on how and in which forms supply and demand meet on the market and how prices and wages develop.

We take these everyday occurrences for granted. The economic policy of the competitive order aims to bring an order to all markets such that the overall economic process functions in an expedient way. The individual farmer, industrialist, craftsman and laborer, thus the individual business and household, should be able to both plan and act freely. They do not take orders but rather seek to apply their own labor force, their productive means and their money where they regard it most beneficial. Thus, households and businesses are not subordinate but rather coordinate among themselves. However, the framework of the economic process is not autonomously decided by businesses and households. The policy of competitive order does not leave the choice of market forms and monetary systems to the economy itself because the experience of the era of laissez-faire policy speaks for itself. The development of the framework in which businesses and households can plan and act freely is governed by the economic policy under which the framework is supervised. Businesses are free to choose what they produce, what technology they use, what raw materials they purchase and what markets they wish to sell on. Laborers are not obliged to serve in a particular form of employment either. They enjoy freedom of movement and the right to a free contract of employment. Freedom of the consumer exists, but not the freedom to choose how to define the rules of the game or the forms which the economic process takes. This particularly falls within the field of *Ordnungspolitik* (order-based policy).⁷

2. The market form that dominates in the competitive order is the market form of "complete competition." This coordinates the plans and decisions of the

7 E. F. Hekscher: "Der Merkantilismus" 1932 volume 1, p. 448 et seq. writes about the economic liberalism in England in the early 19th century as opposed to mercantilism:

The old method would have been an attempt to create a barrier to fundamental changes (Umwälzungen). The new victorious method allowed them to take a free course. Therefore, they were enforced with power unparalleled in mankind's ancient economic history. The third alternative would have been neither to intervene in the course of events nor to regulate its course but to direct it in ordered ways. - This concept has never been tried.

individual businesses and households with one another. If this is not possible, particular measures of economic policy are required. In individual countries, the competitive order would be realized in a particular way depending on the actual or historical situation. So, for example, the competitive order in Germany will look entirely different to that in Belgium or in the United States—but this will be discussed later. What all “competitive orders” have in common is the fact that they are dominated by complete competition.

In addition to complete competition, the “personal economy” (simple, centrally administered economy) is supposed to, and will be, a widespread form of order; this might be the farmer who not only purchases seed, fertilizer, machinery, etc. on competitive markets and sells potatoes, pigs and vegetables on competitive markets, but at the same time also operates a personal economy himself by being a consumer of potatoes and meat. On the farm, the two forms of order merge together. They merge in a different way in the household of the metalworker who also owns an allotment where he grows potatoes, vegetables and fruit for his family. In view of the exceptional difficulties in bringing sufficient order to the modern economy based on the division of labor, it is important that economic policy should take care of these elements of personal economy. This ensures that people become less dependent on the market and have something to fall back on when times are hard. Overall, however, the personal economy can only be an ancillary form of order as it is not suited to direct the economic process based on the industrial division of labor. It is complete competition which characterizes the economic order.

3. What is complete competition? It is a particular, precisely definable market form and is not to be confused with *laissez-faire*. We know that *laissez-faire* has very often and increasingly led to monopolies, etc. —in short: to market forms outside complete competition. One need only think of the history of coalmining in Germany and elsewhere with its comprehensive formation of syndicates or of the labor markets of the 19th century when competition on both sides of the market seldom existed.

4. Complete competition is also entirely different to the “battle for a monopoly.” A semi-monopolistic cement syndicate competing with outsiders living in its shadow, for example, is not complete competition, and neither is the competition between two oligopolistic shipping companies, two railway companies or two petroleum groups. In such cases, the aim is to achieve a monopoly. Unlike in complete competition, the costs are not a regulative factor, but instead prices are usually fixed much lower than costs in order to inflict damage and impose one’s will upon one’s opponents. In semi-monopolistic or oligopolistic opposition, restraints are often placed on the opponent’s suppliers or purchasers. In complete competition, however, there can be no restraints. Oligopolists or monopolists of supply or demand apply market strategies that do not exist in complete competition. This difference is also essential for the evaluation of

social questions: if a semi-monopolistic business on the demand side faces a large disordered workforce, then the remuneration structure will be completely different from that in complete competition. Complete competition has rightly been compared to a race. It is not a battle man-to-man but a race run in parallel. It is not impediment or injurious competition, but rather performance competition.⁸

5. Older criticism leveled at competition—by Sismondi, Marx, the St. Simonists and many others—has been largely devalued by the fact that they muddled the various market forms and referred to them jointly as competition. The description of the economy at that time tells that competitors waged personal vendettas against each other, sending each other into financial ruin in the process; that the competition of “rival capital rages” (Marx); that bigger capitalists beat smaller capitalists to death; that these wars are a senseless waste of assets; that workers are dependent upon an employer and that competition is ultimately a state of anarchy. The situations described actually often existed. Yet they were interpreted quite incorrectly and were described as effects of competition. What was described were battles for a monopoly and the dependence on monopolies and partial monopolies. More recent economic policy-related debate largely draws on such old misapprehensions. It is in this way that the destruction of wheat or coffee stocks comes to be attributed to competition whilst, in reality, it can only occur in monopolistic market forms.

Science has since developed an economic morphology. Insofar as this morphology aims to understand the real economy, and describing the forms found therein, it is also able to describe precisely what competition is. (Yet a science that establishes certain models axiomatically, failing to seek and find forms that exist in the real world is unsuitable for this purpose.)⁹

6. A farmer’s economic planning does not take account of how his wheat sales affect the wheat market since his supply is too small in relative terms. His plans are therefore based on wheat or pig or vegetable prices that he regards as fixed values—as data—and these are prices formed on the market. He may expect certain market prices, estimate the prices he believes he will be able to charge or assume that these prices will move within particular parameters. This is competition.

Competition exists between the housewives of a town who buy food, textiles and shoes, or between lessors offering residential premises for rent. Competition has often been realized in agriculture, trade or industry, primarily in the process-

8 Regarding the problems of the oligopolistic and partly monopolistic battle or the battle of monopolies against each other: Franz Böhm, “Wettbewerb und Monopolkampf,” 1933; Kestner-Lehnick, “Der Organisationszwang,” 2nd edition 1927; Hans Möller, “Kalkulation, Absatzpolitik und Preisbildung,” 1941.

9 About the newer market form: H. v. Stackelberg, I.c. and L. Miksch, “Wettbewerb als Aufgabe,” 2nd edition 1947; as well as my “Grundlagen.”

ing industries, e.g. the paper processing industry, in many branches of machine construction and the textile industry, to mention but a few.

If there is competition on the supply side, as well as on the demand side and if the economic planning of both sides is based on such competition, then the market form of complete competition is achieved. This is true, therefore, where there is competition not only for the supply of wheat, but also for the demand of wheat, or when a town's grocers are competing in the same way as its housewives. Anyone with industrial experience knows that this market form was frequently realized in the 19th and the early 20th centuries, not just in trade and agriculture but also in industry.

7. Yet this description of the market form of complete competition is not quite sufficient for economic policy. Are there methods that can be used to enable administrative practice to recognize complete competition and other market forms? Economic policy needs indications, *symptoms*, by which to implement an economic policy of competitive order. It needs a rule of thumb. Does such a thing exist? The answer is yes. Two methods exist.

The most direct method is to find out from companies themselves whether or not plans developed under competition. For example, if a company planning and building particular machines expects these machines to sell on the market for 500 marks each because they trade on the market at this price, then it can be assumed that competition exists. The price is not forced upon the market by way of a market strategy, but is taken from the market. Such assumptions are supported by the fact that there are no cartel agreements on the market or by information regarding competitors and the size of the market.

A second, less direct, method would be as follows: certain measures evident from outside, for example from the opposite side of the market, clearly indicate that complete competition does not exist because these measures cannot be implemented under complete competition: for example, restraints to purchasers or suppliers that have dealings with competitors, or loyalty rebates or predatory pricing or dumping or destruction of stocks. A further example: the price of raw silk has fallen sharply, yet the company does not reduce the price of its silk products. Here, the company cannot be under complete competition as the price mechanics of complete competition are such that the price of the product will fall if the price of the raw material falls. The company probably has a partial monopoly. Such indirect methods of determining the market form from outside are relatively simple to apply and powerful.

IF THERE IS COMPETITION ON THE SUPPLY SIDE, AS WELL AS ON THE DEMAND SIDE AND IF THE ECONOMIC PLANNING OF BOTH SIDES IS BASED ON SUCH COMPETITION, THEN THE MARKET FORM OF COMPLETE COMPETITION IS ACHIEVED.

8. In the competitive order, complete competition serves not only to increase performance: it is the very form of the market whose prices direct the economic process. Competition is used to increase performance even in the various types of centrally administered economic order. Here, contests are held between individual businesses which are presented with awards; there are also contests held between the employees who are awarded for special performance. Competition is used as a means to increase performance whilst the economic process is directed by central planning offices.

In the competitive order, however, the economic process is directed by the prices of complete competition and by the plans of the many households and businesses complying with these prices. In the competitive order, the direction of the economic process *and* the increase in performance together should be ensured by complete competition.

9. One could also attempt to determine the competitive order from an entirely different perspective: by comparison with a law-based state. In the same way as a law-based state, so the competitive order should also create a framework in which the individual's freedom to act is limited by the freedom of others, thereby ensuring a balance between every unit of human freedom. Indeed, the desire for competitive order is closely related to the desire for freedom.

But the desire to see these realized is not enough—in the same way as affirming and simply hoping for the creation of a law-based state will not summon it into existence. A house has to be built and its plan has to be designed.

Part Three: The Realization

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CHAPTER 1: THE ESTABLISHMENT OF THE COMPETITIVE ORDER

I. Basic Principle

1. We know that during the era of *laissez-faire* and the subsequent epochs of experimentation, economic policy underestimated or failed to see the importance and difficulty of the problem of exerting adequate direction on the economic process, a problem which entered an entirely new stage with the coming of industrialization. Above all, the fact that all economic circumstances are related was and still is neglected, i.e. that the directing mechanism must be indivisible if it is to function. Because of their general interdependence, every single economic policy intervention affects the economic process as a whole. Should interest be manipulated to a lower rate, for example, then this alters the entire price system and thus the entire direction of the economic process, as has often already been proven the case.

The lively economic debate on the influencing of the economy shrouds the fact that the actual problem of exerting this influence was given less and less attention over the decades. It is true that market forms and monetary systems within the framework of which prices were created were already permitted during the era of *laissez-faire*, only inadequately fulfilling the function of exerting a guiding influence. Later, however, during the era of economic experimentation, the lack of concern was even greater. Thinking in terms of price relations waned rapidly. Irrespective of whether the full-employment policy partially crippled the price system through the fixation of prices, the low-interest rate policy, the rationing of foreign currency, or whether the central planning agencies attempted to direct the economic process, which was only possible on the basis of global valuations, the incredibly difficult influential direction of the large-scale industrialized economic process and its overall context were always underestimated.

2. At last, this should change, and the crucial issue of modern economic policy should be treated as a crucial issue. This is to be achieved by making the establishment of a functioning price system of complete competition the essential criterion of every economic measure. *This is the basic principle of the economic constitution.*

The aim is not to pursue a policy to stabilize the business cycle which hinders or cripples the functionality of the price system under the impression of a momentary state of emergency, as with foreign currency control, credit expansion and the like. Likewise, tax policy may not promote the concentration process and thus encourage the advance of monopolies, e.g. through turnover tax or the structuring of corporate income tax. Here, and in all branches of the economic policy, the basic principle of the economic constitution should be present in all measures undertaken. There can be no exception to this approach. The modern economy is a large, interrelated system. All economic-political acts thus influence the overall process and must therefore all be coordinated with each other.

3. The basic principle does not only demand the avoidance of certain acts of economic policy: such as state subsidies, the creation of mandatory state monopolies, a general price stop, import bans, etc. Nor does it suffice to ban cartels, for example. The principle is not primarily a negative principle. Rather, a positive economic constitutional policy is required and its aim must be to further the development of the market form of complete competition and thus comply with the basic principle. Also in this respect, the policy of the competitive order differs entirely from the policy of *laissez-faire*, the fundamental concept of which did not include a positive commercial order-based policy.

Thus, what now needs to be developed are the individual positive principles which constitute the competitive order and which have their common focus in the aforesaid basic principle.¹⁰

¹⁰ Regarding this huge problem there exist three works which are particularly significant: F. Böhm, "Wettbewerb und Monopolkampf," 1933; L. Miksch, "Wettbewerb als Aufgabe," 2nd edition 1947 and Henry C. Simons, "Economic Policy for a Free Society," 1948.

* * *

III. Open Markets

1. The closure of supply and demand is a method that was and is used most to break or hinder the strong tendency to compete, which is especially effective in the industrial economy. The modern state as well as private and semi-public pressure groups have applied an exceptionally broad range of instruments to close supply or demand. Import bans or prohibitive customs duties or foreign trade monopolies isolate the suppliers of a country from foreign competitors, i.e. procure a local closure of supply. Investment bans, restrictions on cultivation, construction bans and the like have a similar effect. Entry bans and the prohibition of migration, the hindrance of a free career choice, license systems with demand tests for commerce, trade, industry and the creation of a *numerus clausus* can be included amongst this; likewise the prohibition on simultaneously pursuing various trades.

Thus far, we have talked of closure measures undertaken by the state. However, private pressure groups and monopolistic enterprises have also developed a system to hinder competitors or to prevent their emergence. The stoppage of materials, workers, supply and sales channels, the binding of customers through exclusive agreements and loyalty rebates, credit freezes and predatory pricing all prevent the emergence of competitors and close supply.

In addition to this are the unique closure measures involved when the state and private powers cooperate, i.e. where the state provides assistance to enable private parties to create a dam to close supply. Examples of this were patent law and resale price maintenance for branded products.

During the Middle Ages and mercantilism, very effective methods were applied to prevent the influx of people and capital into an industry. During the era of industrialization, similar methods were developed with no less success.¹¹

2. If one enterprise is granted the exclusive privilege to conduct a specific trade, such as the post office which is authorized to convey letters or the central bank which is authorized to issue notes, then the direct consequence of the closure is the creation of a monopoly. Thus, from the closure automatically follows the elimination of all non-monopolistic market forms. However, it is frequently the case that supply is closed in favor of a multitude of suppliers and not purely for a single entrepreneur. This is the case, for example, with general restrictions of admission to retail trade or with investment prohibitions for entire industries, or with cultivation restrictions for sugar beet and other agricultural products. Is the closure of the markets perhaps reconcilable with the competitive order in this case? Is it not possible for competition to arise within the framework of

¹¹ See particularly Böhm l.c., p. 75; Kestner-Lehnicl l.c., p. 53 et seq.

closed markets, as was indeed the case, for example, with the supply of tobacco in Germany during the 30s? Is the closure of markets really irreconcilable with complete competition and does the implementation of complete competition really presuppose the need to keep all markets open to the extent possible?

In response, one can indeed say that the competition mechanism can be effective within the framework of closed markets. However, economic policy must nevertheless apply the principle of opening the markets because their closure would entail the acute risk of obstructing complete competition. There are two aspects which bring about this situation.

Firstly, the closure of supply and demand makes it considerably easier for monopolies to establish themselves. If an investment prohibition exists for cement works or if admission to a trade is closed, the likelihood of monopolies developing is extremely high. If import bans or investment prohibitions define the supply of steel, then steel cartels will have a firm foundation. Vice versa: where there is no market closure, where import bans, general restrictions of admission, investment bans and the like have been lifted, it is often difficult to maintain monopolies, and oligopolies revert to competition. For this reason alone, the opening of supply and demand is a precondition for the constitution of the competitive order in the industrial era.

No less important is a *second* aspect: even if complete competition is established on individual closed markets, the connection between the markets is disrupted as a result of the closure and the entire system of complete competition may not fully function. For example, if a state imposes an investment prohibition on machine tool manufacturing factories, then although it is possible for competition to exist between these factories, the investment prohibition prevents the volume of capital, and thus labor, iron and other materials, from being brought into the machine tool manufacturing sector that would have been possible on the basis of the price relations. Consequently, machine tools are more scarce than would have been the case had the investment prohibition been lifted. The general equilibrium, i.e. the coordination of the many markets and industries with each other, cannot be fully achieved if investment prohibitions and other closure measures are in force. The functions of control and selection which, in the case of open and complete competition, are assumed by prices on the one hand and—through prices—by consumers on the other, are partially assumed by the offices which impose the closure. In addition to this, the income generated in closed trades is akin to rents, which would be washed away with the opening of the markets.

Thus, the following principle applies: The constitution of the competitive order requires the opening of supply and demand. Very few exceptions hereto exist, such as the exclusive right granted to the central bank to issue notes.

3. The state may not confine itself to allowing anyone to carry on a trade, to lifting investment bans, general restrictions on admission, privileges, compulsory rights and privileged protection rights, to creating freedom of trade and freedom of movement, to avoiding state import bans; thus to generally refraining from undertaking state closure measures, so that the price system of complete competition can determine the selection process. Rather, it is necessary that the markets are not closed by private pressure groups either. What is the point of state-protected freedom of trade if this is actually lifted by the policy of the pressure groups? What is freedom of trade if an aluminum rolling mill cannot be established because the existing syndicate takes active measures to prevent this? Any form of “impediment competition,” i.e. blockages of any and all kinds, loyalty rebates, exclusivity agreements and predatory pricing against competitors which aim to destroy or deter competitors must be prohibited.

The opening of markets has an economic constitutional purpose. For this reason, private pressure groups cannot be granted the right to eliminate them. They are a part of *Ordnungspolitik* (order-based policy) which may not be left in the hands of private individuals. Here as well, the difference to the policy of *laissez-faire* is evident, where private pressure groups were not only entitled to form, but also to close their markets by undertaking active measures.

4. In the individual areas of the economy, the enforcement of the principle raises significant, difficult questions in each case. For a more precise description of the situation, may I give two examples, namely customs and patent policy.

How are *protective customs duties* to be viewed pursuant to this principle, i.e. duties which do not act prohibitively and thus do not equate to import bans? Such customs duties do not close supply. This applies to the majority of duties that existed prior to 1914 within the framework of the so-called central European trade treaty system.

Such duties do not directly destroy the competitive order. Their effect is similar to that of an increase in the distances between countries. They shift the price relations, but do not make it impossible for the price system of complete competition to control the economy. Thus far, duties are reconcilable with the competitive order. And, moreover, the transition from the system of import bans or import licenses to the system of customs duties is a step in the direction of the competitive order.

Indirectly, however, customs duties can still be dangerous to the competitive order, namely where they facilitate the establishment of monopolies. It is a known fact that they can increase the propensity of the customs-protected industry of a country to form cartels, by making it possible to segregate the country as a sales territory from the global market and to control it monopolistically. And the incentive to establish monopolies especially exists in industries that are able to supply the internal market by themselves, where customs duties thus only gain

any effect whatsoever through the establishment of cartels. The history of the German iron industry offers several examples of this.¹² In these cases, the phase-out of customs duties can be a means to eliminate the trend towards monopolies, thus to procure the establishment of the competitive order.

5. Forms of the economy which are irreconcilable with the competitive order, i.e. forms of the economy that are alien to the system, often arose in connection with modern *patent law*. Patent law also belongs to the multitude of more recent legal institutions which did not have the effects desired by the legislator. Patent law was intended to promote technical development as well as to protect and reward the inventor. The extent to which these goals have been achieved can remain undecided.

Contrary to expectations, despite certain statutory precautionary measures, patent law has triggered a strong trend towards the establishment of monopolies and concentrations in the industry. This is due to the fact that patents create an exclusive right to manufacture an object, to bring it onto the market, use it and sell it. Although many of the patents do not close supply, these are patents which only cover a minor part of the production process of a commodity and which can be circumvented by using other production methods, substitute products and the like. However, a different type of patent group exists, namely master patents, which close the supply of goods, such as inter alia the well-known Telefunken patents for the production of radio tubes, or the benzopurpurin patent of 1884, which became an important feature for the organization of the chemical industry.

FORMS OF THE ECONOMY WHICH
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The closure of supply through the application of patents has encouraged concentrations in two ways. A patent can grant individual firms an individual monopoly, as for example is often the case in the fine mechanics industry. Secondly, patents have also triggered or reinforced the establishment of cartels or groups. And this effect was more important. And this was not only the case for the actual patent cartels, patent trusts or patent pools. The exchange of licenses facilitates the establishment of cartels; the risk run by a member of a cartel in the event of his withdrawal, namely that he loses his right to certain patents, is what cements many cartels together. Patents also gained what can only be described as a decisive role in the establishment of modern-day corporate groups, namely in terms of their expansion and the struggle to keep out competitors. "Rather, the driving force of patents also has to be sought and appreciated where concentration forms develop which allow none of the patent power struggles or underlying license agreements to reach the public, and nevertheless

12 See, e.g., Wiedenfeld "Gewerbepolitik," 1928, p. 148; Haberler, "Der internationale Handel" passim.

have these elements to thank for their creation, form and direction to a very considerable degree. They cannot be quantified, but only manifest themselves as inherent tendencies and latent possibilities” (G. Gather). On the whole, the establishment of the modern economy with monopolies or oligopolies has been decisively defined by patents, trademark protection, the resale price maintenance associated therewith and by leading advertising. Take, for example, the establishment of corporate groups in the chemical, detergent and cigarette industries. Through jurisprudence, the conditions for the implementation and acceleration of the concentration process were considerably encouraged and, simultaneously, the forces which pushed for complete competition were suppressed or invalidated.

6. A patent policy which draws the conclusions from these experiences is—in conjunction with the analogue treatment of trademark protection, resale price maintenance and leading advertising—an important element of economic policy aimed at realizing the competitive order. Its aim is to restrict or eliminate the closure of supply occurring as a result of the granting of the patent. How is this possible? Can one adhere to the fundamental concept of today’s patent law, i.e. to the granting of the exclusive right to exploit the invention? In this case one would have to substantially relax the closure of supply arising from the present legislation and jurisprudence of the civilized countries. There are numerous proposals to achieve this: for example a shortening of the protection period and the expansion of compulsory licenses.

Whether or not it suffices to relax the exclusivity rights can remain undecided. Perhaps the granting of such rights and the closure of supply should be dispensed with entirely, introducing in their stead a system pursuant to which the patent owner is obliged to grant the use of the invention to all seriously interested parties in return for a reasonable license fee. As with all other monopolies, an obligation to contract would also exist in patent monopolies and the contractual conditions would have to be stipulated by the patent office in the event the parties could reach no agreement. Numerous senior patent policy proposals could continue to develop in this direction.¹³

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13 On the patent issue, I owe numerous suggestions to two works by G. Gather, “Patente-Monopole-Machtpositionen,” 1943 (unprinted) and “Reform der Patentgesetzgebung?” in this *ORDO* volume and also to the mentioned works of Franz Böhm, L. Miksch, and H.C. Simons, “Modern American literature,” in particular about patent cartels, in F. Haussmann, “Der Wandel des internationalen Kartellbegriffes,” 1947, p. 33; essays by H. Rasch and Tschierschky in the *Kartell-Rundschau*; W. Röpke, “Die Gesellschaftskrisis der Gegenwart,” 1942, p. 362 and 389 et seq. and the literature mentioned therein; E. Liefmann-Keil, “Monopolbekämpfung durch spezielle Marktstrategie,” *Schmollers Jahrbuch*, 67th volume, 1943.

CHAPTER 2: THE POLITICS OF THE ECONOMIC ORDER WITHIN THE COMPETITIVE ORDER—THE REGULATING PRINCIPLES

Strict compliance with the constitutive principles cannot prevent specific competitive orders containing certain forms of order that are alien to the system (I). Furthermore, and no less important: even if complete competition is realized, it contains weaknesses and defects which require correction (II - V).¹⁴

Therefore, certain “regulatory” principles are necessary, which must be applied in order to keep the competitive order functioning.

I. The Problem of Monopolies in the Competitive Order

1. Economic power should only exist in a competitive order to the extent necessary to maintain the competitive order. The management of households and businesses requires economic power in order to implement the envisaged economic plans. It is admittedly the case that in the competitive order, such economic power is subjected to necessary, strict, daily control by the price mechanism. However, a central bank which has the exclusive privilege to issue bank notes also exerts economic power, which gives rise to the difficult problem of its control. But also this power is created for the purpose of enabling the competitive order, by creating a sufficient monetary order.

2. Even in the competitive order, however, there will be monopolies which do not serve the maintenance of this order, but serve as a disrupting and threatening element. Certain positions of power arise even if these principles are completely applied. Thus, for example, a gas supplier has a monopoly in the surrounding city, i.e. on its market. Or a railway has a position of monopoly in its transport area. Or a factory producing precision scales or medicinal equipment or slide rules dominates its market monopolistically or partly monopolistically. Such monopolistic positions are established on the basis of genuine cost advantages. In these cases the optimum operating size is so important that the quantity produced by only one business is sufficient to supply the market. Several businesses would only be able to sell at prices insufficient to cover their costs.

Here the question arises: What is to happen with these monopolies? All ways of directly and indirectly preventing the creation of a monopoly have been exhausted. Despite this there are powerful entities in existence which endanger the entire order.

3. The question is not identical to the familiar question of monopoly (or cartel) supervision, which many industrial states e.g. Germany with its Cartel Regulation of 1923, have attempted and failed to solve.¹⁵ Trade policies, compa-

¹⁴ See p. 32 above.

¹⁵ Refer to F. Hausmann's "Die wirtschaftliche Konzentration an ihrer Schicksalswende," 1930, p. 231 et seq. and H. Kronstein's "Cartel control," A. Record of Failure, Yale Law Journal, February 1946.

ny law, tax policies, cartel law and cartel case law, as well as all commercial law, there and then facilitated and promoted the creation of monopolies. To some extent there were even mandatory syndicates. The state then attempted to prune the strong wild shoots sprouting from the trees whose growth they had promoted, but the trees merely continued to flourish together with their wild shoots.

Experience has shown that a modern state is unable to establish an effective supervision of monopolies in an economic order in which large parts of the industry are monopolized. Here the political influence of the interest groups is too strong and the monopoly problems too manifest. Even if individual civil servants of the ministries attempt positive initiatives, the support they receive within the structure of the state is too weak, as precisely shown by the extensive German experience. One should not be under any illusions with respect to the efficiency of monopoly control in economic orders in which monopolies proliferate in the industry or in agriculture or among the workers. The United States and its monopoly policies also provide an example.

The situation is totally different in the competitive order. Here the main impact leads to another direction. The creation of monopolistic power entities is prevented. Not only by prohibitions of cartels, but also—and far more importantly—by an economic and legal policy which breaks through the strong forces of competition, as exist in a modern economy, by applying the constitutive principles. In this way the state largely escapes the influence of private pressure groups. Its ability to supervise monopolies is disproportionately greater if the leaders of the coal, potash, iron syndicates, etc., of the large groups and trusts and trade unions, do not have a right to take part in the decision-making process. At the same time the task is far more moderate. Only for the aforementioned unavoidable monopolies is the problem of monopoly supervision topical. The chance of its success is thus far greater.

4. Nevertheless, it is necessary and also possible to draw conclusions from the experiences of industrial states with their monopoly supervision. The first conclusion is that two methods of monopoly control often fail.

Firstly: the nationalization of monopolies does not solve the monopoly problem. State monopolies e.g. the railway or electric utilities often practice just as monopolist policies as private monopolies. In the same way as private enterprises, they seek to achieve the point at which the highest profit can be generated, which in a monopoly will usually substantially deviate from the point of optimum satisfaction of demand. In many cases, even the tendency to fully exploit the position of monopoly is greater among state monopoly administration bodies than among private enterprises. The state monopoly administration considers itself justified in such behavior as the income flows to the state or the town, i.e. represent an indirect tax and are not used for private purposes. Apart from this, the state feels far more secure with respect to potential competition; it can, e.g., restrict the supply of any emerging substitute product by legislative means—as

occurred in Germany with the emergence of the automobile sector as competition for the state railway.

Nationalization has the effect of merging economic and political power. It concentrates the two spheres of economics and politics.

However, the problem of economic power and abuse of power has never, anywhere, been solved by concentration. A concentration of power on the one side increases dependency on the other side: of workers, purchasers and suppliers. Nationalization of the large monopolies, e.g. of the heavy industry, does not mean that the power of the interested parties is effectively subjected to supervision, but that the supervising parties become interested parties.

Secondly: Such risks and other influences have given rise to the ideal of mobilizing the functionaries of the workforce for purposes of monopoly supervision. What is interesting in this connection is, e.g., the German Coal Economy Law of 1919, which appeared at the same time as the Socialization Act.¹⁶ By delegating functionaries of the coal workers and the employees to the management of the mandatory coal mining syndicate as well as the coal association of the German Reich and the coal council of the German Reich, the State wanted to emphasize the public interest in the monopolistic bodies.

The attempt failed, for a reason which is of fundamental importance. If the employees participate in the profits of a monopoly, they have just as strong an interest in the monopoly and in the monopolistic policies as the entrepreneur. The workers of a coal mine often agreed to demands for higher prices for the monopoly products if wage increases were promised in the event of price increases. Increases in railway prices are often approved by the railway unions. The recipients of wages and salaries have far greater interests than the fragmented interests of consumers.

This is where the often friendly, effective attitude of the unions vis-à-vis the cartels has its roots. If the functionaries of the workforce participate in the leadership of monopolies, this gives the monopolies a broader foundation. As a result, the workers unite with the entrepreneurs to form *one* monopoly group. It was illusory to hope that this unification would support the overall interests. Now entrepreneurs and worker functionaries collaborated to support the monopolistic politics of their industry. This is not a case of bringing a counterweight to oppose the weightiness of the monopoly leaders, but a strengthening of the weightiness of the monopoly.

Neither the nationalization of monopolies nor the control by the workforce can solve the monopoly problem in the competitive order.

¹⁶ Hereunto: report by the Commission for Socialisation and report on its action, Berlin 1920.

5. The monopoly supervision should thus be transferred to a state monopoly office. In order to withdraw it from the persistently dangerous influences exerted by interested parties (although these are weakened in the competitive order), this should be an independent office which is only subject to the law. It should not be, for example, a department of the economic ministry, which is far more subject to the pressure of interested parties.

This monopoly office is exclusively responsible for all questions of monopoly supervision. It is also responsible for deciding whether or not the precondition of a dominant economic position is fulfilled in the specific case.¹⁷ What is needed

THE AIM OF MONOPOLY LEGISLATION AND MONOPOLY SUPERVISION IS TO ENSURE THAT THE BEARERS OF ECONOMIC POWER BEHAVE AS IF COMPLETE COMPETITION PREVAILED. THE BEHAVIOR OF THE MONOPOLISTS SHOULD BE "ANALOGOUS TO COMPETITION." THIS IS THE PRINCIPLE WHICH ARISES FROM THE BASIC PRINCIPLE OF THE COMPETITIVE ORDER.

is a new central office, something which is currently lacking, and the establishment of which is both necessary and accomplishable. Such a large monopoly office would be a central figure in the modern, industrialized state. Without such an office the competitive order and with it the modern law-based state is threatened. The monopoly office is just as indispensable as the Supreme Court.

A monopoly office has the task of dissolving avoidable monopolies and supervising unavoidable ones. Admittedly, the number of such monopolies will be relatively low in the competitive order. Part monopolies and two-sided monopolies would be just as liable to its supervision as supply and demand monopolies. If,

therefore, a large factory dominates the supply of the country with spiral springs, as part monopolist, and if there are many further smaller businesses supplying the same product, the large supplier cannot escape monopoly supervision by reference to smaller competitors.

6. The aim of monopoly legislation and monopoly supervision is to ensure that the bearers of economic power behave as if complete competition prevailed. The behavior of the monopolists should be "analogous to competition." This is the principle which arises from the basic principle of the competitive order.¹⁸ Its implementation is to extend to the following aspects:

a) As is generally known, the general terms and conditions of associations, the industry, banks and insurance companies, as well as individual companies such as gas and electric utilities, railways, etc., often exclude state law. The law created

¹⁷ See p. 26 et seq. above.

¹⁸ See p. 32 et seq. above.

by the economy itself have ousted state law, especially from the monopolized areas of the economy.¹⁹

In contrast, the aim is to create the situation which would arise in the event of complete competition. General business usances which arise to supplement statutory provisions on the markets are admissible, but not general terms and conditions which deviate from the statutory rules to the detriment of the contractual partner. This already eliminates a serious defect, which is seriously neglected in legal policies and which was precisely perpetrated by the monopolies.

b) Every form of impediment competition by embargos, loyalty rebates, predatory pricing, etc., is prohibited. The monopoly office must also supervise these aspects. This creates a condition which would automatically arise in a complete competition situation, where impediment competition would be pointless.²⁰

19 Franz Böhm, "Ordnung der Wirtschaft," p. 157, writes:

Thus the consequence of the development of terms and conditions of associations was, inter alia, an unprecedented legal disintegration in the areas of civil law and commercial law, a legal disintegration which today is much more significant than at the time of the German Federation or after the foundation of the Reich before the enactment of the German Civil Law Code. For purchase agreements which a single trader concludes with suppliers of different lines of business today, state law only applies to a diminishing extent, but the most colourful 'laws' conceivable of countless associations and influential one-man businesses therefore do apply. The most precarious aspect however is the contents of such 'laws'. Whilst at the time of political disintegration, the provisions of the purchasing and credit law pursuant to the German Allgemeines Landrecht or General State Law, the Napoleonic Code and the other state laws were dictated throughout by the endeavour to grant a fair balance of interests (transfer of perils, liabilities for warranties, consequences of default, the impossibility of performance, etc.), among writers of terms and conditions of market associations, etc., the tendency prevails to amend the rights and liabilities unilaterally in favour of the one market party. Thus not right but wrong is created. The agreements regarding an arbitration tribunal were often also made in order to avoid an unwanted interpretation of the law of standard forms (Formularrecht) by national courts. Furthermore, the extraordinary spread of arbitration has the effect that the state judiciary, to an ever greater extent, has been pushed away from facts relating to cartel and market law. Moreover, the implementation of arbitral procedures for breaches of cartel obligations frequently took the form of criminal law processes: under the form of damages and contractual penalties processes, in reality, a private criminal justice process takes place.

See also: L. Raiser, "Das Recht der Allgemeinen Geschäftsbedingungen," 1935.

20 The task which exists here has been described by Großmann-Doerth as follows:

The present: On the one hand, this is the national legal law of obligation contracts, substantially the result of the 19th century jurisprudence based on ancient literary tradition, today more and more separated from economic life, therefore meagre, often mummy-like, a running on the spot. - And on the other hand it is the General Terms and Conditions: it dominates, rather than the state law and often in contrast thereto, the life of the obligation contracts. . . . It is necessary that the General Terms and Conditions are finally recognised as almost the most important civil law-related political task given to us. Finally, the conclusion has to be drawn therefore that for some

Admittedly, in order to achieve a result analogous to competition, it is necessary to introduce an obligation to contract, as here coercion is necessary to achieve the same result as would automatically arise under complete competition.

c) As is generally known, under complete competition the same prices will become established for the same goods and services. Supply monopolists, for example, whilst striving for the highest profit, have a tendency to demand differentiated prices for the same goods or services from individual segments of demand. This price differentiation should be prohibited in the competitive order.

d) What is most difficult is to implement the fundamental principle within the scope of determining price levels. The price is to be fixed in such a way that offer and demand are in equilibrium at this price, and, at the same time, the marginal costs are just covered. A chemical plant with a monopoly for a particular medicine must sell its product at a price with two characteristics: the price must be such that offer and demand are in equilibrium; consequently no rationing is necessary. At the same time, the price—e.g. 3 Mark per unit—must equal the costs of the last unit produced. Difficulties arise within the scope of determining the costs. This is because experience has shown that the information provided by the management of the enterprise concerning the costs of production is imprecise and requires stringent all-round examination.²¹

e) This is not the only aspect to the monopoly office's price controls. The office not only has to ensure that the most favorable point for supplying the market is achieved with the *given production apparatus*. Under complete competition, an ongoing, long-term pressure to rationalize the production apparatus arises. It is necessary to carry out a price control of the monopolies which also expresses a long-term pressure analogous to a competition situation.

The monopolistic chemical plant which is subject to the control of the monopoly office will not only have to adjust its general terms and conditions to complete competition, and not only have to refrain from embargos and price differentiation, and not only fix its prices at a level at which they are in equilibrium and cover marginal costs, but it is also subject to a long-term pressure to reduce the costs and prices of the products by rationalization. Otherwise the production apparatus will become antiquated, as often occurs with monopolies, and the supply of goods will not be optimal. Therefore, the plant must expect its

footnote 20 cont'd

time it has no longer reflected our feeling for right and wrong when economy and state establish right against each other. . . . It should at last be naturally understood that the one who establishes right is subject to the legislator's responsibility vis-à-vis the entirety, whether right is established by government bodies or by the economy itself.

(“Die Rechtsfolgen vertragswidriger Andienung,” 1934, p. 201 et seq.).

21 S. L. Miksch l.c., p. 91 et seq.

prices to be revised by the monopoly office from time to time. Under certain circumstances, if possible improvements have been omitted, it must expect a reduction to below the point discussed in d), and thus losses. The monopoly office should refrain from regarding the existing production apparatus as a given variable on a long-term basis.

The questions of monopoly control are manifold and difficult. However, they can be solved *if* the other constitutive and regulating principles of the competitive order are followed, i.e. if the creation of monopolies is restricted to a minimum and if the monopoly control is dealt with under the simple and effective principle of competition analogy.

7. Combating and supervising monopolies also has a prophylactic effect. The otherwise abundant objective of attaining a monopolistic position, which—as has been seen—is a central aspect of economic history, is considerably weakened or eliminated if such decisive monopoly supervision becomes effective.

A further problem in this connection is the issue of how oligopolies are to be dealt with. This includes cases such as the following: Three companies of the electricity industry supply certain electrical machines, or two petrol groups dominate one market, or five aluminum smelters supply the market—without creating a cartel. Or—which is a very common occurrence—part oligopolies arise. For example, two large oven factories dominate the market, but there are also many smaller businesses in this sector which adjust their pricing policies to the larger companies. This oligopoly—or part oligopoly—situation often passes by rapidly, and soon leads to the creation of a cartel, i.e. to a collective monopoly or an individual monopoly, by overpowering the opponent. Sometimes, however, the unstable condition of the oligopoly or part oligopoly exists for many years or decades. How should this situation be dealt with from the perspective of economic policy? It is true that with the general policies accompanying the competitive order—e.g. its trade policies, patents, protection of registered designs, tax policies, etc.—the number of oligopolies becomes far smaller with strongly expanded markets. However, it is still important to ask how one should handle a cartel which only has a few members and after the dissolution of which the market will become oligopolistic?

There are two views: According to the first opinion, as has been put forward particularly impressively by Miksch, a special regulation is necessary for oligopolies and part oligopolies: namely the “tied competition” which takes place under state supervision. According to the other view, this is too great a burden for the state. According to this view, an active monopoly supervision is indeed sufficient, and it also offers something better for such cases. With a decisive monopoly supervision, the oligopolists have no reason to destroy the others by aggressive means or to attain a position of monopoly of their own. This is because it comes up against a rigorous monopoly control. Furthermore, the oligopolists themselves will attempt to behave as if complete competition prevailed, as they

will otherwise come to the individual attention of the monopoly office. An example: a cement cartel is dissolved. As a result, the seven members become oligopolists. That one company now seeks to overpower the others is unlikely. This is because all measures of impediment competition—predatory pricing, blockades, loyalty rebates etc.—are prohibited and punishable. If, however, it becomes a monopolist by using competitive means, it would be subject to the comprehensive, deterring supervision of the monopoly office. What about if the seven companies remain oligopolists? In this event they will behave in almost the same way as in the competition situation. In some respects they will have to behave in this way: They too are subject to the legal provisions on general terms and conditions, on impediment competition and price differentiation. And if they do not approach the prices of the competition, they will have to expect the intervention of the monopoly office on a daily basis.²²

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22 On monopoly control: the cited works by Böhm, Miksch, Haussmann, Röpke, Kestner and others. Latterly: B. Pfister, "Leistungswettbewerb und Monopolkontrolle," *Hochland*, volume 40, p. 558 et seq.