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Some regulatory foundations of UBI in Germany

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Policy Paper – FRIBIS Winter School
“Some regulatory foundations of UBI in Germany”

Dominik Schröder*, Clem Davies**

One problem of economic policy making is to justify its interventions on regulatory grounds. While there is significant research on how to analyse the possible effects of a UBI, there is less focus on its regulatory justifications in politics. For regulatory justification, we use the German theory of Ordnungspolitik, which refers to the rules and institutions which allow the economy to be organised along the principles of markets and competition. This policy paper presents some regulatory foundations for a UBI within the economic and social regulatory system in Germany. The first chapter investigates the origins and characteristics of the German economic regulatory system, while the second chapter examines some of its flaws. In the third chapter, the connection of the regulatory grounds and UBI is shown together with a revised idea of the origins of the German regulatory system, namely ordoliberalism and ‘new ordoliberalism’. In the fourth and last chapter, some future regulatory challenges are sketched and the possibility of the UBI as a solution is outlined.

Characteristics of the German Economic Regulatory System

In Germany, all the major political parties are committed to an economic order described by the term social market economy. This chapter describes the characteristics of the German economic regulatory system, based on this general commitment to a social market economy, as well as its origins in ordoliberalism. We compare the variations in normative values, prioritised along the spectrum of perspectives within ordoliberalism, and how this results in varying policy recommendations.

The basic principle of the social market economy is to combine the efficiency of the market economy with a social security system. Thus, the aspect of social justice plays an essential role in the concept of the social market economy. The results of the

competitive process should therefore meet certain standards of security and social justice. The social market economy in Germany attempts to achieve this by shaping a market-based competitive order through regulatory policy. In theory, three components are prerequisites for market economy processes to lead to social results: a monetary order committed to price-level stability, a competitive order that prevents meritless monopoly profits, and a stimulus and growth policy that smooths out fluctuations in economic activity and ensures full employment. The goal of full employment is to be achieved through a supply-side growth policy flanked by an employment-compliant wage policy (cf. Reichel 1998, p. 83 ff.).

The term ‘social market economy’ can be traced back to a publication by Alfred Müller-Armack in 1947 and has been present in German politics ever since (cf. Müller-Armack 1947). In ordoliberalism, a similar though somewhat distinct school of thought, economic competition is regulated by a competition regime laid down by the state, compliance with which is, in turn, monitored by the state. However, the state does not have to intervene in individual processes or operations and must be sufficiently independent not to be externally influenced while setting the rules. Ordoliberalism, stemming from the German Ordnung, which translates most closely to “regulation”, implies that rules should be laid down in the constitution. By setting rules for competition, ordoliberalism is distinguished from laissez-faire liberalism, which conceptually comes very close to state-free competition (cf. Pies 2021, p. 1 ff.). In many respects, there are parallels concerning the theoretical basis of Walter Eucken's ordoliberalism and Alfred Müller-Armack's social market economy, be it individual freedom as a constitutive market outcome embedded in a competitive order of full competition, or the restriction of powerful group interests (cf. Lange-von Kulesa/Renner, 1998, p. 96).

Nevertheless, there is a difference in essence between the two conceptions. To be sure, both hold that competition conditions social policy. Müller-Armack, however, assumes that individual freedom is merely an "empty concept" unless it is meaningfully related to social justice (cf. Müller-Armack, 1948, p. 91). In comparison to Eucken, Müller-Armack considers it necessary to establish a second pillar of policy, instead of insisting on an integrated pillar of economic and social policy. This pillar is supposed to carry formal and informal values into the market through a social policy, which Eucken rejects as an intervention policy (cf. Vanberg, 2002, p. 234). According to Eucken, the state represents a regulating power that oversees compliance with the regulatory framework and is limited in its effect by legislation (cf. Eucken 2004, p. 334 ff.). The social market economy therefore attempts to initiate meaningful social policy measures by means of social and welfare policy. In this way, the social market economy has been an adaptable concept regarding societal changes.

While the basic pillars of the social system were developed in the 1950s, the last far-reaching and significant transformation of the social security system was approximately 20 years ago, with the labor market reform known as Agenda 2010 (and more recently, the 2023 introduction of its successor, Bürgergeld). This was a rather liberal economic reform and placed the welfare state under the banner of economic competitiveness, with the aim to decrease costs and increase labour market participation. Worth mentioning here is the subsequent creation of the 'Hartz-IV sector', with the problems of long-term unemployment as well as the spread of the low-wage sector. Furthermore, in the area of social insurance, there were benefit cuts in statutory health insurance and in the labour market, for example, the weakened protections against dismissal. At the time, economic liberal reform justifications prevailed as Germany had, for example, higher unemployment and lower growth than in other EU states. These reasons made the primacy of economic efficiency over social aspects and the focus on the well-being of the population stronger. In the present, a strong need for reform

can be seen. The strong development of social policy in recent years with the paradigm of reintegration into gainful employment can be changed back to a socially acceptable social policy that is adapted to the needs of the population and in line with the social market economy.

Some Flaws of the German Economic Regulatory System

In the following section we turn our attention to the practical application of social market and ordoliberalist approaches discussed above. Specifically, we look at the shortcomings and potential improvements to the German regulatory system, setting the stage to analyse the potential contribution of UBI in a strengthened economic order.

Government Regulation

As described above, the ordoliberalist framework purports to set an established order of (or rules for) competition and leave the actors free to act how they wish within these boundaries. Government intervention is limited to setting the 'rules of the game', and players' individual processes or operations are free from intervention. This should limit unwanted behaviour and allow for maximum efficiency achieved through decentralised market exchanges. In practice however, this condition is hard to execute. While ordoliberalism aims to limit arbitrary decision making, the practice of defining the role of government itself requires such arbitration: there are difficulties in distinguishing between policies which "intervene in market processes", and policies that "institutionally frame market processes" (cf. Vanberg 2004, p. 4). Additionally, to set the rules, the state must be sufficiently independent and able to enforce rules, but not able to pursue its own self-interest. However, as governments consist of many self-interested individuals, they are vulnerable to the pursuit of self-interest or of being captured by special interest groups attempting to manipulate rules or outcomes to their own advantage (cf. Buchanan, 1974). Thus, regulatory policies for the individuals comprising government are necessary (cf. Neumärker 2017,

p. 831). The fact that the state must be strong enough to enforce rules, but not too strong so as to pursue its own self-interest, is a key problem of traditional ordoliberalism. For an appropriate assessment framework of this regulatory state order, however, traditional ordoliberalism shows inherent flaws in that it is biased towards efficiency (of markets) without necessarily explaining or endogenizing the justice criteria of efficiency.

Efficiency as a focus

Market efficiency, defined as the free market's ability to maximising total output, and achieved through the competitive market, is a normative value of Eucken's ordoliberalism, and a similarly important pillar within the social market economy. Focussing on efficiency as the primary economic goal comes at many costs, and particularly at the cost of distributional concerns such as social justice, fairness, and inequality. Ignoring these issues can result in a reduction of social cohesion and trust in institutions and may lead to short term decision making at the cost of long-term sustainability or stability, for example by ignoring environmental or social externalities (cf. Blum, 2022). Efficiency as a social goal is not a universally shared positive value – other social justice values, such as equality and equity, are legitimate alternative values (cf. Frohlich/Oppenheimer, 1992 62 ff.; Standing, 2017 p. 34 ff.)

Prioritising efficiency through the market mechanism implies decentralised allocation of goods based on willingness to pay, the concept that individuals gain access to goods and services based on their willingness to pay for them. Aside from the resulting inefficient undersupply of merit goods and over supply of demerit goods, willingness to pay may result in inequitable outcomes: as wealthier individuals have more resources available to access goods, they may have unequal and inequitable access to them. Some less-tangible goods and services can be difficult to value and thus are unable to be allocated a monetary value under the willingness to pay principle, for example, rights such as

enfranchisement, or non-tangible services, like the care given by a loving family member. Efficiency is therefore not an effective means of provisioning an individual's basic needs, and pursuing it is not guaranteed to sufficiently provide for the basic needs of the populace.

Pro-Work Bias

Both traditional ordoliberalism and the social market economy put a heavy focus on paid work, to the detriment of other forms of work and engagement. Basic income could be useful here, designed to “enhance real freedom and foster a more egalitarian society, without directly challenging capitalism as a mode of production” (cf. Bidadanure, 2021 p. 146). The possibility for greater political engagement through basic income is discussed (cf. Bärnthaler and Dengler 2022, Liebermann 2012). Welfare payments are paid in connection with labour force participation; unemployment payments are tied to previous workforce participation (ALG1) and the lower payments, ALG2 (aka Hartz IV) are stringently regulated and primarily focussed on people's future capacity to (re)engage in the workforce. Parental leave payments are similarly tied to previous income. New parents with no recent income, perhaps because they have taken extended time away from the labour force to perform care work, receive the lower Hartz IV rate. Child payments (Kindergeld), an unconditional payment paid to parents of children under a certain age without means test, are an outlier in Germany's welfare system and are the feature of Germany's economy which most parallels a basic income. Aside from child payments, all these redistribution measures are tied to paid work. This is problematic for several reasons:

- Welfare and redistributive measures connected to paid work link citizenship to employment, which has implications for a democratic society (cf. Pateman, 2003).
- The veneration of paid work is at the expense of unpaid but equally valuable activities. This can include care work, volunteering, and community and

political engagement. By excluding those engaged in this type of work from welfare payments, the work contributed is devalued. This is exemplified by the large differences in retirement income for those, most frequently women, who have taken long breaks from the workforce to care for others. The same discrepancy also applies to those who have been systemically discriminated against over the course of their working life.

- When only paid employment is considered work, and thus relevant for citizenship, the unpaid labour contributions, such as raising children, and caring for the sick and elderly, are not considered relevant for citizenship (cf. Pateman, 2004).
- Unemployment is often not optional, and 'good' jobs are becoming increasingly rare. Ackerman & Alstott criticise social democrats for their belief in the utopian idea that "everyone has a right to a job with good wages, short hours, and a pension that rewards years of diligent work" (2006: 4). Such 'good jobs' are increasingly rare, and are not fairly allocated: discrimination, luck, favouritism, and various types of privilege are influential in the allocation of these jobs (cf. Bidadanure, 2019).
- Similarly, the glorification of paid work as the only work to matter is at the exclusion of those who can't engage in paid work – such individuals are offered no or low status within the welfare system. Additionally, little status or fewer (bargaining) rights are available to low-income workers (Ulrich, 2017: 238).
- Automation presents and has already proven a threat to employment, especially to lower-income workers. For low-wage workers, this results in less competition for their labour, and in labour markets which in the last years

have "been characterized by an accelerated growth in precarious and more flexible forms of employment" (McKay, 2001: 101). The compulsion to do such precarious work can have social impacts, including reduced social cohesion, and can in turn question the legitimacy of the economic system (Ulrich, 2017: 238).

Prioritising contributions of paid work over other forms of work has implications for fairness and democracy, devaluing and ignoring the contribution of other forms of valuable labour, disadvantaging those who can't engage in paid labour, and is heavily dependent on the supply of 'good' jobs, which are increasingly rare.

Free-riding

In order to prevent exploitation and free-riding within the welfare system, particularly of the 'crazies' by the 'lazies' (see Van Parijs and Vanderborght (2017) for this argument) regulations are in place. These regulations limit an individual's ability to access welfare, in the form of means-testing, or targeting. In Germany, this targeting and means-testing was increased with the introduction of the Agenda 2010 reforms, but has been slightly reduced with the new Bürgergeld reforms. Targeting has "considerable human and administrative costs", as well as room for "arbitrariness and clientelism" (Van Parijs and Vanderborght, 2017: 18). Means testing can create disincentives to engage in part-time or casual work, an activity which could have positive social or financial impacts. Eligibility testing can be administratively complex, time-consuming, and highly invasive. Cohabitation rules and monitoring of sexual partners are examples of invasive monitoring (cf. Miller, Yamamori and Zelleke, 2019). These stringent eligibility criteria and processes conflict with a purely 'rights based' approach to welfare. While regulators are concerned with the free-riding of 'welfare queens', they are ignoring the free-riding of paid workers on those involved in reproductive labour. Pateman argues that free-riding isn't the issue of Van Parijs' male surfers, but of those

‘breadwinners’ who occupy high-paying, prestigious positions of paid employment and who take advantage of the disproportionate amount of unpaid work done by the ‘homemakers’ (cf. Pateman, 2004). When the burden of care work falls on one group, it can be at the cost of economic independence, which Pateman, using UBI as an example, argues is a democratic right necessary for individual freedom (2004). More broadly, society freerides on the unpaid care work of parents, particularly mothers, who contribute to reproducing and maintaining a healthy population. While caring and being cared for are inescapable, universal facts of life, care work is often unpaid, or underpaid and precarious. Even when financially remunerated, paying for care work can still leave it undervalued (cf. Dowling, 2016; Fraser, 2016; Dengler and Lang, 2022). Moving away from welfare and redistributional regulations dependent on paid work would have significant democratic impacts by valuing unpaid labour contributions.

Ordoliberalism, New Ordoliberalism and Connections to UBI

In practice, there are many challenges to limiting the government’s role strictly to making rules. As we discuss below, a universal policy such as UBI presents a solution to the answer to providing a socially just redistribution mechanism within the specifications of ordoliberal governance.

While the original idea of ordoliberalism is concerned with the basic constitutional building blocks with which a free economy and society should be constructed, the idea of a “new ordoliberalism” takes up critical points about ordoliberalism and conventional constitutional economics with regard to rule-making within regulatory policy. “New ordoliberalism” attests that conventional regulatory policy lacks protection of its regulatory foundations at the political-economic level (cf. Neumärker 2017, p. 831). Exemplary in this context is the ex ante and ex post rule-making in the sense of the economics of justice. A principle of justice is established when individuals act within the rules defined at the constitutional level. However, a rule framework

set at the constitutional level, which integrates any fairness and efficiency criteria before implementation, would not necessarily have to meet the same fairness and efficiency criteria after implementation and use of these rules. Rules defined ex ante could be challenged by emerging notions of fairness after the implementation of these rules. Such rules would thereby encounter problems of acceptance in the long run and eventually succumb to collapse. Accordingly, there are no sufficient suggestions as to how a reform and improvement of regulatory structures should be implemented by economic and political means. While the original ideas of Müller-Armack sees the outcomes of the market economy as causal for the payments of benefits of social security, economic and social policy are perceived in the social market economy model as separate areas requiring different measures, as the concept of social compensation shows (cf. Cassel & Rauhut, 1998, p. 7 f.).

The UBI could provide a reorientation of the conceptions of justice and freedom to be used in regulatory measures and for a reorientation of ordoliberal thinking (cf. Neumärker, 2018, p. 329 f.). To be able to provide a suitable regulatory framework for the welfare state is one of the challenges of the future, the systematic integration of effects hoped for from the UBI requires a considerable expansion of the economic work-leisure analysis. Also, the idea of a UBI could sometimes be said to have the secondary side effect that by securing an income through an unconditional payment, the focus of the population could again turn to participation in democratic processes. Thus, through an economic means (income) a socio-political goal (participation) would be realized and there would be no need for a separate social policy toward higher political participation. While the social market economy is characterized by a tendency toward case-by-case decisions and a pragmatic approach, the payment of a UBI would take place without a prior means test, so there would be no need for a situation-specific approach (cf. Schmid, 2006, p. 162). Whereas the “new ordoliberalism” only makes framework regulations, the social

market economy sometimes also pursues process policy to correct undesirable results of the market, i.e., it intervenes in interactions of the economic subjects themselves (cf. Müller-Armack, 1976, p. 33 f.). The UBI itself does not regulate interaction and transactions between legal entities and is therefore not a regulation of process policy. However, it also does not regulate how these economic entities may interact with each other and is thus not a directly acting framework regulation; rather, it only indirectly affects the interactions of economic entities, through a redistribution of capital relations, with which it could be evaluated as a framework regulation. As the redistributive regulation that it is, however, it could also be regarded as an atypical intervention in unwanted market outcomes.

There are still open questions about the extent to which citizens are willing to go along with the new possibilities of the UBI and whether a gradual introduction would not be better (cf. Liebermann, 2015, p. 27 ff.). Arguments that question the citizens' maturity might not be admissible and a basic income should not be prevented by objections from representative bodies if it is the will of the citizens to introduce it. Overall, the UBI might be able to strengthen democracy as well as participation in democracy because it enables citizens to change their time allocation and to organize their lives in a more self-determined way. Due to the increased complexity of politics, it is nevertheless the case that not every person will be able to familiarize themselves with the issues of politics in such a way that they can keep up with the representative democratic system of institutions. At the very least, however, the UBI reduces a barrier that has so far prevented many citizens from egalitarian participation.

Future Regulatory Challenges and UBI as a (Possible) Solution?

Precarious employment affects workers' health and impairs their trust in democracy, thus damaging the political order. It is very likely that precarious employment will continue to increase in the coming years. Digitalization, automation,

and artificial intelligence are changing the organization of work and reducing the number of dependent employment relationships. The consequence for workers is an impediment to life planning, through a lack of security and the unpredictability of employment (cf. Huws, 2017). A UBI could mitigate the consequences of the spread of precarious employment and provide increased financial security for employees. It would also strengthen the position of workers in the labour market by no longer forcing them to take any old job regardless of employment status and hourly wage. This could increase wages in jobs that have so far been less desirable. Despite the basic income, it might be important to maintain a minimum wage to prevent the UBI from subsidizing low wages (cf. Gilbert et al., 2019).

Varoufakis (2016) as well as Jackson and Victor (2018) propose to finance the UBI through a redistributive sovereign wealth fund with social dividends from "common property." This proposal extends the understanding of common property and assumes that profit requires a new form of social contract. A popular example in this context is that of the Apple company. As Mazzucato (2015) explains, the development of many components of an iPhone was made possible in the first place by public money. In addition to research, the state in many countries also invests massively in the education of future skilled workers and the maintenance of the means of production. Thus, the state contributes to profit-making and is entitled to a share of it in some form. In the new social contract, companies become contractual partners of society. The state, and thus the general public, should be remunerated proportionately for its investment because it contributes to private profit. It is from this remuneration, i.e. the transfer of money from the private sector to the redistributive state fund, that the UBI can be financed. Beyond the scope of this paper is the debate on how much private enterprise and common property social dividends should contribute. Additionally, it is interesting to explore how this new social contract can be financially and legally implemented.

Advocates of regulatory policy, especially in the 1970s, were critical of the development of some industrialized countries toward a "rent-seeking society" (cf. Wünsche et al., 1984). From a traditional regulatory point of view, common ownership and the attempt to obtain pension payments from the state is neither desirable nor efficient. It was argued that this state intervention hinders technological progress and increases the use of scarce (environmental) resources. In the classical regulatory sense, important economic civil rights are for the time being mainly "the right to private property and to freedom of trade and commerce" (cf. Ulrich, 2019, p. 519). Recurrent economic crises affected industrialized countries and brought new problems. The effects of unemployment on prosperity and political stability became very visible. In the context of these crises, the argument that private property and freedom of trade alone were not enough to counteract unemployment, poverty, and disease gained strength. The demand for the right to integration in the economy and the rising criticism against constraints of the market increased in importance. A basic income independent of employment falls into this second category and, together with standardized labor rights and consumer protection regulations, contributes to a "partial emancipation from the constraints of the market" (Ulrich, 2019: 519).

In the social market economy, too, a third way has been found to resolve the legal conflict surrounding common property. Here, however, the problem of the law of use of common property is addressed primarily as a component of environmental policy. Common property is primarily limited to relatively large, indivisible (or mobile) natural resources: a less comprehensive definition than offered by Mazzucato (2015). When it comes to commons, the focus in the social market economy is on avoiding negative externalities through "private and market environmental strategy" (Benda, 1984: 34). In a symposium of the Ludwig Erhard Foundation, it was suggested that policymakers introduce tradable limited-use rights for quasi-public goods instead of excluding environmental resources,

such as water, from the market through nationalization (cf. Wünsche et al., 1984). The starting point here is also the efficiency argument: if environmental resources are not integrated into the market economy, pricing mechanisms do not work. Without this, environmental resources can be used for free, which will prevent their efficient allocation. However, it remains unclear what "quasi-public goods" are and what legal status these goods will assume. The goal of financing a UBI in the long run could be achieved even in a non-growing economy, but this might require rethinking the property issue as well.

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