ABSTRACT

There is a pressure for convergence in the area of merger control in the EU member states. How is this pressure spelled out in German, British, and French merger control? Do the three countries’ merger control regimes have recognizable ideational foundations and policies?

Through a careful, detailed comparison we reveal significant differences and similarities between the three countries. A clear relationship can be traced between each country’s merger control set-up and an ism on the state–market relationship: German ordoliberalism, British neoliberalism, and French mercantilism. Pressures for European convergence coexist with significant traces of ideational national foundations.

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Key words: Germany, United Kingdom, France, competition policy, merger control, ordoliberalism, neoliberalism, mercantilism, nation state

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Do National Ideas and Policies Still Matter? The Case of Merger Control in Germany, the United Kingdom and France
1. Introduction

Merger control in the European Union (EU) member states is a split responsibility between national and supranational responsibility. Since 2004, a pressure for convergence has been particular significant. How is this pressure spelled out in German, British, and French national merger control? One way to look at this question is to ask to what extent national traits have vanished due to convergence, i.e. if and how weakened nation state regulation is squeezed in favor of supranational regulation. The reverse way would be to ask to what extent national ideas still qualify as the core of strong national regulation in an area where supranational coordination. By asking the latter question we emphasize that nation state regulations may still be strong and necessary.

National regulation of firms’ abuse of market power in European countries dates back to mid 20th Century – with significant differences in content as well as timing. The control of monopolies is a correlate to the advent of industrial capitalist societies. With the rise of large national and multinational enterprises there has been a need for increased focus on the control of large companies who can exploit their market power. EU competition policy is generally viewed as a relatively hard-hitting policy – with giant fine notices to some of the largest multi-national firms as markers of political salience (Buch-Hansen and Wigger, 2011). With increased cross-national activity, this has demanded coordination between national policies and EU and a concomitant convergence of EU and national policies.

Our question is then whether national ideas and policies wiped out and gradually subsumed to EU-policies – or whether national ideas and policies resilient. Supranational regulation is in this interpretation an addendum to already existing and strong national regulation. Nation states basic ideas about policies are still thriving and strong. In order to answer the avovementioned question, we identify the national ideational roots of competition and merger policies, the materialization of
these ideas in terms of policy output, and we study how polities in France, Germany, and the United Kingdom have developed side by side with increased EU regulations.

Merger control includes all state-authorized regulations controlling mergers and acquisitions. Mergers cover horizontal mergers, vertical mergers, and the merger of conglomerates. Other industrial policy regulations are also included if they are of relevance for mergers.

The article is structured as follows: In the theory section we present the following ideal types: ordoliberalism, neoliberalism, and mercantilism. We operationalize the ideal types and confront them with actual merger policies. Then follows a short methodology section, and thereafter the analysis and a concluding section.

2. Theory

This section presents three ideal types concerning how state–market relationship can be organized. If national ideational foundations play a role in merger control regulation, ordoliberalism is expected to be the ideational foundation for the German case, neoliberalism for the British case, and mercantilism for the French case. The analysis tests these expectations.

The article rests on the assumption that ideas are potentially important for how policies are constituted. Ideas are arguments that consist of solutions to common problems (cf. Steinmo 2008). Such ideas are part of “cognitive paradigms, taken-for-granted descriptions and theoretical analyses that specify cause and effect relationships” (Campbell 2002, p. 22). In order for an ideational explanation to be valid on political phenomena the *explanandum* cannot be explained by the usual suspects in political theory, i.e. institutional factors or actor interests/preferences. In order for ideas to work as an *explanans* the argument (= idea) must be argued to play a role beyond institutions and
actor preferences, even if ideas in most cases will be related to actor preferences or certain institutions (cf. Rueschemeyer 2006).

The ideal types presented below serve to create an overview and render a comparative approach possible. The three ideal types are based on the Kuhnean (Kuhn 1970) paradigm model, with three levels of ideas. First, within each ideal type we establish the general discourse of regulation. We present the overall ideational foundation and the normative view of the state–individual relationship as well as the state’s role in relation to the market. Second, we present the level of ideas on the so-called unit-specific discourse of regulation; that is, the normative view on the overall design of competition policy and merger control. Third, we operationalize the ideal types into concrete ideas concerning regulation. The application of these concepts is then confronted with actual merger control policies in the three EU member states; Germany, the United Kingdom, and France (Adcock and Collier 2001).

The merger control within the EU is a split competence between the EU level and the member-state level. Mergers with ‘union dimension’ fall under the jurisdiction of the EU while member state rules on merger control functions alongside the EU rules. However, it is assumed in the paper that some form of convergence is taking place in the competition policy field within the EU due EU regulations (cf. also Nedergaard 2006).

The convergence in competition policies was institutionalized in 2004 via the European Competition Network after which the EU’s merger network group was established in 2010. It consists of the Commission and the member states’ competition authorities (with the exception of Luxembourg, the only member state without a merger control law). The aim of the network group is to disseminate best practices and facilitate cooperation in merger cases involving multiple jurisdictions.
Member state enforcement of merger control implies that transnational mergers often have to be dealt with in multiple EU member states at the same time. There were e.g. 150 mergers in the EU in 2013 in which multiple national competition authorities had to investigate the same case (Bundeskartellamt 2014, p. 11). Consequently, there is also a functional argument for convergence (Zivy 2013).

Ideals type 1: Ordoliberalism

Ordoliberalism emerged in Germany in the 1930s. Also known as the Freiburg School, it remains active to this day. Walter Eucken (1891-1950) is considered the primary figure in Ordoliberalism. Eucken (1948, p. 79) preferred Verkehrswirtschaft, the decentralized market economy, as the ideal type of social organization. By this, he understood a market with free competition and free price-setting, where actors meet on equal terms and all transactions are voluntary (Eucken 1952, p. 376).

In contrast to classical liberalism and neoliberalism, Eucken sees a strong state as a necessary guarantor for order in the market place and a free market (1952, p. 373; Hutchinson 1981, p. 163). Over time, an unregulated economy will lead to cartels, monopolies, oligopolies, and similar competition weakening phenomena that weaken effective competition (Eucken 1991, p. 259,266). The free market is not achieved through laissez-faire politics; rather, it is a politically constructed institution that should serve all citizens of society (Eucken 1948).

Ordoliberalism not only relates to when to intervene in the market but also how to do so. Order is key in the Freiburg School (Eucken 1952, p. 372; Vanberg 2004, p. 6). It should be constructed through a constitutional order and sanctioned via a politically defined set of rules for the design of the market.
The unit-specific discourse of regulation in ordoliberalism is based on two fundamentals: economic freedom and consumer interests. Consumer interests should be prioritized in order to benefit citizens in general (Vanberg 2004, 12). Eucken’s ordoliberalism differs from neoliberalism in terms of seeking a maximum consumer surplus rather than a maximum welfare surplus in general.

As regards individual freedom, the state must ensure that consumers do not lose economic freedom due to market concentrations. However, even though Eucken (1991, p. 270) is generally skeptical vis-à-vis economic concentrations, he recognizes that natural monopolies can promote consumer interests by exploiting economies of scale in order to reduce prices.

Hence, competition policy decisions are based upon the assumption that objective evaluations of competition on various markets matter in real life. This is one of the reasons why concrete decisions on competition policy in the ordoliberal tradition should be taken by institutions independently of political interference (Rodger 2000, p.4). The Rechtsstaat concept is strong in the Freiburg School. A strong state is not a comprehensive state as in the mercantilist tradition; rather, it is strong in the sense that it has the capacity to take decisions based on a detailed market analysis, a state that is optimally shielded from the influence of rent-seekers, and a state that can effectively implement its decisions (Vanberg 2004, p.17). Consequently—and for the sake of stability and predictability—state decisions should be made based upon general rules rather than discretionary case assessments.

Studies show that the ordoliberal tradition has had a significant influence on economic policy in (West) Germany since WWII (Shonfield 1965, p.265; Muresan 2014, p.244; Vanberg 2004).

Below, we briefly examine how the general discourse on regulation in Germany has been imprinted by ordoliberal thoughts. We then examine how the existing literature combines the unit-specific discourse on regulation with German ordoliberalism. This is claimed to be the case with fiscal policy, monetary policy, and competition policy.
From the perspective of the Allied Powers, the concentration of industry in the Nazi era rendered the authoritarian government management of business interests possible. The ordoliberal view fit nicely with the Allied interest in minimizing risks of totalitarianism by following liberal economic policy.

Franz Böhm, Freiburg University, became political advisor to Minister of the Economy Ludwig Erhard (Muresan 2014, p. 64, 71). The latter became an explicit follower of the ordoliberal economic philosophy. After the 1949 elections, Erhard was the mastermind behind liberalizing the German economy.

The existing literature points out how the ordoliberal approach is imprinted in all of the economics-related policies in Germany (Dullien and Guérot 2012, p. 2). The Rechtsstaat principle, with politically independent public authorities acting on a foundation of general principles, left its mark on the monetary policy. For decades, the politically (after European standard) independent Bundesbank has pursued low, stable inflation rates (Lijphart 2012, p. 234). Studies of German fiscal policy also trace the continued imprint of ordoliberalism (Nedergaard and Snaith 2015, p. 1097). With the exception of a Keynesian detour in the late 1960s, German fiscal policy has been overwhelmingly ordoliberal, with a strong focus on balanced budgets (Muresan 2014).

Germany has the strongest competition policy in Europe. This is partly due to the American influence on the organization of the German economy after WWII and partly to the strong influence of ordoliberalism (Muresan 2014, p.185). Germany was the first country in Europe to adopt strong and comprehensive competition policy through the adoption of the Gesetz gegen Wettwerbsbeschränkungen in 1957. A merger control was implemented in 1973, and German competition law generally stood out in Europe by relying solely on competition criteria although the
Bundeskartellamt also considered employment in certain cases, e.g. during the German re-unification process in the 1990s (Doern and Wilks 1996, p.203-205).

The examination of the German model reveals how it has traditionally been imprinted with strong ordoliberal traits. We later test whether the German design of its merger control can be characterized as an ordoliberal approach toward competition policy.

*Ideal type 2: Neoliberalism*

The intellectual source of neoliberalism is classical liberalism, which is also a source of inspiration for ordoliberalism. Hence, the outline of neoliberalism will partly aim at identifying different nuances between these two schools.

Milton Friedman’s 1962-book, *Capitalism and Freedom*, is central to understanding the general discourse on regulation in neoliberalism. The book focusses on the (negative) freedom of individuals, defined as an absence of coercion from fellow human beings. A maximum of freedom can be ensured by leaving the allocation of society’s resources to the market. In a free market, individuals participate in voluntary transactions. Conversely, if more power is given to the political system, freedom is reduced. Hence, state intervention should be kept at a minimum (Harvey 2005, p.2). The state should care for the defense, police, and judicial system. According to Friedman, interventions in existing markets are difficult to organize due to a lack of information and the risk of rent-seeking.

The neoliberal, unit-specific discourse on competition policy is not purely *laissez-faire*. According to Friedman (1962, p.26), companies should not be free to prevent competition through cartels and other entry barriers. Nevertheless, Chicago School researchers apply a more lenient approach to
economic concentration than does ordoliberalism. Especially in two scenarios, a high degree of market concentration is seen as unproblematic: in markets with no barriers to entry and when companies confront economies of scale.

According to the Chicago School line of thought, policies should be judged on their impact, not their intention (Friedman 1975). Competition policy should therefore be based on the econometric analysis of market impacts (Hovenkamp 2013). This is in contrast to legalistic ordoliberalism, which would also take into account the protection of small businesses and the consumer’s freedom to choose between multiple suppliers. In order to avoid rent-seeking, Friedman is—similar to the ordoliberals—a strong advocate of policy decisions being taken on the basis of rules as opposed to discretionary judgement.

The aim of neoliberalism is generally to enhance efficiency and maximize total aggregate welfare\(^2\) of society (Kirkwood and Lande 2009). Hence, the consequence of the neoliberal approach to competition policy might be less societal equality, whereas the ordoliberal approach probably brings a more equal distribution of society’s wealth.

The neoliberal tradition has had strong influence on British economic policy since 1979 when the Conservaties came to power. We therefore expect to find clear features of the neoliberal ideal type in the design of the British merger control. The paragraphs below browse the British discourse on regulation as imprinted by neoliberal thought since Margaret Thatcher became premier minister.

From the 1950s through the late 1970s, British economic policy was imprinted with the idea of a relatively active, interventionist state (Shonfield 1965). Fiscal policy followed the Keynesian line of thought, where unemployment should be off-balanced with inflation. This paradigm was challenged

\(^2\) Aggregate welfare = consumer surplus + producer surplus.
by the Conservatives by the late 1970s after a long period of stagflation which—they argued—revealed the fundamental weakness of the interventionist model.

The Tory takeover in 1979 marked a break with the previous discourse on the state–market relationship. Thatcher was inspired by liberal thinkers such as Adam Smith, Milton Friedman, and Friedrich von Hayek (Graham 1997, p.126). The neoliberal turnaround in the UK became a textbook example of the neoliberal revolution: a liberalization of the individual vis-á-vis the state.

The Conservative government accelerated the privatization of state-owned companies and property in order to reduce the role of the state (Schmidt 2002). Contrary to a similar process under Socialist French president Francois Mitterrand, British buyers were not favored in the UK.

Marketization was introduced in new areas like health care, education, and public administration. The UK became a “laboratory” for the neoliberal governance regime of New Public Management (Hood and Dixon 2012). The light touch financial sector regulation also became part of the British approach. As the former director of the British authority of Financial Services symptomatically stated in the midst of the financial crisis: “markets are in general self-correcting” (Financial Services Authority 2009, p.86-87).

As regards the unit-specific discourse on competition policy, Britain does not—in contrast to Germany—have a strong tradition for enforcement of competition rules. Although the UK was the first European country to introduce merger control via the Monopolies and Mergers Act in 1965, decisions on merger cases remained in reality a political matter (Buch-Hansen 2012, p. 110). This approach changed in the aftermath of the neoliberal wave due to new administrative guidelines. With the Tebbit Guidelines in 1984, competition became the main criterion in concrete cases (House of Commons 2015, p.6). With the Enterprise Act of 2002, the evaluation criteria became
solely a test of the “substantial lessening of competition.” Buch-Hansen (2012) concludes that, over time, British merger control has become more neoliberal.

_Ideal Type 3: Mercantilism_

The general mercantilist discourse on state and market draws on the literature airing out of Friedrich List’s work, _The National System of Political Economy_ (1909[1841]). List wrote on the background of Adam Smith’s classical liberalism. While he was primarily interested in trade policy, his thoughts formed on the background of a broader economic literature, which also implies recommendations related to competition policy (Shonfield 1965, p.97). List characterized Smith’s theory as a competition theory, because it aimed to improve welfare globally. According to List, this perspective overlooks power relationships between nations. Instead, List (1909, p.97) began with the nation.

Levi-Faur (2001) characterizes List’s work as “economic nationalism.” Where the individual is the reference point in ordoliberalism and neoliberalism, the state or nation is the reference point for mercantilism. This has implications for policy design. First, individual interests must give way to the nation’s collective interests (List 1909, p.39). Second, the distinction between nationally and foreign-owned companies becomes policy-relevant, as domestic business groups, companies, or sectors should be favored (Clift and Woll 2012, p.308).

In List’s (1909, p.134) approach, the strong state intervenes for the benefit of the common, national good. This should not, however, be confused with some kind of planned economy or totalitarianism. The individual is free to choose on the market, but the state ought to regulate and construct incentives for individuals to act in accordance with the national interests. Hence, according to mercantilism, a strong production base and employment should be prioritized over
consumer interests (List 1909, p.114, 118-119). Moreover, pride and tradition can also motivate mercantilist protectionist policy.

The unit-specific discourse in mercantilism concerning competition policy (including merger control) is more broad-spectrum than in ordoliberalism and neoliberalism (Buch-Hansen and Wigger 2011, p.22-23). With more criteria for decisions in cases on competition policy, the room for discretionary decisions increases dramatically. Consumer welfare and total welfare are not exclusive concerns in mercantilism; rather, they are merely two out of many relevant concerns, which include employment, the tax base, security, and domestic R&D (Geluebcke 2015). In its purest form, the mercantilist state should promote national champions to be able to cope with international competition. This acceptance—or even encouragement—of mergers contrasts the ordoliberal ideal type. Mercantilism sees concentration as necessary when facing fierce international competition (Servan-Schreiber 1968, p.271). Consequently, it operates with a more lenient merger control for domestic companies and more restrictive merger control vis-á-vis foreign companies.

In contrast to the independent institutions of ordoliberalism and neoliberalism, nothing should prevent political interference in concrete competition policy decisions. Decisions should have a clear democratic mandate, and attempts to depoliticize decisions on merger control, to name but one example, are inexpedient (Buch-Hansen and Wigger 2011, p.23).

According to the literature, mercantilism has a strong influence on economic policy in France, and we expect a French mercantilist approach to merger control. Long before WWII, France was imprinted with the idea of dirigisme (Clift 2006) and the state intervened in the economy for the sake of the common interest and due to “the habit of the exercise of power by public officials over the private sector of the economy” (Shonfield 1965, p.128). For many years, French dirigisme
assumed the form of state-promoted mergers, e.g. via public loans (Clift 2009, p.157). From the 1980s onwards, post-war dirigisme was superseded by a market-led economic philosophy towards state-enhanced capitalism (Schmidt 2003, p.533). The change was shaped by globalization processes, neoliberal ideology, and the internal market of the Single European Act (Clift 2009, p.162).

Despite these influences, according to Vivien Schmidt (2003, p.532-34), French economic policy remains characterized as state capitalism that is more interventionist than either the German or British approaches. Moreover, successive waves of privatization were not based on pure market conditions in France; rather, they were strongly influenced by classical French dirigisme, where the French state orchestrated the new ownership structures in the nation’s interest.

Transferred to merger control policy, the law-enforcing unit should expectedly not be politically independent. Merger control was introduced in France in 1977. For a long time, however, it mainly served non-competition purposes. The decision-making capacity was split between the formally independent authority, Conseil de la Concurrence, and the Ministry of Economics, Finance and Industry. In this construction, the minister had the final say (Wiese 2005, 28).

In the first eight years since the introduction of the merger control in 1977, eight transactions were investigated, only one of which was rejected. It was widely accepted that French policy-makers did not care about the massive problems with inadequate competition. As stated in a 2005 OECD report: “The value of state intervention in the economy is widely presumed in France. In this setting, the merits of decentralized market competition may have been doubted” (Wiese 2005).

3. Operationalisation
This section presents the third level of ideas, where we translate the three ideal types into concrete ideas of regulation. The purpose is to be able to distinguish between merger control designs that represent ordoliberalism, neoliberalism, and mercantilism, respectively, in an operative and concrete manner (Adcock and Collier 2001) and in order to avoid confirmation bias, cf. the methods section below. Buch-Hansen and Wigger (2011, p.17) distinguish between three components that we adapt to our purpose: by extent, we understand the type of transactions covered by the regulations; that is, whether merger control covers a broad or narrow spectrum and whether it is independent of the companies’ nationality or not. By content, we understand the general goals and means that underpin merger control. By form, we understand the institutional design and the process through which merger control is exercised.

The distinction between content, form, and extent serve to structure the analyses, but it also fosters a more nuanced comparative analysis.

Extent

The extent of merger control can be broad or narrow, which can be measured using three indicators (see below). In addition, the extent of merger control can be dependent or independent of the nationality of firms. Extent can be seen as a continuum with two extremes. On the one end the extent is wide, as required in the ordoliberal ideal type, where the purpose is protection of competition per se and the legalistic tradition prescribes all cases to be treated equally. At the other end of the continuum, merger control is of a limited extent, with few transactions covered. This design can be seen as an expression of a mercantilist approach. Here, few mergers are seen as problematic because it is unwarranted to limit national companies’ exploitation of economies of scale.
In the neoliberal approach, the extent of investigated mergers is fixed on the basis of cost–benefit calculations as to whether preventing mergers “pays off.” For example, it is not efficient to cover small and medium-sized transactions, as administrative cost will typically exceed the potential societal gains through a ban.

We point out four indicators, two of which are related to the merger control legislation of the concerned jurisdiction. The first is what is understood by a merger in qualitative terms. A narrow definition covers what is categorized as a merger in a corporate legal sense, while a broad definition expands this definition by including, for example, acquisitions, joint ventures, and the acquisition of minority shareholdings.

The second indicator is the definition of thresholds based on a quantitative measure (turnover or market share) as a criterion as to whether a merger is controlled. Large-number thresholds express a narrow extent of merger control and vice versa with small-number thresholds.

The third indicator for the extent of merger control is the actual number of merger decisions. This indicator should be taken with the proviso that the number of merger cases in a country can be an expression of other factors than regulatory design.

The fourth indicator concerns discrimination on the basis of nationality of the market actors. In order to investigate this issue, we analyze competition legislation, as well as the rules for foreign direct investment controls. In mercantilist merger control, one should expect legislation pertaining to investment controls to be used to restrict foreign takeover of national companies, even though there are no competition issues involved. This is not expected to be the case in either the ordoliberal or neoliberal traditions.

Table 1 combines the principles of the various ideal types with the indicators. We indicate the values of the indicators corresponding to the ideal types.
Table 1. Expectation of values ranked by ideal types

<table>
<thead>
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<th>Ordoliberalism</th>
<th>Neoliberalism</th>
<th>Mercantilism</th>
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<tbody>
<tr>
<td>Definition of a merger</td>
<td>Broad</td>
<td>Moderate</td>
<td>Narrow</td>
</tr>
<tr>
<td>Threshold values</td>
<td>Low</td>
<td>Based upon</td>
<td>High</td>
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<td></td>
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<td>cost/benefit</td>
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<td></td>
<td></td>
<td>considerations</td>
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<tr>
<td>Actual number of cases with merger control</td>
<td>High</td>
<td>Moderate</td>
<td>Low</td>
</tr>
<tr>
<td>Merger control depending on nationality of market actors</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Content

The content of merger control concerns the criteria underpinning decisions regarding the merger cases. The content component also operates with two types of indicators: the first is the concrete design of legislation and administrative guidelines, the other is statistical data on the sanctioning of merger control.

The most important distinction concerns whether competition criteria alone are applied or whether other political criteria can influence decisions. Ordoliberalism and neoliberalism exclusively include competition-based criteria, whereas mercantilism includes a wider range of policy objectives.
Even though both ordoliberalism and neoliberalism exclusively apply competition-based criteria, they differ on how. On the basis of studies of the guidelines of competition authorities concerning merger control decisions and interviews with competition authority representatives, conclusions will be drawn as to whether the criteria of consumer welfare (ordoliberalism), total welfare (neoliberalism), or a broader range of criteria (mercantilism) is applied.

The second indicator concerning content covers actual enforcement. A high number of enforcements indicate a restrictively designed merger control (i.e. ordoliberalism). Few enforcements will be regarded as an expression of a lenient attitude vis-à-vis the concentration of national companies (i.e. mercantilism). Neoliberal merger control implies a moderate number of enforcements.

**Form**

The form component regarding merger control concerns whether or not merger control decisions are made by a politically independent authority. We restrict ourselves to analyzing the formal frame of merger control, i.e. whether decisions and recommendations in concrete cases are made by the competition authority itself and whether the political level has competence to change administrative decisions.

Another form parameter concerns whether or not control is performed before or after the merger (Ottaviani and Wickelgren 2011). The ordoliberal and mercantilist ideal types are expected to presuppose ex ante control, whereas the neoliberal ideal type is expected to presuppose ex post control. The ex post control of mergers provides authorities with better information regarding the impact of competition when making decisions, but there is a risk that mergers will have detrimental effects before being rolled back.
4. Methodology

We use a most-similar-systems design, where maximum variation is sought on the independent variable and minimum variation on third variables (Lijphart 1971).

Regarding the independent variables: among the EU member states, Germany, the UK, and France are the closest one gets to empirical examples of the ideal types for ordoliberalism, neoliberalism, and mercantilism, respectively. At the same time, these countries are similar with respect to a number of other criteria, which limits the relevant third variables, including economic development, EU membership, and economic size.

Studies based on ideational explanations often struggle to detect the causality mechanisms between ideas and policy design (Campbell 2002, p. 29). Ideational explanations may also be subject to confirmation bias. These limitations also apply to this study. We exploit a co-variational approach (cf. Blatter and Haverland 2012, p. 33ff.) in order to reduce these problems: If we out of a careful empirical analysis find co-variation between on the one hand the basic normative ideas of the relationship between state and market and on the other hand the legal and institutional construction of each country’s merger control – and at the same time we can show that these differences are relative stable over time (i.e. not subject to changes following shifting government color) and that they are not just causes by institutional differences between the three countries – we may conclude that ideas have an independent effect on national merger control systems vis-á-vis the convergence pressure from the EU level.

The empirical basis of the study builds on legislation on competition and foreign direct investment, administrative guidelines on merger control, annual reports from national competition authorities,
interviews with representatives from various competition authorities and relevant experts, and guidelines on competition rules from law firms. Finally, we also rely on direct interviews.

5. Analysis

In this section, we analyze merger control in the three countries based on the ideal types presented above.

Germany

In the following, we analyze the present German approach to merger control measured against the ordoliberal ideal type in Table 2. This enables us to detect whether or not the present German merger control is imprinted with ordoliberal ideas. The analysis is structured along the three components of competition policy: extent, content, and form.

Table 2. Expectations regarding German merger control (ordoliberal ideal type)

| Extent | - Broad (i.e. many transactions captured) |
| - Legal criteria (legality) instead of economic cost–benefit efficiency |
| - No discrimination on the basis of nationality |
| Content | - Decisions made exclusively on the basis of competition criteria |
| - Focus on protection of small market actors and promoting consumer interests |
| Form | - Ex ante control of mergers |
Re “extent”

German merger control is based on turnover thresholds. Transactions are covered if they lead to the concentration of companies with a global turnover for the merging companies of a minimum of €500 million and the national turnover presents a minimum of €25 million for one of the companies and a €5 million minimum for the other (Bundeskartellamt 2013, §35). The German threshold value is low compared to the threshold in France (see below). In addition, the qualitative definition is broad (Weck 2015) and broader than the corresponding definition in the EU merger control regulation.

In addition to ordinary mergers, German merger control also includes transactions involving acquisition of assets or stockholdings of less than 20% of the total value if it provides the buyer with opportunity to exercise a “material competitive influence” over its counterpart (Bundeskartellamt 2013, §37). The broad German merger control coverage is also confirmed by more than 1000 annual notifications sent to the Bundeskartellamt (2015). This number is high compared to the UK and France (cf. below).

The administrative costs related to low threshold values were traditionally said to be justified by competition gains. In 2009, however, Germany deviated from the ordoliberal mark on the extent of the merger control by the introduction of a de minimis limit (Bagatellmarktsklausul): mergers should not be investigated for markets with a turnover of less than €15 million (Bundeskartellamt 2013, §35).
2013, §36). This break—overall of minor importance—bears witness to some influence from the neoliberal ideal type.

Another development pulled the German merger control towards the mercantilist ideal type. In 2004, German legislation made it possible for the German minister of industry to reject acquisitions of German companies on the grounds of national security considerations if the potential buyer was from outside the European Economic Area and in the case of an acquisition of more than 25% of the voting rights (Bundesministerium für Wirtschaft und Energie 2013, section 55f.). It was originally limited to companies producing weapons or IT; in 2009, however, all takeovers of German companies were included that could potentially threaten “public order or security” (Bundesministerium für Wirtschaft und Energie 2013, section 58).

This new “mercantilist” provision has yet—as of 2017—to be used. The government stresses that it will only be used under very “exceptional” circumstances. On the other hand, it might already have deterred potential foreign investors from acquiring German companies.

In sum, the extent of the German merger control is broad. This is in harmony with the ordoliberal ideal type. However, the introduction of a higher de minimis limit pulls in a neoliberal direction. In addition, the extension of the ministers’ opportunity to block foreign investor acquisitions is a new mercantilist element (albeit unused thus far).

Re “content”

Investigations of mergers are based solely on considerations concerning competition (with a minor reservation, cf. above). Effects on employment, regional development, etc. are not taken into account. It is, however, debated which considerations should be included. Existing guidelines point out that the purpose of merger control is “to protect competition as an effective process,” which “at the same time protects the interests of consumers, not necessarily in the short term but rather in the
longer term and on a more permanent basis” (Bundeskartellamt 2012, p. 2). However, according to Andreas Bardong (2015), head of the Bundeskartellamt for merger control, it is primarily an issue about semantic nuances without greater importance: Based upon the practice, there is limited support for the prediction that the protection of economic freedoms is a criterion in German merger control; on the contrary, consumer welfare seems to be a central purpose for assessing mergers.

If we move from the general aim to the concrete tools, the test used in German merger control cases was changed with the revision of the Gesetz gegen Wettwerbbeschränkungen in 2013. The old test concerning a dominant position was replaced by the so-called SIEC test (= Significantly Impede Effective Competition). Hereby, the German approach moved from a classical judicial approach to an approach emphasizing econometric analyses, which recognizes synergy and efficiency effects of mergers (Rusu 2010, p.43).

The change from a prevailing legalistic approach to econometric analyses of consumer welfare might appear as a transition from a classical ordoliberal approach to one inspired by neoliberal effects analyses. However, the purpose of the econometric analyses is still consumer welfare, as in the ordoliberal ideal type.

Re “form”

The form of the German merger control is a paradoxical mix of ordoliberalism and mercantilism. On the one hand, in line with the ordoliberal tradition for the separation of powers, the Bundeskartellamt is formally independent of political interference (Weck 2015). This tradition is stressed via the possibility to verify decisions in competition cases in both the regional court in Düsseldorf and the federal court in Karlsruhe (Bundeskartellamt 2013, §63).

On the other hand, the ordoliberal tradition for independent merger control is countered by room for political interference in individual decisions. If the Bundeskartellamt rejects a merger, the minister
of industry can overturn the decision (2013, §42). The minister’s overturn must be justified by the calculated economic benefits of the merger. Examples of such benefits include energy supply, employment, and public health (Jestaedt and Sura 2003, p.196-97f.).

The possibility of ministerial overturn recalls the mercantilist ideal type. However, such overturn is a relatively rare phenomenon in Germany: From 1974 through 2015, there has been 22 cases of so-called Ministererlaubnis altogether (Bundesministerium für Wirtschaft und Energie 2015). The minister can only interfere if a merger is rejected by the Bundeskartellamt. In 19 of the 22 cases of minister interference, the mergers were approved with (in four cases) or without (six cases) conditions. Also, the provision on Ministererlaubnis in merger cases does not empower the minister to do as they please; a judicial court review is always possible.

Concerning the other main indicator of the form of merger control, notification should be done before a merger takes place. The so-called standstill position implies that no merger can be completed before approval by the Bundeskartellamt (2013, p.639). German merger control is an ex ante control in accordance with the ordoliberal ideal type.

This points in the direction of an ordoliberal design with some neoliberal elements, including a de minimis limit and the use of econometric analyses. The latter, however, in order to protect consumer welfare. The German case is concluded in Table 3.

Table 3. German merger control

<table>
<thead>
<tr>
<th>Extent</th>
<th>- Broad definition of a merger</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Low threshold values</td>
</tr>
</tbody>
</table>
A recent de minimis provision limits the extent of merger cases based on an account of efficiency.

Control with foreign investments allows a minister veto, thereby discriminating on the basis of nationality. This provision has never been used.

- Decisions are made exclusively based on competition criteria
- Consumer interests are the central purpose; protection of economic freedom plays a limited practical role

- Ex ante control
- Independent competition authority
- The minister can intervene after rejection of a merger. This provision is rarely used

The United Kingdom

In the following, we test the expectations concerning the present British approach to merger control based upon the neoliberal ideal type. Table 4 sums up the expectations.

Table 4. Expectations for British merger control (neoliberal ideal type)

<p>| Extent | - Cost–benefit considerations, where competition gains are assessed against the |</p>
<table>
<thead>
<tr>
<th>Content</th>
<th>Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>- No discrimination based on nationality</td>
<td>- Ex post control</td>
</tr>
<tr>
<td>- Decisions exclusively on the basis of competition criteria</td>
<td>- Independent authority</td>
</tr>
<tr>
<td>- Central purpose is the maximization of total welfare</td>
<td>- No political intervention in concrete decisions</td>
</tr>
</tbody>
</table>

Re “extent”

As in Germany, British authorities use a broad definition of mergers which covers *de jure* and *de facto* change in the control of a company as well as cases where one company influences the business of another by exercising material influence (Competition Commission & Office of Fair Trading 2010, p. 14).

The test of material influences is—as in the German case—more comprehensive than the provision in the EU’s merger control regulation on “decisive influence” (Bardong 2015). Material influence is, for example, when a shareholder—despite only having a small stock share—is the biggest shareholder or where a company can influence the board in another company.

In contrast to Germany and France, the extent of British merger control is based on two different quantitative criteria. First, there is a £70 million turnover threshold of the target company, which is
high compared to the other two countries. However, transactions are also covered by a control procedure if the mergers result in a position with at least 25% of the supply on the relevant market. Hence, the threshold values for British merger control are difficult to compare with those in Germany and France, as they are predominantly based on market share rather than turnover.

The British de minimis clause implies that transactions are not covered if they take place on markets with a total value under £3 million. If the market value is £3–10 million, the decision as to whether the transaction is covered is made on a case-by-case basis. The present limit is therefore not far from the German €15 million limit. The clause was changed in 2000, when the de minimis limit was raised from £400,000 (Boos et al. 2010, p. 3). The raise was explicitly made with reference to cost–benefit considerations on “whether the expected customer harm resulting from the merger is materially greater than the average public cost” (Office of Fair Trading 2010, p. 3). This is distant from the ordoliberal ideal and its focus on the protection of competition.

There is no legislative basis for prohibiting foreign investors from buying British companies. This is in accordance with neoliberal philosophy about open and free markets. There have, however, been a number of recent media cases concerning foreign companies acquiring British companies. This led to a tightening in 2015 of the legislation in the Enterprise and Regulation Act on the acquisition of British companies (Dunkley 2011). Consequently, buyers must inform authorities about their plans, including whether they will keep R&D and jobs in the UK (Conroy 2015). This change indicates a mild break with the neoliberal ideal type. Nevertheless, the question remains open as to whether the British Government can de facto block the acquisition of British companies solely through rhetorical deterrence (Callaghan 2015).

In sum, British threshold values are difficult to compare with those in France and Germany. The British de minimis provision is an expression of a cost–benefit consideration in line with the
neoliberal ideal type. British legislation does not allow political discrimination against companies with a specific nationality. However, the rhetoric of the government may attenuate the appetites of foreign investors to make strategic acquisitions.

Re “content”

Over time, the substantive criteria for deciding in British merger cases have shifted towards competition policy concerns (Parker and Majumdar 2011, p. 6). Until the change of the Enterprise Act in 2002, decisions were made on the basis of a public interest test (including industrial policy and regional policy considerations in addition to competition) (cf. House of Commons 2015). With the present design, competition is the only relevant starting point for merger control decisions. Under extraordinary circumstances, however, public interest considerations can justify exemptions (see below).

As in (neoliberal) Anglo-Saxon countries in general, British competition authorities also use the so-called SLC test (Significant Lessening of Competition) as the substantial test in merger cases (Levy 2010, p. 227). On the surface, this deviates from the SIEC test used in Germany and France. It is, however, conventional wisdom among experts that, in practice, it is of little importance whether one uses the SLC or SIEC test; both are based on measuring effects and both use econometric methodology (Bardong 2015; Competition Commission & Office of Fair Trading 2010).

The British guidelines for handling merger cases render it clear that the main criterion is to ensure competition in order to enhance consumer surplus (Competition Commission & Office of Fair Trading 2010, p.19). In this sense, the content of British merger control differs from the neoliberal ideal type as consumer welfare is prioritized over total welfare.
In sum, the content of British merger control generally follows the neoliberal ideal type, as it exclusively uses competition criteria as the basis for decisions and is based on effects. The analysis also shows, however, that the maximization of consumer surplus as opposed to total societal welfare is the general purpose. Thus, the content of British merger control is a hybrid between the neoliberal and the ordoliberal ideal types.

Re “form”

The British voluntary review system distinguishes the UK from the other two countries, as merging companies are not obliged to notify mergers (Competition Commission & Office of Fair Trading 2010, p.6). Consequently, a number of mergers are first assessed by the Competition & Market Authority after having entered into force; that is, an ex post approach is applied as expected in the neoliberal ideal type. However, the Competition & Markets Authority (CMA) can investigate both expected and actual mergers. In reality, the system is therefore a mix of ex ante and ex post control (Beale 2015, p.1).

As in Germany, the CMA operates independent of political interference. Also as in Germany, however, the British minister can redo concrete decisions. Hence, the British model appears to be a hybrid with an independent competition authority inspired by the neoliberal or ordoliberal model combined with possible ministerial interference corresponding to the mercantilist ideal type.

Nevertheless, the tendency reflected in the Enterprise Act in 2002 (which led to the establishment of an independent authority) has moved the British model away from the mercantilist ideal type. However, the present legislation mentions concerns for national and public security, financial stability, freedom of the press, and media pluralism as motives that can justify the minister’s interference (Competition Commission & Office for Fair Trading 2010, p. 69; Parker and
Majumdar 2011, 143). In contrast to the German Ministererlaubnis (whereby the minister can only allow otherwise-blocked mergers), the British minister can also block a merger. The latest occurrences were in 2012 and 2007, where the minister blocked mergers in the media industry out of concern for media pluralism.

In sum, British merger control is characterized by the neoliberal ideal type, cf. Table 5. Most notably, the extent of merger control is formally independent of nationality, merger control—as a starting point—exclusively uses competition criteria, and, finally, enforcement is a mix of ex ante and ex post due to the voluntary notification system.

All this points in the direction of a neoliberal design. There are also mercantilist elements, however, especially as regards the ability of the minister to intervene in concrete decisions based on public interest criteria. Moreover, the content of the merger control is a hybrid with an effect-based approach but primarily focusing on consumer welfare.

Table 5. The British merger control

| Extent                      | - Broad, qualitative definition |
|-----------------------------|---------------------------------
|                             | - Threshold values based on market share and difficult to compare with German and French turnover-based threshold values |
|                             | - The de minimis provision explicitly based on efficiency considerations by exempting small market mergers |
|                             | - No legal basis for ministerial blocking of acquisition of British companies by foreign investors |
Decisions solely on competition-based criteria
- Consumer welfare weighs heavier than total welfare
- The SLC test is the substantial test. Its starting point is econometric analyses, and it weighs the same factors as the SIEC test used in Germany and France

Enforcement is a mix of \textit{ex ante} and \textit{ex post}
- Independent competition authority
- The minister can extraordinarily intervene in concrete decisions based on public interest criteria. Rarely used.

\textit{France}

As shown above in this article, the French merger control is expected to follow a mercantilist ideal type. Below, we will hold the empirical factors in France up against the operationalization above concerning extent, content, and form. Expectations regarding the French merger control are presented in Table 6.

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{Extent} & - Limited merger control \\
\hline
\end{tabular}
\caption{Table 6. Expectations for the French merger control (mercantilist ideal type)}
\end{table}
Discrimination based on nationality with tougher controls on foreign firms

Decisions made on multiple criteria, including non-competition-based criteria, e.g. employment, national security, and regional development

Ministerial intervention in concrete cases, with a high degree of discretion in relation to balance various policy goals

Ex ante control procedures

Re “extent”

French merger control has a narrower scope than does German merger control. First, the French threshold value for the target company is considerably higher than the German value. Mergers are covered by French merger control if total turnover of the merging companies exceeds €150 million and if each of the merging companies has a turnover of at least €50 million on the French market (Legifrance 2014, Art. L: 430-2). In Germany, the latter threshold is only €5 million. However, the threshold values for the French retail sector are lower than the general threshold—€15 million. It was introduced in 2011 and led to an increase in the number of notifications (Autorité de la Concurrence 2012, p.4).

Second, the French definition of control is narrower than the British and German. French mergers are defined as transactions if the change of control is of “decisive influence” (Legifrance 2014, Art. L: 430-1). This definition is in line with the definition in the EU merger regulation, but it is not as
broad as in Germany and the UK, where non-controlling minority interests are also covered. The relatively narrow extent of French merger control corresponds to the mercantilist ideal type.

Third, another mercantilist feature of French merger control is its discrimination of buyers based on nationality. The French Code monétaire et financier includes provisions covering the foreign acquisition of shares of a minimum of 33.3% of French companies (Legifrance 2010, Art. L. 151). The foreign acquisition of French companies requires prior ministerial approval if taking place in so-called sensitive sectors, including activities concerning public security, arms production, national energy supply, water supply, transportation, electronic communication, public health as well as businesses, infrastructure, and facilities of “vital importance” to the country (Neven 2014).

In short, there is—in accordance with a mercantilist ideal type—ample opportunity to block foreign investors from buying French companies. As in the German case, it is difficult to determine the impact of the French provision, as it has never been used. Nevertheless, the mere existence of such a provision might deter interest among foreign investors to buy French companies due to the risk involved (Callaghan 2015).

Re “content”

As with German and British merger control, French merger control is—to begin with—solely based on competition criteria. This deviates from the expectation that criteria such as employment and competitiveness should also enter a merger control investigation. While it is also possible to use non-competition criteria, this is related to extraordinary ministerial intervention and is therefore included in the analysis of “form” below.

As in Germany, French merger control operates with the SIEC test, where mergers are approved unless they inhibit effective competition. This is intended to maximize the consumer surplus (Autorité de la Concurrence 2013, p.68-69). Mergers that inhibit competition can be approved if
they lead to a “sufficient contribution to economic progress to offset the adverse impacts on competition” (Legifrance 2010, Art. L. 430-6). According to French practice, such approval is only relevant when consumers will obtain a share of the economic gains (Autorité de la Concurrence 2013, p.125). This is in accordance with ordoliberalism’s focus on consumer surplus as opposed to the neoliberal focus on total welfare. Conversely, the French approach has nothing of the ordoliberal legalistic focus on the protection of smaller market actors.

Since its establishment in 2009, the Autorité de la Concurrence has increasingly relied on econometric methodologies (Vasbeck and Zelenko 2015, p.15). The authority mentions that enhanced corporate competitiveness can be regarded as a contribution to economic progress, which can justify reduced competition if it benefits consumers (Autorité de la Concurrence 2013, p.130), but this measure is rarely used in practice (Vasbeck and Zelenko 2015). Instead, the French competition authority stresses that the competitiveness of French companies is best ensured via effective competition on the domestic market (Autorité de la Concurrence 2012). This causality breaks with the mercantilist view that restrictive merger control inhibits the opportunities available to national companies to compete internationally.

In short, the content of the French merger control does not initially appear to bear any mercantilist features. This contradicts the expectations presented above.

Re “form”

The 2008 reform in Loi de modernization de l’économie made it mandatory to notify mergers in advance (ex ante). This is in line with the expectations concerning a state interventionist mercantilist procedure. When considering the governance structure, the French picture is similar to those in Germany and the UK. The Autorité de la Concurrence operates independent of political interference. This is in contrast to the system operating until 2008, where the authority on merger
control was part and parcel of the Ministry of Industry and where the minister potentially had decisive influence on individual cases (Wiese 2008).

Since 2008 France formally moved away from the mercantilist ideal type with direct involvement of the political level (Nogues 2009, p.2). Despite this, the Minister of Industry still has significant powers at their disposal in order to influence concrete decisions (Legifrance 2010, Art. L. 430-7.1). The minister can redo any decision made by the competition authorities with reference to *motifs d’intérêt general*, such as industrial development, employment, or competitiveness.

The minister’s ability to redo concrete merger decisions is in accordance with the classical mercantilist approach. However, one should refrain from placing excessive emphasis on this since the possibility for political interference in concrete cases has yet to be used. Nevertheless, two French lawyers from Linklaters LLP point out that the possible interference from the Minister of the Economy in merger control cases is one of the significant areas of uncertainty for French practitioners (Vasbeck and Zelenko 2015, p.15).

In sum, the French merger control is characterized by all three ideal types, cf. Table 7. The narrow extent and the special rules on the foreign acquisition of French companies is in accordance with a mercantilist design. In contrast, the content of merger control mixes ordoliberal focus on consumer welfare and a neoliberal methodology based on econometric analyses. As to the form, it is in accordance with the expected *ex ante* control. In principle, the minister’s right to redo cases is also a mercantilist approach, but this opportunity has never been used.

**Table 7. French merger control**
6. Conclusion

We started this paper by asking whether French, German and British ideas and policies concerning mergers and business competition had been wiped out and gradually subsumed new EU-policies or whether national regulation in these areas is still stong and in correspondence with nationally accepted ideational conceptions. Through a careful, detailed comparison of the governance structure and the content of merger control in the three countries, we have shown that there are significant differences between the three countries—as well as some similarities. We also shown that to a significant (but also varying) degree, a clear relationship can be traced between each country’s
merger control set-up and an *ism* on the state–market relationship. National ideas and policies do matter! They also appear to sustain: Despite the European convergence pressure, basic ideational national foundations are still upheld. Figure 1 illustrates this by plotting the three countries into a triangle, the apexes of which are ordoliberalism, neoliberalism, and mercantilism.

Figure 1. France, Germany, and the United Kingdom in a triangle of ordoliberalism, neoliberalism, and mercantilism

The goal of the ordoliberal merger control ideal type is to protect consumer welfare and economic freedom. This implies an extensive merger control independent of the nationality of the firms in question. Control is carried out *ex ante* and by an independent authority in order to safeguard the goal as well as the rights of merging firms. The ordoliberal ideal type has clearly imprinted German merger control: it embraces more cases of control than in the other two countries, and Germany pursues *ex ante* control via a formally independent authority. However, there are also some neoliberal traits, such as a “bagatelle” or minimum limit for control. Some mercantilist traits are
found in the minister’s ability to overturn the decision of the Bundeskartellamt. Nevertheless, the German case is rather close to the ordoliberal ideal type.

The neoliberal ideal type shares a number of traits with ordoliberal merger control; however, it also deviates by placing emphasis solely on total welfare. Merger control will be administered according to individual case cost–benefit analyses and will be performed *ex post* by an independent agency. Company nationality plays no role. The result will be a modest number of cases. British merger control largely resembles the neoliberal ideal type, albeit with some deviations: weight is not only placed on total welfare but also on consumer welfare (ordoliberal trait), and the minister can intervene in individual cases based on broader considerations than economic welfare (mercantilist trait). In Figure 1, the UK is placed close to the neoliberal apex.

A mercantilist ideal type deviates from the previous types mainly in terms of a broader set of criteria for merger control while at the same time possessing a narrower merger conception. Besides total and consumer welfare, mercantilism allows for deeply political considerations such as employment and national security. This implies high threshold values, few merger controls, and considerations regarding the nationality of the merging firm. A mercantilist ideal type is to some extent found in French merger regulation: high threshold values goes with traits of discrimination on the basis of nationality. French ministers can redo decisions made by the competition authorities, but this opportunity has yet to be exploited, just as foreign investors have yet to be blocked from buying French firms. In sum, the French model has some mercantilist traits but is more mixed up with traits from the other ideal types than in the two other countries. Hence, France is located somewhat closer to the center than the two other countries in Figure 1.

Where does this bring us? There are three points to be made. The first is that we do find clear evidence of ideational imprints on national merger control systems. Ideas do matter through their
influence on the national administrative systems in case merger control systems. They do survive shifts in government color and they do not appear just to mirror institutional differences between the three countries. Fundamental national ideational foundations are still found to be important: the many German merger control transactions compared to the other two countries are in accordance with ordoliberal ideas; the French foreign investment control is in accordance with a mercantilist approach; and the voluntary British notification system is in accordance with a more lenient neoliberal control system.

The second point is that there is also some evidence of convergence in the national systems. In all three countries, competition is among the main criteria in merger control. All three have similar guidelines for the substantial test of the consequences of mergers. In all three countries, non-economic considerations are warranted, and all countries deploy independent agencies, more or less with the option of political interference. To some extent, internationalization in general and Europeanization in particular seem to have imprinted national merger control systems, albeit in a situation in which national ideational foundations are clearly identifiable.

The third – and last – point to be made is that the national ideas still qualify as the core of national regulation despite convergence in the area of merger control. National regulations are indeed still vital and they adapt rather than vanish as a consequence of increasing supranational regulation. EU regulation is an expansion of national regulation – however an expansion that allows national regulation to remain in existence. Nation states are still thriving and strong, and they are capable of creating coordinated answers to international challenges without seriously jeopardizing basic national ideational structures and policies.

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