

# The European School of Thought in EU Merger Control

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It is time to say  
„hello again“

# The European School of Thought in EU Merger Control

Economics in EU competition law is distinguished from

- i) US antitrust economics
- ii) economics as a science



# Challenge Today: Broad Range of Economics vs. Legal Expectations

## **Economists differ in**

- Social objectives
- Facts
- Scientific procedures
- Ideology

## **Legal community in the EU expects**

- Sound framework
- Coherent approach
- Solid guidance
- Court-proof analyses

# US: Chicago School of Thought

Based on different concerns/objectives

Antitrust: a branch of economic policy governed by economic analysis (**price theory**)

Very little room for "per se" rules

Competitive harm: **adverse price + output effects**

Price-theoretic idea of competition as a **static** situation

**Excessive trust** in the efficiency produced by dominant firm strategies and vertical relationships

"efficiency paradox"

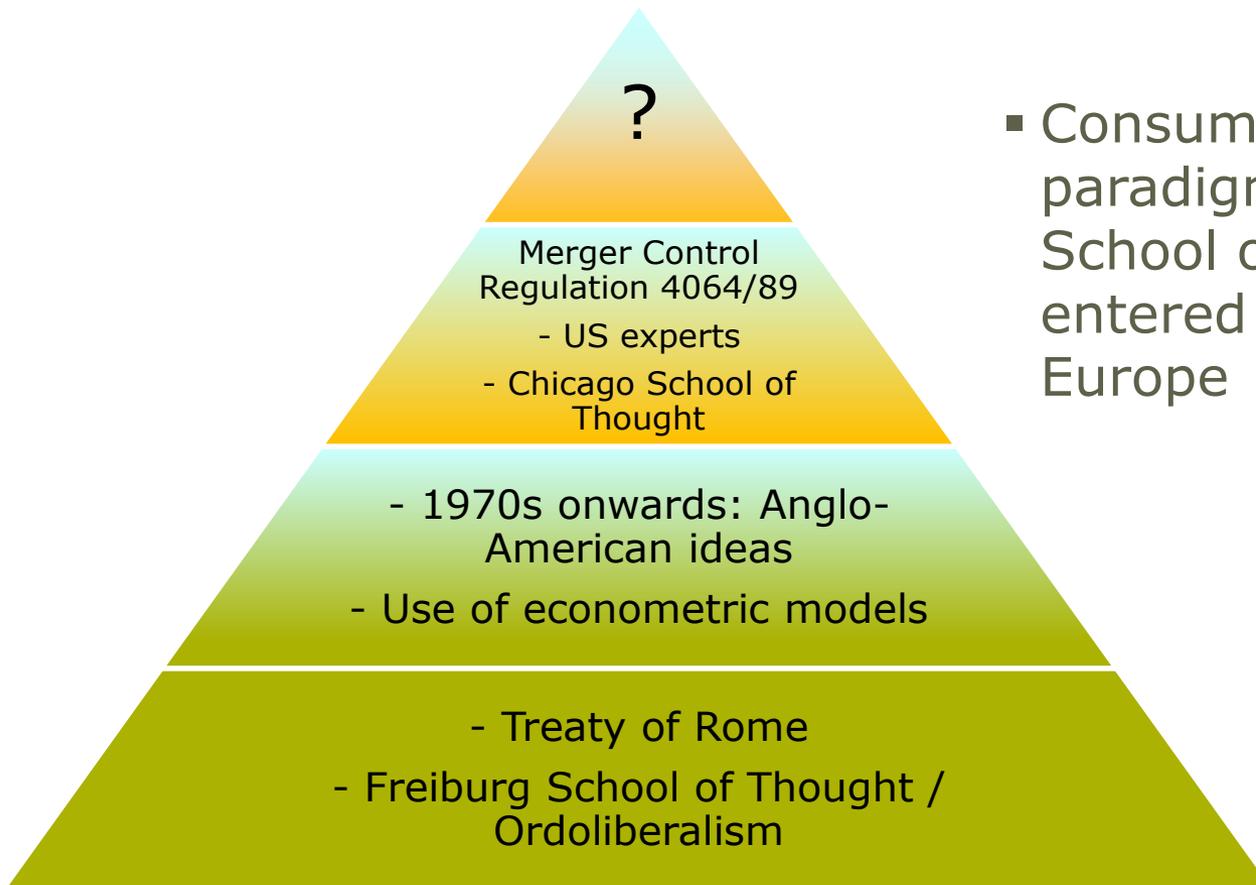
**Sole value "thesis":** allocative and productive efficiency

Faith in freedom of entry

Vertical restraints are always pro-efficiency

**Outcome-approach:**  
"Will the outcome of a merger be inefficient by inducing the aggregate of all producers to reduce the total amount of goods they produce?"

# Development Economic Thinking EU



- Consumer welfare paradigm of the Chicago School of Thought entered the arena in Europe

- **BUT: US antitrust law and EU competition law differs**

# Ordoliberalism & Freiburg School of Thought

- EU 2012: Nobel Peace price for work in advancing peace in Europe

## European History

- 1930s and during Second WW: scholars at the University of Freiburg developed their ideas with respect to a Europe post-WW
- Historical observation: concentrations of power distort the functioning of economies
- Request: proper legal environment for the economy
- Request: Healthy level of competition through democratic measures
- Request: Limiting the power of private actors
- Focus: **Social Market Economy**

# Freiburg School of Thought: Competition

- **Economic process** depends upon the specific kind of **economic system** that exists
- Each economic system combines elementary constituting elements (e.g. property rights, competition, money, etc.)
- → A liberal market economy cannot survive for long in a totalitarian State, nor can a democratic State under the rule of law survive if economic power is highly concentrated
- **Interdependence** of the economic and political system
- The only way to achieve sustained economic performance and stability in Europea is through an **economic order based on competition**

# Freiburg School of Thought: State Intervention

- Market order of 'free competition'
- **State intervention:** proper execution of general competition law
- **Constitutional Framework** necessary to **protect process of competition from distortion**
  - → Minimization of governmental intervention in the economy
- Nonetheless, on markets that are characterized by 'imperfect competition,' the **state must actively intervene** to establish a market order of '**ordered regulated competition**'
- Freiburg School thinkers agreed with earlier conceptions of liberalism → a competitive economic system is necessary for a prosperous, free and equitable society

# Freiburg School of Thought: Competition Policy

- Competition and competition law are not viewed as automatism, but are a **task of governmental economic policy**
- **The law should be used**
  - to prevent the creation of monopolistic power
  - to abolish existing monopoly positions where possible and, where this was not possible
  - to control the conduct of monopolies
- Monopoly prohibition: directed primarily at cartels and other anti-competitive agreements between competitors
- An independent monopoly office to enforce those principles

# Ordoliberalism in the EU Treaties

## Article 2(3) of the Treaty of Lisbon:

*"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly **competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment"*



- EU competition law is guided by the objectives of the TEU (Articles 2 and 3 TEU)
- Articles 101 and 102 TFEU: normative concept
- Integration objective: internal market
- Vertical restraints - Article 101 (3) - Mergers

# Conclusion: School of thoughts



**! No Convergence !**



- **Efficiency paradigm**
- **Sole concern: consumer interests**
- **“Laissez faire” approach**
- **Market freedom**

- **Competition embedded in other goals of the EU**
- **Social welfare**
- **State intervention**
- **Functioning economy for peace in Europe**

# Mandatory emergence of a European School of thought



Still Chicago School thinking



Nobel Peace Prize 2012: *"for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe"*

## Lessons learned for economists:

Competition economists need to know and understand the ideology of EU competition law

Mandatory knowledge of

- case law of the Courts of the European Union
- legal language to address economic issues

**PROBLEM:**  
Some economists simply do not respect the EU legal subject matter

# Merger Regulation 139/2004



- 2002: General Court overruled three Commission decisions
  - flawed economic analyses
  - misevaluation of competitive intensity in relevant industries

## 2004 SIEC test

Council Regulation 139/2004 – Article 2  
(2) A concentration which would not **significantly impede effective competition** in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market

**Efficiency claim:** in coherence with Article 101 (3)

# Differences in Merger Assessment Outcome: A practitioners point of view

## Undertakings and divestitures differ; rarely Court review

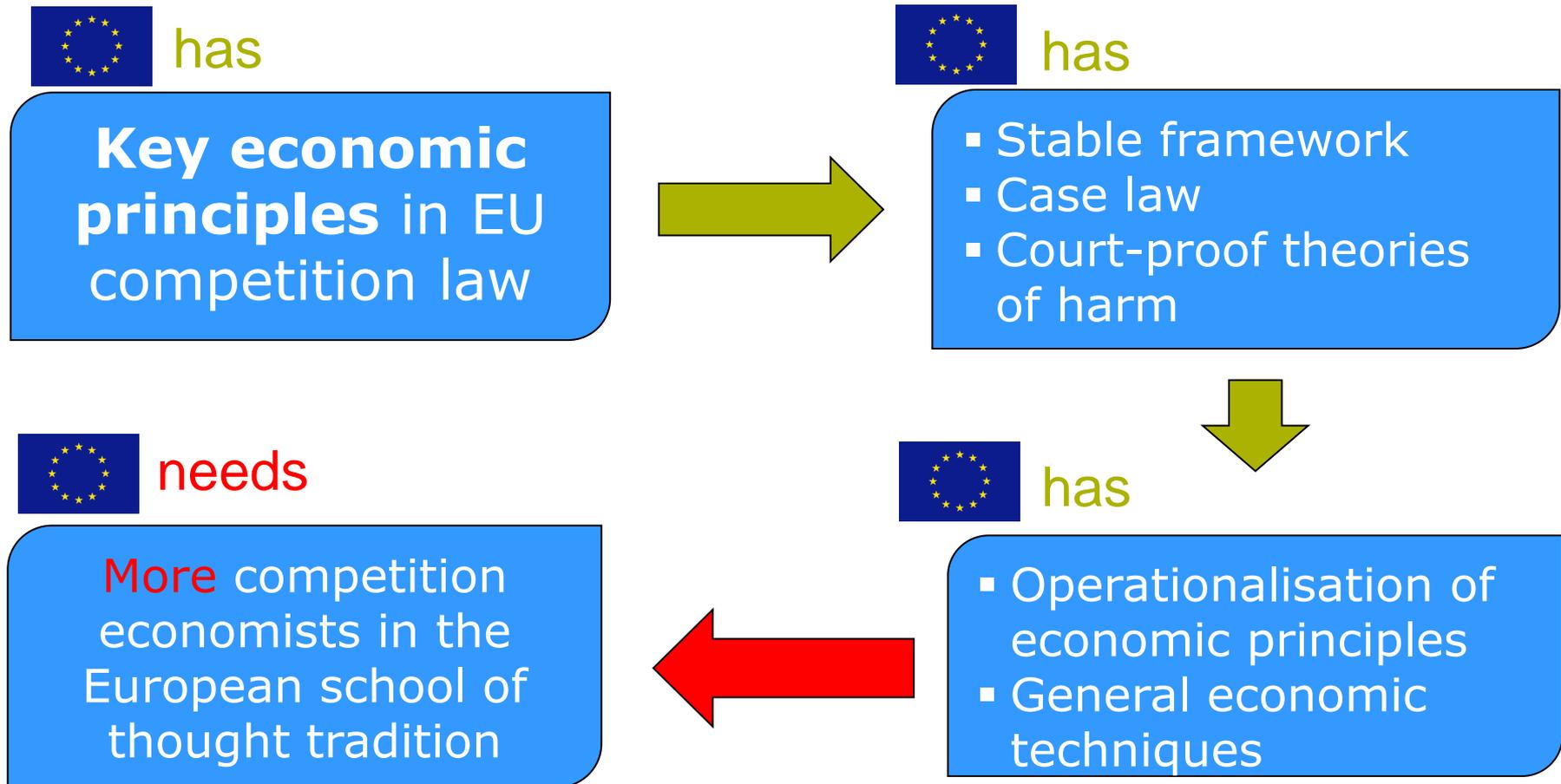
"UPS and TNT Express believe competition in Europe continues to be significant, coming from multiple players who offer similar services. The combined company will help create a more efficient logistics market, thereby improving the competitiveness of Europe and the solutions offered to businesses and consumers. Those benefits include future improvements to e-commerce to help achieve the EU objective of a Digital Single Market. In addition, customers and consumers will benefit from a broader portfolio of services and better global access, along with lower supply-chain costs overall and improved service levels in terms of timing and reliability." Press Release October 19 2012



# Strong Guidance by the Courts of the European Union

- Issue: Commission and “soft law”
- In a few cases only, the Commission has a tendency to “cross the Atlantic”
- Limited Court-review: “manifest error”-issue
- Nevertheless: tough judgements by the Courts in merger cases
- **Actually, Courts shape the school of economic thought in Europe**

# The Issue: Which Economists?



It is time to say  
„Good Bye“  
to the Chicago School of  
thought  
in Europe

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