

The European School of Thought in EU Merger Control

Prof. Dr. Dr. Doris Hildebrand, LL.M.

Professor of Economics, University of Brussels (VUB) &
Managing Partner EE&MC - European Economic & Marketing Consultants GmbH
Bonn * Brussels * Vienna
Adenauerallee 87, D- 53113 Bonn
Phone: 0049-228-9267760
DHildebrand@ee-mc.com * www.ee-mc.com

Stockholm, 9th November 2012



Vrije Universiteit Brussel

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"

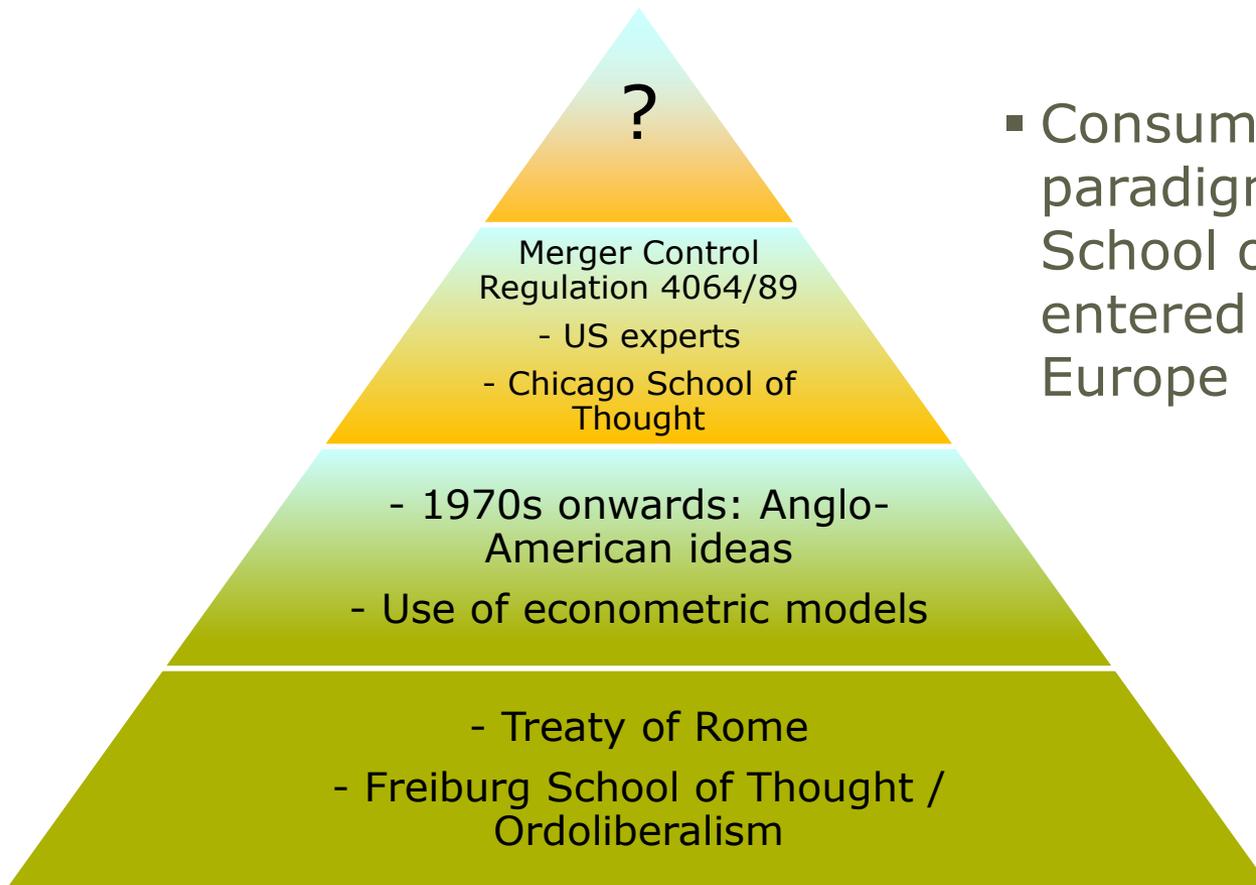
Sole value "thesis": allocative and productive efficiency

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

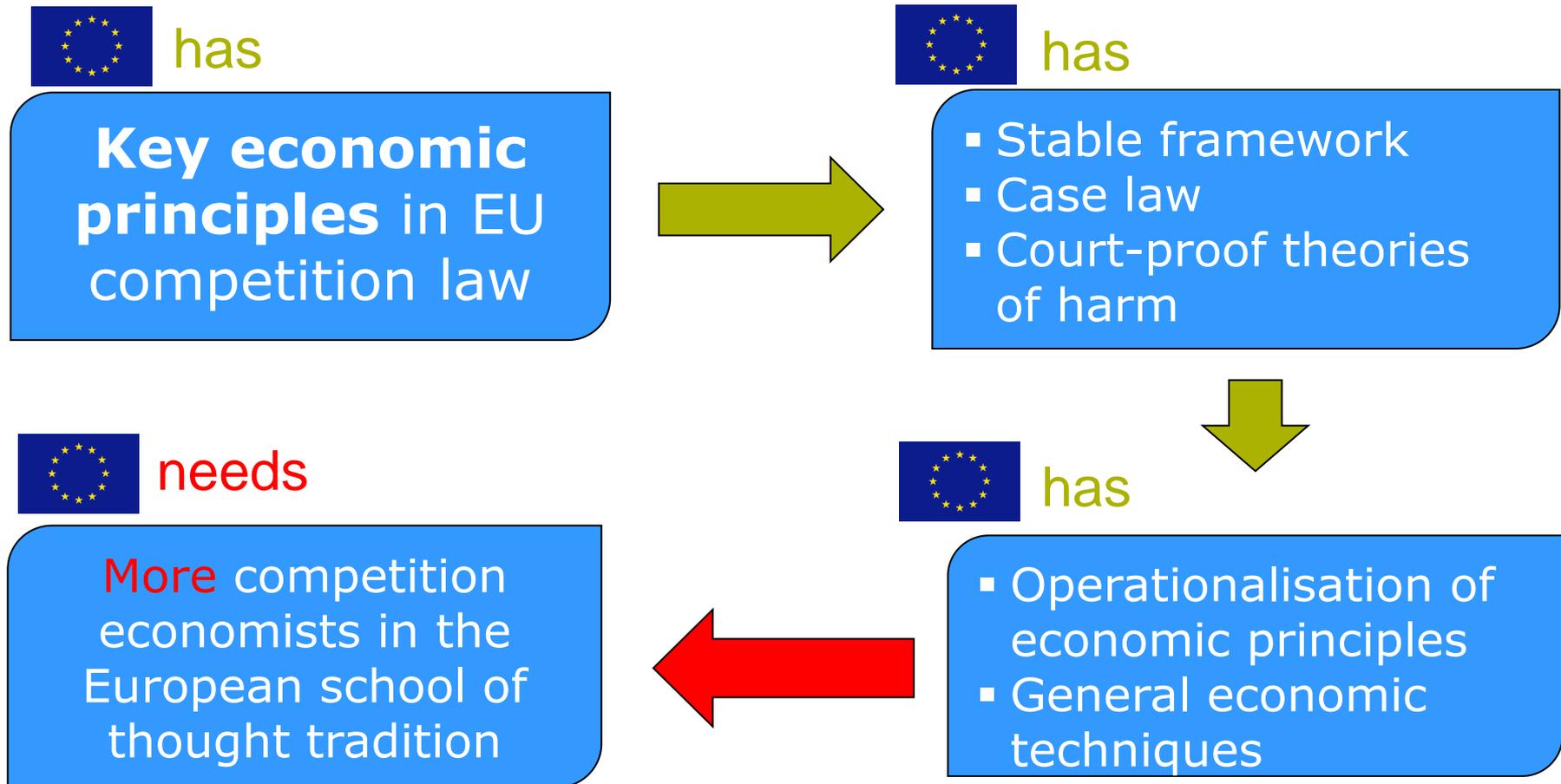
"UPS and TNT Express believe competition in Europe continues to be significant, coming from multiple players who offer similar services. The combined company will help create a more efficient logistics market, thereby improving the competitiveness of Europe and the solutions offered to businesses and 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

Prof. Dr. Dr. Doris Hildebrand