

What does the  
New Nationalism  
Bode for Competition?

TRENTO SUMMER SCHOOL III  
ON ADVANCED EU COMPETITION  
LAW & ECONOMICS

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# The theme, the story

- In trade and competition, we were moving along a congenial and constructive path towards harmonious interaction of systems
  - much led in theory and details by the EU
- when the recession of 2007 and then job loss (mostly from automation), terrorist threats, fear or dislike of immigrants, and opportunism beginning at least from 2014
  - a spirit of nationalism overtook the spirit of respect and cooperation
    - with potentially profound impact on trade and competition and a race to the bottom
    - The constituency includes: those who feel left out by globalization
- How might this impact competition law and policy and what can we do stay on the cosmopolitan path?

# outline

- 1 The world order and developments – US/EU
- 2 The “new” world order
- 3 Two visions
  - **Billiard Balls** versus **One World** with subsidiarity
    - The dangers of the billiard ball game to trade and competition
- 4 How might billiard ball theory play itself out
  - Goals, Cartels, Monopoly/Abuse, Mergers, the State
- 5 Way forward

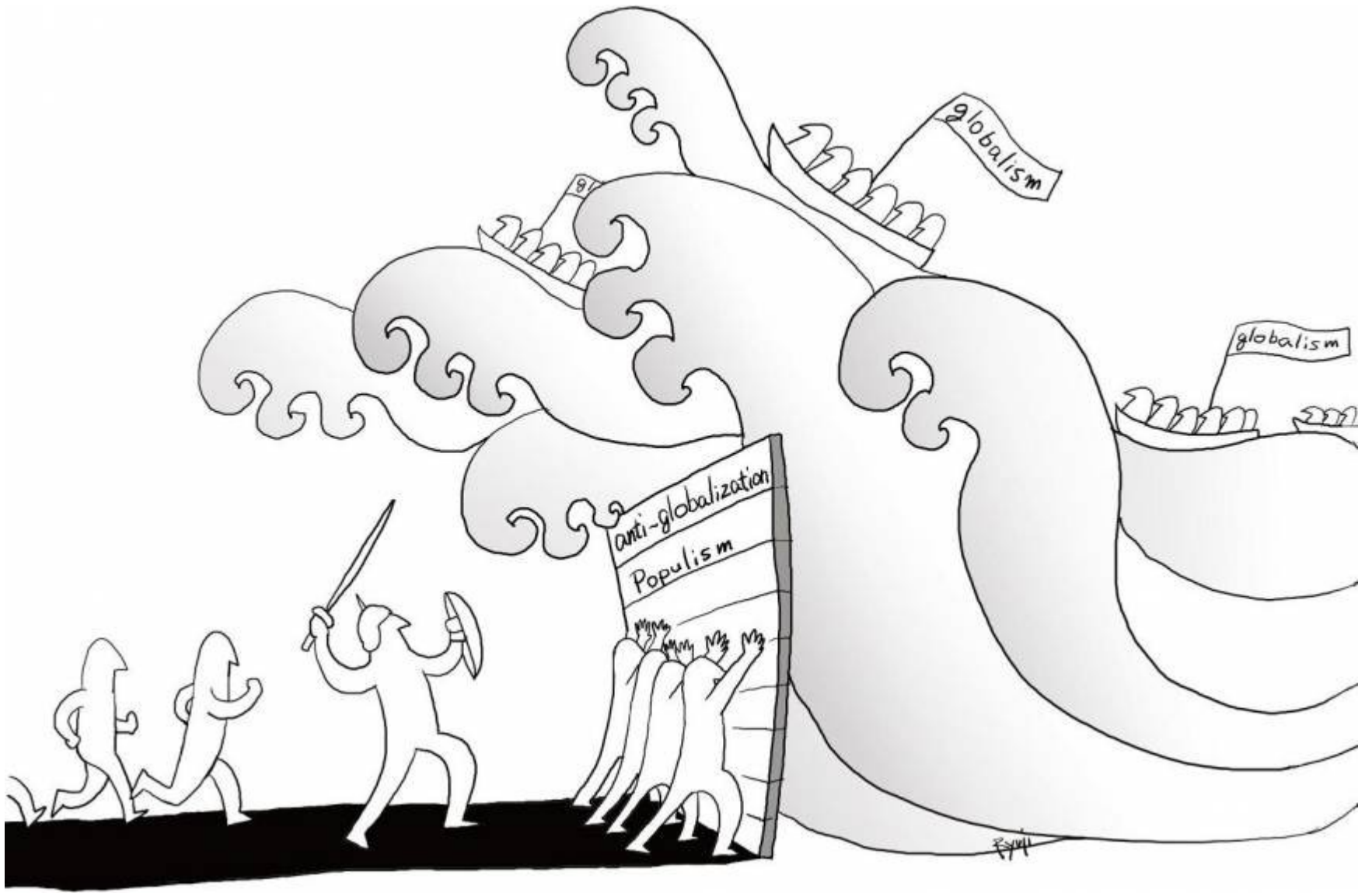
# 1. The US/EU Order of Competition

- Developments in the US
  - The new administration; Supreme Court changes
  - “America First”
  - Substantive developments: cartels, mergers, monopolies; efficiencies, intellectual property
  - Fear of strategic uses of antitrust and Chamber of Commerce Committee
- Developments in the EU
  - Abuse of dominance – *Intel* - awaiting the CJEU; excessive pricing; Internet and algorithms

(Further specifics as we discuss each subject area and possibilities for nationalism)

## 2. The new trajectory for many nations

- “The End of Davos Man” Economiquity, CUTS Jan-Mar 2017
- Brexit, Trump, close call of Le Pen, Wilders, the far right of Germany AfD, the attraction of the strongman leader, the demagoguery
- In the name of
  - JOBS
  - THE ECONOMY
  - FEAR AND HATRED OF THE IMMIGRANTS
  - GROWING INEQUALITY





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# 3. The Two Visions

- There are two visions of the economic and political interaction of nations
  - Billiard ball
  - Community
- Problems and prospects of the billiard ball game
  - Disengagement from trade agreements, and →
  - Applying my-country-first antitrust
  - Industrial policy antitrust, race to the bottom
    - leaving on the table the gains of trade, of cooperation, convergence, higher standard of living
    - » And happier people





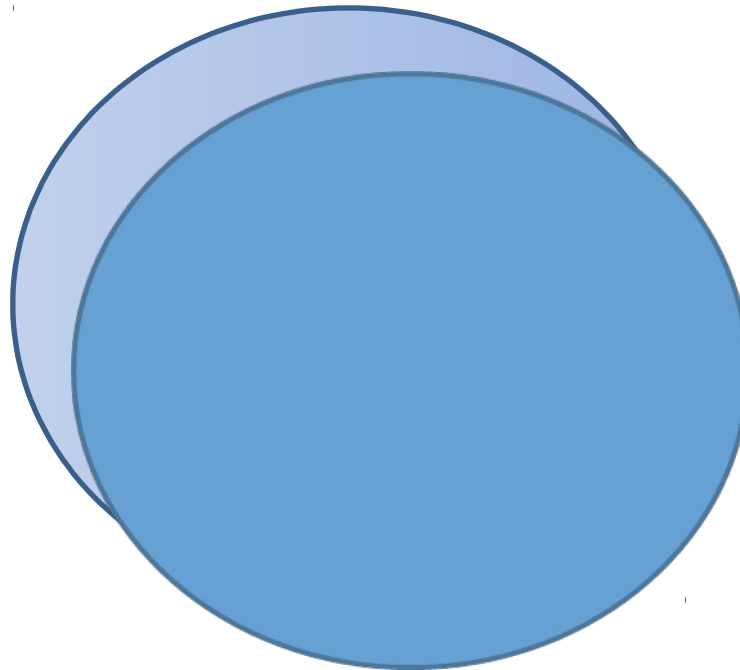
## 4. How the new nationalism might play out in competition law

- This requires a view of competition law, where we are, what is threatened
  - and of convergences, divergences, possible paths for nationalistic divergence
  - Goals
  - Cartels
  - Mergers
  - Monopoly/Abuse
  - The State

## a. GOALS

- Consumer welfare
- Making the market work; counteracting power and abuse
- Might goals be bent to include: **My-County-First?**
  - This can mean:
    - Favoring my-country's businesses
      - because the firms do something good (create jobs), or – They are “my cronies”
    - Using competition law as a hook to get whatever you want for your country – conditioning a merger on spinning off a resource-rich asset to a national firm, or
    - Suing a firm to appropriate its intellectual property
    - and might this be without transparency or due process?

## b. Hard Core Cartels – substantive law almost identical



New issue: conspiracy  
by algorithm  
Detection and remedies

My-country first would

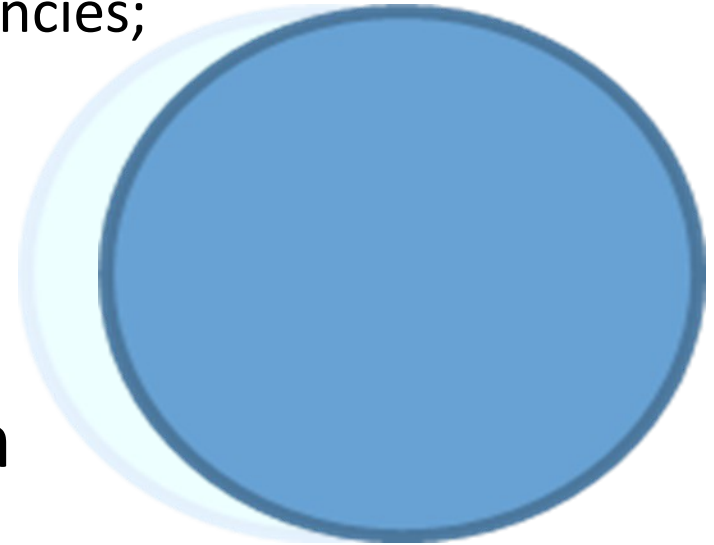
Encourage export cartels to exploit foreigners

Deny usual defenses such as foreign sovereign compulsion

Encourage courts to lower burdens of proof for foreign cartels hurting the home market, and hesitate before calling domestic collaboration a cartel

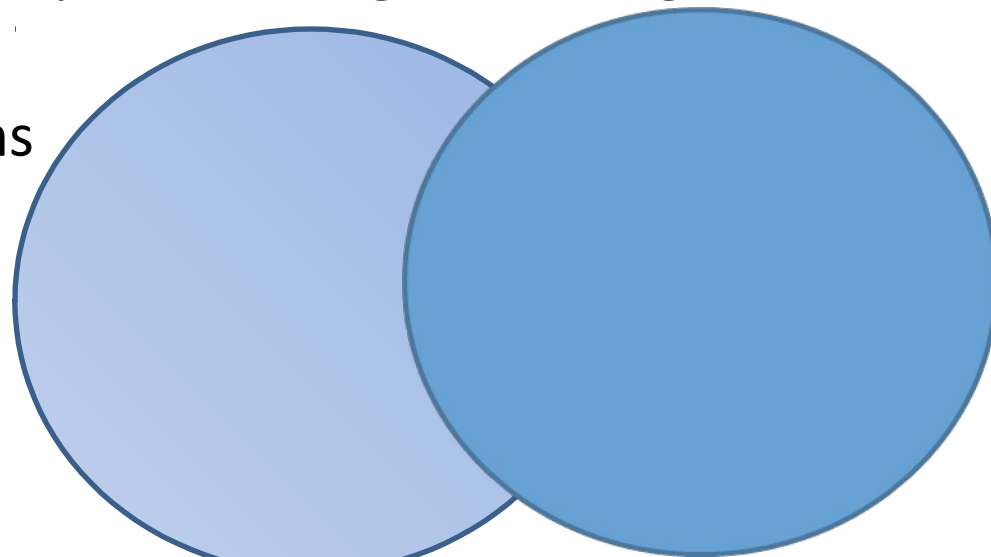
## c. MERGERS

- Substantive merger analysis of nations is almost identical: Does this merger increase market power? Issues: dealing with efficiencies; media concentration; remedies
- But my-country first can show up in discriminatory application of standards and in “industrial policy” remedies



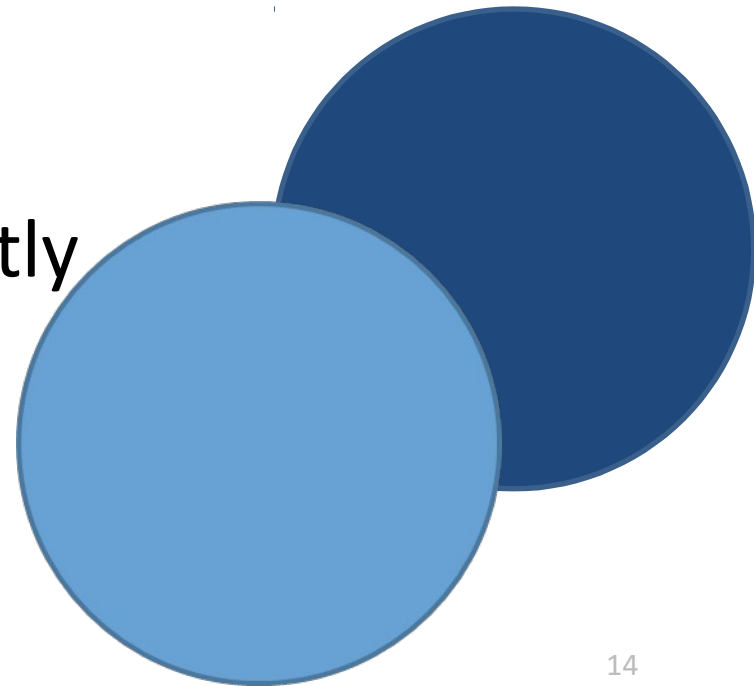
## d. Abuse of dominance

- CJEU/US Supreme Court – significant divergence
  - EU issues: big data; platform competition
- US requires proof of increase in monopoly power by anticompetitive acts and exercises deference to freedom of dominant firm
- EU and other jurisdictions may find dominant power more easily; worry more about acts that foreclose challengers
- **My-country-first** would step up the suits against foreigners and require them to give advantages to domestic firms

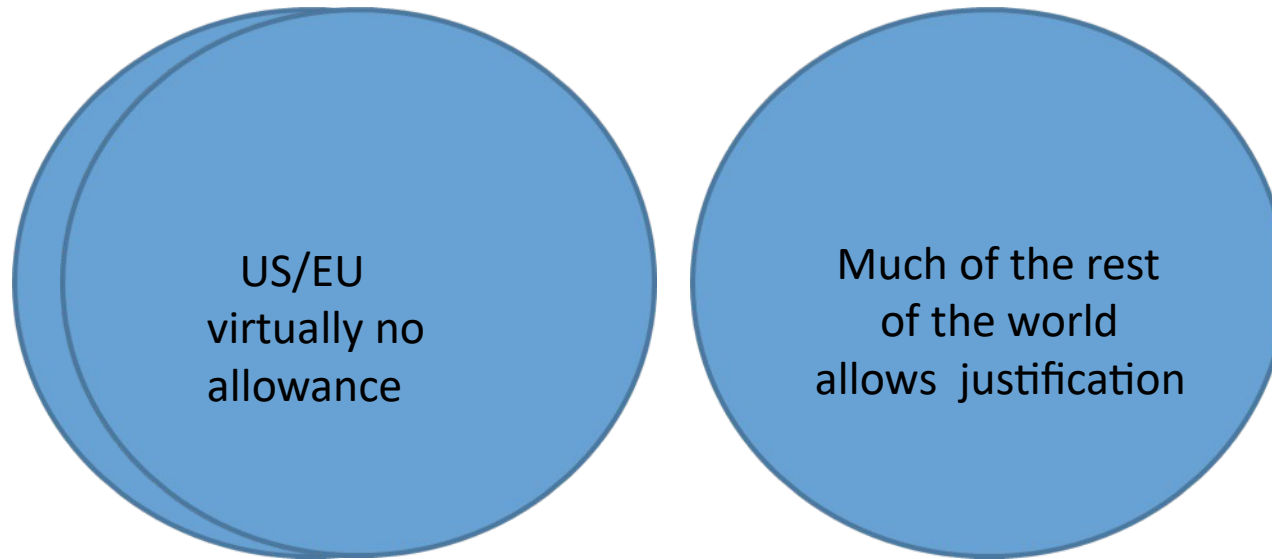


## e. Anticompetitive State Acts

- EU is the leader in competition law provisions that prohibit certain anticompetitive state acts, such as giving privileges; state aid control
- Competitive neutrality
- My-country-first operates on privilege and preference; directly contrary to non-discrimination
- EU is a bulwark against my-country-first



# f. Public Interest, Industrial policy



Many statutes allow consideration of jobs, SMEs, increasing exports, national champions, crisis  
**China** allows what is good for its “socialist market economy”

That is: **My Country First**

# 5. A Way Forward

What to do about wave of nationalism, populism?

- See excellent remarks of Director General Leitenberger
  - [http://ec.europa.eu/competition/speeches/text/jl\\_porto-9-5-17\\_en.pdf](http://ec.europa.eu/competition/speeches/text/jl_porto-9-5-17_en.pdf)
- Stay the course of the EU model
- Give better explanation of what competition and color-blind enforcement does for people
  - and of the dangers of eroding the shared base of community and eroding the rule of law
- Move forward on collaborations; ICN, OECD, UNCTAD; recommended principles on due process, industrial policy
- Outside of the competition portfolio:
  - More regard for those who do not see the gains from globalization; more equity



## CONCLUSION

# The World We Want – Billiard Balls or Community?

