Integration of Non-Efficiency Objectives in Competition Law

by

Ofer Green

A thesis submitted in conformity with the requirements for the degree of Master of Laws (LL.M.)
Faculty of Law
University of Toronto

© Copyright by Ofer Green (2008)
Abstract

Competition law constitutes part of broader policies. Thus, in addition to the pursuit of efficiency, competition law expresses non-efficiency concerns. The paper will explore the theoretical perspectives as to the objectives of competition law; analyze the practical aspects that implementation of non-efficiency objectives entail; and suggest a framework for implementation of non-efficiency objectives within competition law. As will be argued, non-efficiency objectives should – to varying degrees along the axes of time, place and circumstances - play a meaningful role in competition analysis. The primary assertion of the paper will be that competition law ought to consistently strive to outline the contours of those axes. Such contours should be drawn primarily on the basis of the potential adverse effects of the restrictive trade practice upon efficiency, as compared to the potential public benefit that may stem from the practice, as well as upon the circumstances that prevail within the jurisdiction.
Acknowledgements

For me, this paper represents not only the product of research and writing, but also the culmination of a journey and the fulfillment of an aspiration. My heartfelt gratitude is extended to Professor Ariel Katz, my supervisor, for his guidance, understanding and support; David Yahav, General Counsel of the Israel Electric Corporation, for allowing me to take a one-year leave of absence from work; Professor Michal Gal, who saw and blessed the conception of this paper; the Faculty of Law and the School of Graduate Studies at the University of Toronto, for the generous financial aid; Professor David Dyzenhaus, Kaye Joachim and Julia Hall, for always listening and helping.

But most of all, my gratitude and appreciation go out to my wife, Jizell, who sacrificed much more than I did so that I may pursue graduate legal studies in Canada. This paper is dedicated to her and our newborn daughter, Yarden.
# Table of Contents

## Introduction

1

## Part I – The Objectives of Competition Law

10

- General
- Economic Efficiency: Definition and Nature
- Efficiencies in Merger Control
- Economic Efficiency and Non-Efficiency Concerns: Friends or Foes?
- Failing Firm Doctrine
- Objectives of Competition Law: Jurisdiction-Specific Analysis
  - United States
    - The Rise of the Chicago School: Efficiency-Oriented Antitrust Analysis
    - The Chicago School Challenged
    - Efficiency Dethroned?
  - European Union
    - European Union Competition Law: Multi-Value Approach
    - Normative Framework for Assessment of Non-Efficiency Objectives
    - Recognized Non-Efficiency Objectives
  - Israel
    - Statutory Incorporation of Non-Efficiency Objectives
    - Judicial Incorporation of Non-Efficiency Objectives
  - Canada and the United Kingdom
    - Canada
    - United Kingdom
  - Developing Countries
    - Objectives of Competition Law in Developing Countries: General
    - Objectives of Competition Law in Developing Countries: South Africa

## Part II – Integration of Non-Efficiency Objectives – Practical Challenges

83

- Quantification of Non-Efficiency Objectives
- The Institutional Question
  - Consideration of Non-Efficiency Objectives by the Competition Agency
  - Consideration of Non-Efficiency Objectives by the Judiciary
- Appropriateness of Competition Law for Addressing Non-Efficiency Concerns
- Subjectivity, Unpredictability, Inconsistency and Politicization
  - Subjectivity of Non-Efficiency Objectives
  - Unpredictability and Inconsistency of Non-Efficiency Objectives
  - Politicization of Competition Law
- Economic Efficiency – Objective, Predictable, Consistent, Apolitical?
Introduction

Competition (antitrust) law, as the “Magna Carta of free enterprise”,\(^1\) is designed, in essence, to ensure, maintain, promote and enhance free competition. However, competition is rarely considered as an end in itself.\(^2\) Rather, economic efficiency\(^3\) is widely considered, according to both legal doctrine and economic theory,\(^4\) as the direct and ultimate\(^5\) normative objective of competition law.\(^6\) Efficiency creates new sources of capital, promotes economic growth,\(^7\) may bring about reduced prices and greater diversity of products and services for consumers, and may induce development, innovation and creativity.

---

\(^1\) U.S. v. Topco Associates, 405 U.S. 596, 610 (1972). The U.S. Supreme Court further observed, id., that the antitrust laws were “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”

\(^2\) See: Addy, The Canadian Competition Act as a Model of Flexible, Forward-Looking Competition Law (Mexico, 1993), available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01062e.html: “The [Canadian Competition] Act does not see competition as an end in itself. Rather, competition is a means to achieve dynamic efficiencies in the economy, and to provide competitive prices and quality products and services to Canadian industry and consumers.” See also: Everett & Ross, The Treatment of Efficiencies in Merger Review: An International Comparison (2002), §1.2.3, available at http://www.strategis.ic.gc.ca/pics/ct/ct02516e.pdf: “Typically now, competition policy is seen as a tool for protecting and enhancing the competitiveness of markets, not simply for the sake of competition, but because competition generates certain benefits that are valued.” Nevertheless, the view according to which competition law ought not to consider competition as an end in itself is not unanimous. See, e.g., Fox, “Antitrust, competitiveness, and the world arena: efficiencies and failing firms in perspective”, 64 Antitrust L.J. 725, 728 (1996); “The U.S. antitrust laws protect not competition, not efficiencies, although efficient markets and efficient competitors are expected products of the system.”

\(^3\) See infra, p. 21, for discussion on the definition(s) of the term “economic efficiency”.

\(^4\) For an illuminating historical account of economists’ attitudes towards competition law, see: DiLorenzo & High, “Antitrust and competition, historically considered”, 26 Econ. Inq. 423 (1988).

\(^5\) On the distinction between the direct and the ultimate goals of competition law, see infra, p. 42.

\(^6\) See, e.g., Organization for Economic Co-operation and Development (OECD), Competition Policy and Efficiency Claims in Horizontal Agreements (Paris, 1996), p. 5: “There is wide consensus that the basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources – and thus efficient market outcomes – in free market economies.”; available at: http://www.oecd.org/dataoecd/1/4/2379526.pdf.

If, as asserted by certain commentators, economic efficiency were the sole or primary objective of competition law, then this paper would be brief, for the injection of non-efficiency concerns into competition law would simply be unacceptable (at least under most circumstances). However, in reality, competition law (as law in general) is not conceived and realized within a vacuum, but rather constitutes part of broader national and public policies, interests, strategies and priorities. Indeed, “antitrust law does not exist in a vacuum. It is not the sole expression of relevant public policies.” As commented, “competition policy can never be isolated completely from other public policy choices relevant to democratic societies.” Competition policy “is an expression of the current values and aims of society and is as susceptible to change as political thinking generally.”

Thus, for instance, “governments have occasionally used merger regulation as a tool to foster goals beyond the maintenance of market competitiveness.” Examination of the link between economic efficiency and non-efficiency objectives shows that, while such objectives are not necessarily inconsistent, at times preference of the latter is justifiable and even necessary.

Fortunately (or, unfortunately, depending on perspective), the views according to

---

8 The terms “non-competitive”, “non-competition”, “extra-competition”, “non-competition law proper” and “non-economic” are synonymous, in the context of this paper, with the term “non-efficiency”. Note that the paper refers to objectives and concerns not based exclusively upon efficiency-oriented analysis as "non-economic"; thus, for instance, mitigation of inflation, though obviously a macroeconomic concern, constitutes a "non-economic objective" in the context of this paper. Hovenkamp defines “non-economic” preferences as “goals that have nothing to do with the public welfare”; Hovenkamp, “Antitrust policy after Chicago”, 84 Mich. L. Rev. 213, 242 (1985).
13 See infra, p. 39.
which competition law should in fact embody non-efficiency objectives are stubborn, persistent and articulate. Accordingly, non-efficiency considerations constitute, to varying extents, part of competition law, policy and analysis in various jurisdictions.\textsuperscript{14} Government decisions and actions may embody a \textit{de facto} preference of non-efficiency objectives despite the \textit{de jure} supremacy of the efficiency objective, due, \textit{inter alia}, to pressure by interest groups; conversely, the explicit inclusion of non-efficiency objectives as an integral part of competition law does not necessarily lead to the pursuit and attainment of such objectives by the judiciary or the antitrust enforcement bodies.\textsuperscript{15} As Pitofsky (then Chairman of the U.S. Federal Trade Commission) observed, “the reality is that as a matter of prosecutorial discretion and even in some court decisions, prosecutors and judges will occasionally take social welfare considerations into account. The question is whether that is sound policy and if so, how it should be implemented.”\textsuperscript{16} Accordingly, the primary questions that the paper will address, then, are: when, how and by whom should the “gate” into competition law be opened so that non-efficiency considerations may enter? Ultimately, the validity of the argument according to which “economic

\textsuperscript{14} Owen, Sun & Zheng, “Antitrust in China: the problem of incentive compatibility”, \textit{1 J. Comp. L. & Econ} 123, 142 (2005): “virtually every country that has competition policy also has non-efficiency objectives.”


efficiency provides the only workable standard from which to derive operational rules and
by which the effectiveness of such rules can be judged”\textsuperscript{17} will be assessed.

The paper is organized as follows:

In \textbf{Part I}, the paper will explore, and critically analyze, the spectrum of theoretical
perspectives as to the objectives of competition law. In particular, the paper will
concentrate on analysis of the two “extreme” views: (a) the view according to which
economic efficiency is the paramount (or exclusive)\textsuperscript{18} value of competition law, and thus
there is little or no room for non-efficiency considerations;\textsuperscript{19} (b) the view according to
which economic efficiency is but one consideration among numerous competition law
objectives.\textsuperscript{20,21} Thus, the paper will seek to provide a theoretical-conceptual infrastructure

\textsuperscript{17} Baxter, “Responding to the reaction: the draftsman’s view”, 71 \textit{Cal. L. Rev.} 618, 621 (1983).
See also: Baxter, “The sole goal of antitrust is economic efficiency”, \textit{Wall Street Journal}, March 4,
\textsuperscript{18} Economic efficiency is rarely considered as the exclusive objective of competition law. See:
today, when influential voices are advocating that there is only one goal – and his name is
Economic Efficiency – what they really mean is that economic efficiency is the one goal, among
many, that should prevail.”
\textsuperscript{19} As one commentator expresses this approach, “there are those who believe that economic
efficiency is the only goal of antitrust; they doubt that non-economic social and political
considerations were ever meant to play a role in competition policy.” Johnson, “Current antitrust
goals and policies: how different are they really?”, 27 \textit{St. Louis U. L.J.} 321, 328 (1983).
\textsuperscript{20} Flynn describes such view as maintaining that economic analysis is a “useful tool, one of several
sources of insight to be relied upon in framing policy, to be weighed along with other sources of
knowledge, value choices and intuition.” Flynn, “Antitrust jurisprudence: a symposium on the
also: Sullivan, “The economic jurisprudence of the Burger Court's antitrust policy: the first thirteen
years”, 58 \textit{Notre Dame L. Rev.} 1, 2 (1982): “Economic analysis should be only one of many
components of the overall analysis. Noneconomic concerns in a given case may be as relevant as
economic efficiency.”
\textsuperscript{21} As Hovenkamp describes the two “extreme views”: “Broadly speaking, antitrust jurisprudents
have been divided into two camps: those who think that the efficient allocation of resources ought
to be the overriding or exclusive goal of antitrust policy, and those who would permit antitrust
policy to consider additional values unrelated to efficiency.” Hovenkamp, “Distributive justice and
competing goals for antitrust can be classified into two groups: social and economic. The social
that is necessary in order to analyze the status and weight of non-efficiency considerations within competition law. In this context, the centrality of economic efficiency within competition law will be demonstrated through the role of efficiencies analysis in merger control. Part I will also treat the “failing firm defense”, and analyze the interpretation and application of this defense as expressing, on one hand, the significance of non-efficiency, social, considerations (such as the interests of employees and creditors), and on the other hand, the efficiency objective (in that efficiency dictates that the failing firm be sold to a competitor rather than be disintegrated).

Following the general discussion regarding the objectives of competition law, and in order to concretize analysis, the paper will venture to explore the specific perspectives on this matter in five jurisdictions. In addition, the paper will draw special attention to the unique role of non-efficiency objectives in developing countries.

Part II will be devoted to analysis of the practical aspects and challenges that assessment and implementation of non-efficiency objectives entail and that affect the establishment and application of an analytical structure for consideration of non-efficiency objectives within competition law. Such analysis will map the advantages, disadvantages, and points of strength and weakness, of attributing significance and weight to non-economic objectives. The relative strength, if any, of an efficiency-oriented analysis will be assessed.

Part III will be devoted to suggesting a general framework for coherent and workable assessment and implementation of non-efficiency objectives within competition

goals include a desire for a fair or equitable marketplace and a desire for limits on the political power of business. The economic goals include economic efficiency and 'individual market' consumer welfare.” Morris, “International trade and antitrust: comments”, 61 U. Cin. L.R. 945, 945 (1993).
law. The framework will be suggested on the basis of the theoretical and actual relationships between such objectives and economic efficiency, taking into account the pragmatic issues as presented in Part II. As will be argued, non-efficiency objectives should – to varying degrees along the axes of time, place and circumstances - play a meaningful role in competition analysis. Ultimately, the primary assertion of the paper will be that competition law, policy, and analysis ought to consistently strive to outline the contours of those axes, in an attempt to find the point (or points) of balance between non-efficiency objectives and economic efficiency. Such contours should be drawn primarily on the basis of the potential adverse effects of the restrictive trade practice upon efficiency, as compared to the potential public benefit that may stem from the practice, as well as upon the social, political, economic and other circumstances that prevail within the jurisdiction that is the subject of analysis.

As will be asserted, even the staunchest supporters of economic efficiency as the primary or absolute goal of competition law would necessarily concede that under certain circumstances, non-efficiency considerations justify departure from strict efficiency analysis. Part IV of the paper will explore two such circumstances. Since the objectives that may be considered as “non-efficiency objectives” are numerous, the paper will focus

22 Primary non-efficiency objectives and considerations that have gained recognition include:
(b) Protection of national champions. See: ABA, supra note 17, p. 15.
(d) Fairness. See: Areeda & Hovenkamp, supra note 9, p. 105ff.
on two such objectives – protection of small business and employment - the application of which has not only been the subject of comprehensive analysis, but which also possess a “generic” nature in that they reflect the various dilemmas, difficulties and challenges that analysis of non-efficiency objectives entails. In this respect, the paper will explore the legal status of these objectives and the influence thereof upon competition policy within various jurisdictions.

The potential significance of the paper is both academic and pragmatic:

The potential academic significance of the paper stems from the fact that the economic efficiency objective reigns (today more than ever) over competition law discourse and scholarship; achievement of objectives that are extraneous to efficiency is usually left to other fields of law. The paper, in presenting non-efficiency objectives and insisting that such objectives do not constitute “pure intellectual mush” or a “cornucopia

(e) Self-regulation by collective bodies, such as bars and professional sport clubs. See, e.g., Schweitzer, supra note 10, p. 3; Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Havighurst, “A comment – the antitrust challenge to professionalism”, 41 Md. L. Rev. 30 (1981).


Panel Discussion: Merger Enforcement and Practice, 50 Antitrust L.J. 233, 238 (1982) (comments of Bork). See also: Bork, “Contrasts in antitrust theory: I”, 65 Colum. L. Rev. 401, 415 (1965); “the political and social values mentioned in connection with antitrust usually turn out to be
of social values"\textsuperscript{24} and should assume a respectable role within competition law, thus presents a unique perspective, aiming to solidify a comprehensive and coherent account – through thorough theoretical analysis and empirical study of legal systems in both industrial and developing countries - of objectives that usually shy away from the spotlight of competition law, as well as to suggest a plausible framework for analysis and assessment of such objectives.

The paper potentially possesses pragmatic significance as well. Since policy makers, legislators, judges and antitrust enforcement agencies are in fact influenced (whether openly or tacitly) by non-efficiency considerations, then making sense of the alleged "mush" and "cornucopia" and suggesting a coherent framework for implementation of such considerations are of particular significance. Different objectives may lead to different analyses, results and even “perception of the facts relied upon to prove or disprove an antitrust violation”;\textsuperscript{25} comprehension of the significance attributed to non-efficiency objectives within any jurisdiction is thus invaluable to the coherent and effective interpretation and implementation of competition law within such jurisdiction. The following two examples demonstrate this point. First, if the primary goal of competition law were the protection of small business and decentralization of political and economic power (as was the case in early U.S. antitrust law)\textsuperscript{26}, then the formation or strengthening of market power would be of greater concern than if the primary goal were economic


\textsuperscript{25} Flynn, \textit{supra} note 20, p. 1188.

\textsuperscript{26} See \textit{infra}, p. 130.
efficiency.\textsuperscript{27} Second, competition policy in developing countries often stresses non-economic, social, objectives;\textsuperscript{28} over-emphasis upon economic efficiency in developing countries would thus inevitably lead to frustration of such policy.

\textsuperscript{27} This example also demonstrates the conflict that may arise between the efficiency objective and protection of small business. See Trebilcock \textit{et al.}, \textit{The Law and Economics of Canadian Competition Policy} (Toronto, ON: University of Toronto Press, 2\textsuperscript{nd} ed., 2003), p. 39.

\textsuperscript{28} See \textit{infra}, p. 83.
Part I – The Objectives of Competition Law

General

“Whether antitrust policy promotes, or should promote, social goals other than efficiency and competitive markets deserves some thought because it lies at the root of so much controversy in antitrust.”

Any discussion regarding the status and weight of non-economic considerations must be based upon familiarity with the objectives of competition law in general. As Bork asserts,

Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law - what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be governed by one value or by several? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.

And as observed by the American Bar Association -

The policy objectives that underlie the application and enforcement of antitrust or competition laws are important for several reasons and are not simply of academic interest:
1. They inform the enforcement and application of the law.
2. They help identify and explain differences in legal standards and outcomes in individual cases.
3. They increase transparency and facilitate reasoned debate to the extent that they make explicit the rationales for decisions in individual cases.

Indeed, “the significance of the debate [regarding the goals of antitrust law] far
exceeds intellectual titillation for the inhabitants of the academy, as practical ramifications are involved: “without identifying and understanding the goal of antitrust, the courts and federal antitrust agencies cannot apply the laws in a fashion consistent with the goal, and practitioners cannot accurately evaluate the strength of their clients' cases or convincingly argue the merits of such cases.” Thus, great significance is attached to the exploration of whether competition law “strive[s] to achieve moral goals [or carries] any moral baggage other than the promotion of competition.”

Moreover, understanding the objectives of competition law in the specific legal system that is examined is of utmost importance, since the degree to which non-economic goals are implemented is dependent upon the objectives that guide competition law within that legal system. Indeed, “it is noteworthy that in determining the scope of application of broader social values within the antitrust regime, one must be sensitive […] towards the special circumstances and underlying policy objectives of the specific competition policy.” In this context, attention is turned to the fact that the “objectives of competition laws vary widely from one jurisdiction to another […] parallel objectives, possibly conflicting with that of economic efficiency or consumer welfare, are present in many competition laws.”

Much ink has been spilled on the issue of the objectives of competition law, and the

32 Flynn, supra note 20, p. 1187.
33 Calvani, supra note 30, p. 8.
debates are lengthy and vigorous. Since “competition law is infused with tension,” the debate over the legitimate goals of antitrust is ceaseless,” and “considerable dispute over the goals of the antitrust laws has surfaced in scholarly commentary on the subject.” As observed, “the respective weights and priories attached to [...] objectives of competition policy have remained largely ambiguous and hence are the subject of intense debate. The inherent conflicts between some of these objectives heighten the controversy.” Clearly, the objectives of competition law are unclear, perhaps primarily since most competition laws do not expressly define the objectives upon which they are based, and since these

40 Lande, supra note 22, p. 67.
42 Canada constitutes a notable exception. See infra, p. 79. The Japanese Antimonopoly Act 1947 (Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade) also includes a “purpose clause” (Article 1), according to which “the purpose of this Act is [...] to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development”; available at: http://www.jftc.go.jp/epage/legislation/ama/amended_ama.pdf. According to Article 2 of the Trade Practices Act 1974 (Australia), “the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.” See also: United Nations Conference on Trade and Development (UNCTAD), Model Law on Competition – draft
objectives are both “political and cyclical”, and thus change over time, circumstance and place.

Ultimately, the views regarding the objectives of competition law “each reflects a normative judgment about what antitrust should do.” The views are rooted far deeper than competition law, and correlate, to a significant degree, with views regarding the appropriate role of government in the regulation of economic activity, as well as with views regarding the appropriate role of economic analysis in the formation and implementation of legal doctrines, standards and rules. For instance, the approach to government intervention in the market may influence the view regarding the objectives of competition law: conservative and libertarian views are associated with support for minimal government intervention, and thus correspond with the view according to which the exclusive objective of competition law should be efficiency, since “if the job of antitrust is, and is only, to prohibit transactions that impair efficiency, then government interference with private business transactions is minimized.” In contrast, the liberal view distrusts aggregations of corporate power, and thus corresponds with concern for non-efficiency objectives such as the welfare of small business and dispersion of power.


43 Hovenkamp, supra note 8, p. 213.
47 Fox, supra note 45, p. 1156.
Also, traditional economic theory focuses on the “deadweight loss”\textsuperscript{50} suffered by the economy as a result of the creation, enhancement or abuse of market power (\textit{e.g.} output restriction and price increase), while ignoring the distributional or equity consequences of such abuse;\textsuperscript{51} “importation” of such theory into competition law adversely affects the attribution of weight to non-economic, social, considerations. Conversely, “introduction of non-economic values may be threatening or bothersome to individuals attempting to apply economics. The non-economic values are foreign matter, and the discipline rejects them.”\textsuperscript{52} As explained below,\textsuperscript{53} even income distribution, while quantifiable in essence, is rejected as a legitimate objective by proponents of efficiency as the paramount objective of competition law.

The discussion proceeds as follows: first, description and analysis of the definition and nature of economic efficiency are provided; the significance of efficiency analysis within competition law is exemplified by the role of efficiencies in merger control. Then, account of the interaction between efficiency and non-efficiency concerns is presented, both at the general level and through examination of a specific example (the failing firm doctrine). Thereafter, the objectives of competition law within five jurisdictions are presented and analyzed.

\textbf{Economic Efficiency: Definition and Nature}

For proponents of efficiency as the primary objective of competition law, efficiency is not

\textsuperscript{50} As explained by Trebilcock \textit{et al.}, \textit{supra} note 27, p. 148, n. 23, “the ‘dead-weight loss’ associated with a price above marginal cost is the loss in total surplus in the market relative to the case where price equals marginal cost.”

\textsuperscript{51} See \textit{infra}, p. 24.

\textsuperscript{52} Fox, \textit{supra} note 45, p. 1156.

\textsuperscript{53} \textit{Infra}, p. 24.
perceived merely as the desirable by-product of the competitive process, but rather as the very goal of such process. As one commentator asserted, “it needs to be remembered that the goal is efficiency, not competition. The ultimate goal is that there be efficiency.”

Indeed, the very raison d’être of competition law is perceived by certain commentators to be the promotion of economic efficiency, though “the spectrum of views as to how antitrust should produce or conduce to efficiency is nearly as wide as the spectrum of views as to what ends antitrust should serve.”

Efficiency is “a slippery and value laden term,” and there is “no consistent approach to efficiency.” Nonetheless, since the basic premise of the paper is examination of the relationships between economic efficiency and other, non-efficiency, objectives of competition law, exposition of the former is in order. Indeed, “before anyone can form an opinion about the role that efficiency ought to play in antitrust law, she must have some relatively precise idea about the meaning of efficiency.”

---

54 Summers, “Competition policy in the new economy”, 69 Antitrust L.J. 353, 358 (2001). Compare with: Fox, supra note 45, p. 1180: “Efficiency’ is not an ultimate goal. It is an intermediate goal pursued in order to facilitate freedom of choice, to serve other interests of consumers, and to make the best use of society’s resources.” See also: Public Interest Advocacy Centre (Canada), Response to “Treatment of Efficiencies in the Competition Act” (2004), p. 3; available at: http://www.piac.ca/consumers/piac_response_to: “Considering efficiency as a goal in itself is analogous to accumulating gold and other forms of money for their own sake.”

55 Fox, supra note 45, p. 1152.

56 Id., p. 1157.


59 Hovenkamp, supra note 21, p. 29.
Economic theory discerns between three primary types of efficiency.60 Productive (or supply-side, or technical) efficiency refers to minimization of the cost of production or, in other words, the ratio between the output and input of a firm.61 Allocative (or demand-side) efficiency, which is considered as the most important type of efficiency in competition law, refers to the use and assignment of resources in the manner that best serves society; such efficiency is said to exist once resources are allocated in such manner that no rearrangement of such resources would improve welfare.62 In addition to these “static” efficiencies, economic theory also refers to dynamic efficiency, that is, the process whereby prices are lowered and quality is improved over the long-run, as a result of competition between rivals that induces innovation and the introduction of new products or new production processes.63 While static efficiencies focus on the maximization of output and resource allocation at a given point in time, dynamic efficiency focuses on the impact of innovation, technical progress and investment over time.64 Certain proponents of economic efficiency as the primary objective of competition law stress the importance of

62 See Fox, supra note 45, p. 1160: “Allocative efficiency is an ideal state. It contemplates that all resources across all markets in the economy are allocated to their best use in view of consumer wants and willingness to pay the price it costs society to make and distribute the goods.”
static efficiency,\textsuperscript{65} while others stress the central role that dynamic efficiency should play in the implementation of competition law,\textsuperscript{66} particularly in developing countries.\textsuperscript{67} The differences between proponents of static and dynamic efficiency are not merely semantic: while the former focus on short-term cost savings (such as mergers may yield), the latter prefer long-term innovation (and thus, for instance, are more apprehensive as to mergers that reduce the number of firms engaging in the pursuit of innovation). As observed, “the simultaneous pursuit of dynamic and static efficiency involves trade-offs.”\textsuperscript{68} In addition, the simultaneous attainment of the two types of static efficiency - productive and allocative - may be difficult, if not impossible; for instance, a merger may increase productive efficiency (due to scale economies) while reducing allocative efficiency (by causing price increase).

The assertion that efficiency should be the primary objective of competition law is not entirely workable without addressing the question regarding the desirable result of such economic efficiency.\textsuperscript{69} According to one approach, efficiency should maximize consumer surplus, that is, the difference between the price consumers in a market collectively pay for a product and the price such consumers would be willing to pay over and above the

\textsuperscript{66} See: Fox, supra note 45, p. 1149.
\textsuperscript{68} Graham & Richardson, Global Competition Policy (Washington, DC: Peterson Institute, 1997), p. 8. See also: Van den Bergh & Camesasca, European Competition Law and Economics: A Comparative Perspective (Antwerp, Netherlands: Intersentia, 2001), p. 5: “the different efficiency goals are not entirely consistent with each other.”
\textsuperscript{69} In addition, views differ as to the manner by which efficiency should be assessed within the context of competition law. See Fox, supra note 45, p. 1158. See also: Heyer, Welfare Standards and Merger Analysis: Why not the Best? (Economic Analysis Group, Discussion Paper, 2006); available at: http://www.abanet.org/antitrust/at-source/pdf/references/heimer-ken-06-8.pdf.
Efficiencies, according to such approach, should be pursued only if passed on (at least partly) to consumers, rather than captured entirely by firms. According to another approach, efficiency should maximize *producer surplus*, that is, the difference between the price that producers in a market collectively receive for their products and the sum of those producers’ respective marginal costs (including normal profit). According to yet another approach, efficiency should maximize *total surplus* (or social welfare), that is, the sum of consumer surplus and producer surplus. The competition laws of most countries focus on consumer surplus. For instance, in the U.S., the Horizontal Merger Guidelines provide that “the Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, *e.g.*, by preventing price increases in that market.” In the E.U., the Merger Regulation provides that the Commission, in appraising concentrations, shall take into account, *inter alia*, “the development of technical and economic progress provided that it is to consumers’ advantage.”

---


employed - constituting a notable exception to such focus upon consumer surplus. The debate among proponents of the different approaches is substantial. Nevertheless, the relevance of the debate concerning the desirable result of economic efficiency to this paper is inconsiderable; the different approaches share a common ground, that is, the primacy of efficiency analysis in competition law, while the paper seeks to undermine the concept of such primacy.

The efficiency objective is generally associated with disregard for the distributional or equity ramifications of competition law. The crowning of efficiency as the queen of competition law is linked to the traditional (and prevalent) economic approach to market power, which concentrates on the “aggregate deadweight loss” as expressed by allocative (in)efficiency in terms of Pareto improvements. In other words, efficiency analysis is concerned with increasing the size of the (economic) pie, rather than ensuring the fair division of the pie (“Kaldor Hicks” efficiency). Thus, Bork, a prominent representative of the efficiency-oriented Chicago School, maintains that “it seems clear [that] the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity.” Posner, another prominent Chicagoist, asserts that the “‘wealth-distribution’ argument […] has no implications for the content of antitrust policy.” Hovenkamp maintains that “antitrust has no moral content and is unconcerned about the distribution of wealth.” Nevertheless, Elzinga asserts that

---

75 See infra, p. 36.
76 That is, movements from one allocation to another that can make at least one individual better off without making any other individual worse off.
77 See infra, p. 50.
78 Bork, supra note 24, p. 111. See also id., p. 90: “Antitrust thus has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed or used.”
equity considerations - primarily regarding income redistribution - may play a central role in efficiency analysis: “economists have endeavored to make the case for income redistribution on objective terms. In these analyses, the concept of efficiency encompasses the maximization of economic welfare, not just the value of total output, and includes attaining an optimal distribution of income. Equity is central to the analysis.”\textsuperscript{81} The relationship between economic efficiency, on one hand, and equity and distributional concerns, on the other hand, is of relevance to the paper since non-efficiency objectives are based, to a substantial extent, upon the latter. Since the relationship (notwithstanding Elzinga’s view) is one of alienation, if not outright hostility, the view according to which efficiency should constitute the exclusive or primary objective of competition law would seem to be based not merely upon the premise that efficiency is preferable as the objective of competition law, but also upon the notion that efficiency is the only acceptable objective. As explained below, the disregard for equity concerns that the efficiency objective entails has led to the argument that such objective is apolitical.\textsuperscript{82}

Admittedly, economic efficiency, within the context of competition law, possesses a certain allure.\textsuperscript{83} Indeed, the very word “efficiency” has “a tremendous emotional impact – how can one be against efficiency?”\textsuperscript{84} The allure of efficiency is emphasized by the widespread acceptance of economic analysis.\textsuperscript{85} Unsurprisingly, “the conventional wisdom

\textsuperscript{81} Elzinga, \textit{supra} note 15, p. 1193.
\textsuperscript{82} \textit{Infra}, p. 112.
\textsuperscript{83} On the role of efficiency in legal analysis, see generally: “Symposium on efficiency as a legal concern”, \textit{8 Hofstra L.R.} 485ff (1980).
\textsuperscript{84} First, \textit{supra} note 57, p. 963.
\textsuperscript{85} Areeda & Hovenkamp, \textit{supra} note 9, p. 119. See also: Williams, \textit{Competition Policy and Law in China, Hong Kong and Taiwan} (Cambridge, UK: Cambridge University Press, 2005), p. 34: “In competition law, the explicit reference to economic theory is obvious and the use of economic analytical tools in reaching administrative or judicial decisions is absolutely embedded in the practices of competition authorities and courts worldwide.”
in the antitrust community today is that the antitrust laws were passed to promote
economic efficiency.”

Posner observes that “almost everyone professionally involved in
antitrust today – whether as litigator, prosecutor, judge, academic, or informed observer […] agrees that the only goal of the antitrust laws should be to promote economic welfare”, by which Posner means “the economist’s concept of efficiency.” Indeed, “during recent years most jurisdictions have seen a remarkable trend toward a significant narrowing of competition law objectives in the direction of a more economic based analysis, according ever greater weight to economic efficiency and consumer benefit.”

Among OECD countries, “there appears to be a shift away from the use of competition laws to promote […] broad public interest objectives.” As a study by the United Nations Conference on Trade and Development (UNCTAD) indicated, “the trend is towards relatively greater emphasis upon competition, efficiency and competitiveness objectives.” The view of the International Chamber of Commerce (ICC) is that “in general, non-competition factors should not be applied in antitrust merger review.”

In my opinion,

87 Posner, supra note 79, p. ix.
91 UNCTAD, The Basic Objectives and Main Provisions of Competition Laws and Policies (1995), p. 2; available at: http://wwwunctadorg/en/docs/poitd_15enpdf. See also id., p. 6: “Competition systems in many countries are now placing relatively greater emphasis upon the protection of competition, as well as upon efficiency and competitiveness criteria, rather than upon other public interest goals.”

21
the “allure” of economic efficiency, as well as the gradual adoption of such as the primary objective of competition law by a growing number of jurisdictions, do not obviate the need for a thorough and critical assessment, as provided by this paper, of the primacy of the efficiency objective and of the appropriate role for non-efficiency objectives within competition law.

Despite the “allure” of the efficiency objective, the view according to which non-efficiency objectives should play an important role within competition law is persistent. As asserted, “efficiency as a policy objective relates only to ensuring the best possible use of factors or outputs of production. Not only are other policy objectives important, but they often take precedence over efficiency considerations.”\(^{93}\) First asserts that “there is something less than overwhelming about constructing an entire body of law around the sole notion that […] a consumer’s desires should be maximized.”\(^{94}\) Fox maintains that “if the antitrust laws were to be applied only to achieve provable efficiency gains, then antitrust law would require a searching reexamination and major overhaul, perhaps even repeal.”\(^{95}\) Porter argues that “by relying too heavily on narrowly conceived consumer welfare theory, antitrust analysis may be overlooking some of the most important benefits of competition for society. Antitrust is not living up to its full promise in deterring behavior that is not in society’s interest.”\(^{96}\) Pitofsky urges that an exclusively economic approach to antitrust law would lead to market domination by few corporate giants, thus


\(^{94}\) First, supra note 57, p. 965.

\(^{95}\) Fox, supra note 45, p. 1141.

inevitably increasing governmental market intervention.\textsuperscript{97} Stucke suggests that the multiple objectives of antitrust constitute a reason to “rejoice”: “rather than consider these multiple goals as an obstruction to achieving an idealized competition policy, these multiple goals reflect the various stakeholders’ interests and concerns, which they want addressed.”\textsuperscript{98} In addition, Stucke maintains that “competition policy is sufficiently vibrant to have multiple and evolving goals of varying priority, not all of which need to be consistent.”\textsuperscript{99}

The foregoing statements refer, \textit{in general}, to the desirability of non-efficiency concerns within the realm of competition law, and are thus applicable to any and all such concerns; Part IV includes discussion on the desirability of two specific non-efficiency goals, namely protection of small business and employment.

In addition to academic support for the inclusion of non-efficiency objectives in antitrust analysis, both courts and legislatures in fact attribute importance to such objectives. At this stage, general observations that derive from the judicial and legislative approach towards non-efficiency goals ought to be presented:

\textbf{First}, if legislatures opposed the attribution of weight to non-efficiency considerations, then competition laws would be enacted or amended so as to provide exclusivity (or, at the least, primacy) to economic efficiency analysis. The fact that competition laws do \textit{not}, for the most part, afford such exclusivity (or primacy) strengthens the view according to which non-economic considerations should play a role within

\textsuperscript{97} Pitofsky, \textit{supra} note 22, p. 1051. See also: Blake & Jones, \textit{supra} note 22, p. 383: “antitrust operates to forestall combinations of economic power which, if allowed to develop unhindered, would call for much more intrusive governmental supervision of the economy.”


\textsuperscript{99} \textit{Id.}, p. 52.
competition law. As Scherer comments on the “monolithic efficiency approach” embraced by Posner, “if the courts have strayed beyond the bounds of the efficiency criterion Professor Posner considers so important, and if this is not what Congress wants, one wonders why Congress has not intervened”. In this respect, Hovenkamp observes that “of course, Congress could rewrite the antitrust laws and make concerns for efficiency express, but it has not done so. In fact, the widely proclaimed Chicago School’s revolution’ has pretty much passed Congress by.”

Second, non-economic objectives explicitly constitute the ground – either exclusively or jointly with efficiency considerations - for competition laws. Such laws are passed by representative politicians, not economists. As maintained, “although economic analysis provides valuable insights into business dynamics and the probable effects of a commercial practice in the marketplace, economics is not law.” Since “law is a human institution designed to fulfill human aspirations,” competition law ought to take account of all aspirations, whether or not they pertain to economic efficiency. The pursuit of consumer welfare through economic efficiency is based upon the premise that the market constitutes the sole place for expression of public preferences, thereby ignoring the important role that the political process plays in this respect: “we cannot call a result

100 The concept of “competition policy” is wider than the concept of “competition law”. “Competition policy” refers to “the measures taken by any government to promote market structures and regulate market behavior. As the principal legislative for furthering this, a competition policy encompasses within it a system of competition law.” Van Rompuy, The Place of Non-competition Considerations in EC Antitrust and Merger control in the Audiovisual and Telecommunications Sectors; available at: http://www.ies.be/files/070220%20VanRompuy_research_set_up.pdf.
102 The Chicago School considers economic efficiency to be the exclusive objective of antitrust law. See infra, p. 50.
103 Hovenkamp, supra note 8, p. 250.
104 Khemani, supra note 41, p. 5.
105 Flynn, supra note 20, p. 1186.
efficient if it only satisfies the desires of citizens as consumers” and “we cannot ignore preferences that have been registered politically but do not show up in a calculation of marketplace efficiency.” As Schweitzer maintains, “the ‘pure’ view of competition policy oriented towards efficiency only incompletely reflects the reality of the plurality of legal institutions which frame the competitive process and influence it.” Hovenkamp asserts that “the [market efficiency] model fails to account for preferences that people do not express with their dollars – for example, a distrust of large concentrations of economic or political power in private hands, or perhaps even a preference for more expansive opportunities for small business.” Hovenkamp further explains that disregarding such preferences is “irrational”, as political dialogue indicates that the public places value upon such preferences. Thus, disregarding the significance of non-economic objectives is, in fact, equivalent to ignoring democratic ideals and process, and may undermine public confidence in competition law. Indeed, “to say that […] political goals do not count leads to an antidemocratic interpretation of the antitrust laws.” Since the influence of competition law upon society in general, and commerce in particular, is profound, and due to the myriad stakeholders affected by antitrust legislation and decisions, political reality dictates that the consideration of an exclusive goal (e.g. efficiency) would often be unfair or outright impossible. As Stucke asserts, “inoculating a competition policy’s objectives

106 First, supra note 57, p. 966.
108 Hovenkamp, supra note 8, p. 241.
109 Id., p. 242. See also: Hovenkamp, supra note 21, p. 4: “the goals of antitrust policy must be as manifold as our citizens’ convictions. […] economists must yield when democratic processes of consent call for more distributive policies.”
110 Burns, “Vertical restraints, efficiency and the real world”, 62 Fordham L. Rev. 597, 628 (1993): “To the extent society views antitrust law as out of touch with the real world, the public’s confidence in and respect for the law will be lost.”
from populism is to inoculate it from democracy”\textsuperscript{112} and “competition policy in a democracy will never be captured by a single economic goal.”\textsuperscript{113} Indeed, “for better or worse, economic policy has to accommodate – or appear to accommodate – the prejudices, hopes, fears and crass self-interest of people who count in politics”.\textsuperscript{114}

**Efficiencies in Merger Control**

The central role of efficiency analysis within competition law is perhaps most clearly demonstrated by the significance attributed to efficiencies in merger control.\textsuperscript{115} The significance stems from the fact that efficiency constitutes the primary motivation for mergers. Indeed, “the potential for increased efficiency is a common motivation for firms to merge.”\textsuperscript{116} As clearly articulated in the U.S. Horizontal Merger Guidelines, “mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.”

---

\textsuperscript{112} Stucke, *supra* note 98, p. 48.

\textsuperscript{113} *Id.*, p. 52.


Mergers may promote static efficiencies (e.g. productive efficiency through economies of scale), as well as dynamic efficiencies by fostering innovation.\textsuperscript{118}

Nevertheless, tension may exist between the promotion of efficiencies through mergers and the effect of mergers upon competition. The tension may be described briefly as follows: on one hand, mergers allow firms to reach a size that facilitates efficient economic activity (such as through realization of economies of scale); on the other hand, mergers reduce the number of competitors within a given market, thus undermining competition.\textsuperscript{119}

The tension as aforesaid is often resolved in favor of efficiencies. The significance thus attributed to efficiencies within the context of mergers is expressed either by treatment of efficiencies as a factor in determining whether a merger is anti-competitive (“factor approach”) or as an exception that justifies a merger found to be anti-competitive (“efficiency defense”).\textsuperscript{120} Comprehensive description and discussion on efficiencies analysis within merger control venture beyond the scope of this paper.\textsuperscript{121} However, an understanding of the status of non-efficiency objectives of competition law requires an understanding of the pivotal importance of efficiencies analysis. Therefore, a brief account

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{117}]Horizontal Merger Guidelines, supra note 72, id. See also, id.: “Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”
\item[\textsuperscript{118}]Katz & Shelanski, “Mergers and innovation”, 74 Antitrust L.J. 1 (2007).
\item[\textsuperscript{119}]See Everett & Ross, supra note 2, §1.2.3: “If a merger combines two small firms, allowing them to realize significant efficiencies through economies of scale, it could well lead to lower prices […] by turning them into a much more powerful competitor for the established larger firms. On the other hand, if the merger reduces the number of vigorous competitors or eliminates a particularly effective competitor, it could certainly reduce the competitiveness of the market.”
\item[\textsuperscript{120}]For discussion on the “efficiency offense”, see: Kolasky & Dick, supra note 63, p. 211.
\end{enumerate}
\end{footnotesize}
of the role efficiencies play within the merger review of five jurisdictions follows below.

For the sake of coherence, the five jurisdictions discussed within the context of the objectives of competition law are also discussed below.

In the United States, the language and legislative history of the antitrust statutes provide no guidance as to the role of efficiencies in merger analysis. The Supreme Court was initially reluctant to afford significance to efficiencies in merger analysis. As the Court set forth in the Procter & Gamble case, “possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.” Eventually, though, the Courts recognized the central role of efficiencies in antitrust analysis. A similar progression was evident in the Merger Guidelines: while the 1968 Merger Guidelines included only a narrow recognition of the efficiency defense, the

122 Infra, p. 47ff.
125 Id., p. 580. See also: Brown Shoe Co. v. United States, 370 U.S. 294 (1962); U.S. v. Philadelphia National Bank, 374 U.S. 321, 371 (1963): “a merger the effect of which may be substantially to lessen competition is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial […] Congress was determined to preserve our traditionally competitive economy. It has therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.”
126 See infra, p. 50. The U.S. Courts of Appeals and District Courts have also considered, and at times accepted, the efficiencies defense. See Kolasky & Dick, supra note 63, p. 232-235.
1984 Guidelines transposed efficiencies [...] into an integral part of the competitive effects analysis, the 1992 Guidelines lowered the standard of proof for efficiency arguments, and the 1997 revision introduced “tools [the Department of Justice and the Federal Trade Commission] had developed to evaluate efficiency claims.” The Guidelines provide a defense for an otherwise illegal merger that “may be reasonably necessary to achieve significant net efficiencies”, unless “equivalent or comparable savings can reasonably be achieved by the parties through other means.” Efficiencies are usually recognized by case law only if passed on the consumers in the form of price reduction.

In the European Union, Article 81(3) EC provides that efficiencies may justify an anticompetitive agreement, decision or practice, by setting forth, as the first positive requirement for an exemption, “improvement in the production or distribution of goods or in technical and economic progress.” The Merger Regulation provides that the Commission, in appraising concentrations, will take account of the “development of technical and economic progress provided that it is to consumers’ advantage and does not

---

129 Kolasky & Dick, supra note 63, p. 209.
130 Horizontal Merger Guidelines, supra note 72. See Part IV.
131 Id.
132 Kolasky & Dick, supra note 63, p. 209.
134 See, e.g., FTC v. HJ Heinz Co., 246 F.3d 708, 720 (DC Cir., 2001); U.S. v. Long Island Jewish Medical Center, 983 F.Supp. 121, 147, 149 (EDNY, 1997); U.S. v. Rockford Memorial Corp., 717 F.Supp. 1251, 1289 (ND Ill., 1989, aff’d 898 F.2d 1278 (7th Cir., 1990)).
136 See infra, p. 66.
form an obstacle to competition. Recital 29 of the Regulation explicitly reserves a place for efficiency analysis in merger control. Section VII of the Guidelines on the assessment of horizontal mergers sets forth the terms for consideration of efficiencies, the most important of which are that “the efficiencies […] benefit consumers, be merger-specific and be verifiable.”

In Canada, competition law is unique in providing for a statutory efficiency

---


138 Under the former European merger regime, pursuant to the 1989 Merger Regulation (Council Regulation (EEC) 4064/89 on the control of concentration between undertakings, O.J. (1989) L 395/1 (30.12.1989)), the role of efficiencies analysis in the E.U. was rather unclear. While the 1989 Regulation also referred to “development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition”, the role of efficiencies remained vague. The Commission addressed the influence of efficiencies upon merger analysis in the de Havilland decision (Aérospatiale-Alenia/de Havilland, Case IV/M.053, [1991] O.J. L334/42) and did not rule out the possibility that efficiencies may be relevant for assessment under Article 2 of the 1989 Merger Regulation (Id., p. 65. See also: AT&T/NCR, Case IV/M.050 [1991]; Accor/Wagon-Lits, Case IV/M.126, [1992] O.J. L204/1). Nevertheless, the Commission did not demonstrate a consistent approach to the efficiency defense. See Noël, “Efficiency considerations in the assessment of horizontal mergers under European and U.S. antitrust law”, 8 Eur. Comp. L. Rev. 498, 552-3 (1997); Everett & Ross, supra note 2, p. 46ff. Under the new merger regime, the picture is clearer, as per Recital 29 of the 2004 Merger Regulation and the Guidelines on the assessment of horizontal mergers.

139 According to Recital 29 of the Merger Regulation, supra note 73, “in order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration 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.”


141 Id., §78.

142 See also: Kocmut, The Role of Efficiency Considerations Under the EU Merger Control (The University of Oxford Centre for Competition Law and Policy), available at: http://www.competition-law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%202009-05.pdf.
defense. Section 96 of the Competition Act provides for an efficiency exception (defense), and sets forth that the anticompetitive effects of a merger will be balanced against the efficiency gains of such merger. If the efficiency gains, which must be merger-specific, are greater than and offset the effects of any prevention or lessening of competition as a result of the merger, than the Competition Tribunal must allow such merger to proceed. According to Canadian competition jurisprudence that prevailed until the Superior Propane decisions, the anti-competitive costs with which efficiency gains were to be compared according to Section 96 referred to the total surplus standard (the sum of consumer and producer surplus). Under such standard, only the “deadweight loss” to the economy as a result of the merger is considered, while “the wealth likely to be transferred from consumers to producers as a result of the merger is not considered to be an anti-competitive effect, because such a transfer is neutral: that is, it neither increases, nor decreases total societal wealth.” The Superior Propane merger case, the only instance in which a merger was allowed to proceed in Canada based on the efficiency defense, altered this state of affairs. In the first decision rendered by the Federal Court of Appeal in this case, the Court rejected the total surplus standard. Rather, the Court promoted the “balancing weights approach” (suggested by Professor Peter Townley)

---

144 According to Section 96(1) of the Act, the gains in efficiency that may be considered are those that “would not likely be attained if the order [under Section 92, to dissolve or restructure a completed or proposed merger] were made.”
145 The Act provides no guidelines as to the manner by which such trade-off is to be performed.
146 See: Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289 (Competition Trib.).
147 See supra, note 50.
148 Canada (Commissioner of Competition) v. Superior Propane Inc. and ICG Propane Inc., 2001 F.C.A. 104, par. 47. See also: Trebilcock et al., supra note 27, p. 147.
149 Superior Propane, supra note 148, id.
for the purposes of Section 96. According to such approach, “weights are assigned to
producer and consumer losses and gains, based upon the composition of these two groups
and other factors, in order to reflect societal attitudes toward equity among different
income classes.”\textsuperscript{150} Thus, this approach provides for consideration of broad, “socially
adverse”,\textsuperscript{151} effects brought about by a merger and the wealth transfer from buyers to
sellers caused thereby, including non-economic considerations such as protection of small
and medium enterprises, and the balancing of such effects against efficiency gains of the
merger.\textsuperscript{152}

Pursuant to Section 96, efficiency gains come into play after a merger has been
found to be anticompetitive (efficiency defense). Efficiency gains may also constitute part
of the competitive effects analysis (\textit{i.e.} analysis of whether a merger is anti-competitive),
pursuant to Section 93 of the Act, which allows the Competition Tribunal to consider, “in
determining whether or not a merger or proposed merger prevents or lessens, or is likely to
prevent or lessen, competition substantially […] any other factor that is relevant to
competition in a market that is or would be affected by the merger or proposed

\textsuperscript{150} Holsten, “The Commissioner of Competition v. Superior Propane – the Tribunal strikes back”,
2002 \textit{Canadian Competition Record} 26, 31 (2002).
\textsuperscript{151} Economic Council of Canada, \textit{Interim Report on Competition Policy} (Ottawa: Queen’s Printer,
available at: \url{http://www.competitionbureau.gc.ca/epic/site/ch-
\textsuperscript{152} See: \textit{Merger Enforcement Guidelines}, supra note 151, \S\S 8.18: “The [anti-competitive] effects to
be considered are not limited to resource allocation effects and include all the anti-competitive
effects that are likely to arise from a merger, having regard to all of the objectives of the Act”
(emphasis added). See also \textit{id.}, \S\S 8.19: “The Bureau examines all relevant price and non-price
effects, including […] redistributive effects.” In addition, see \textit{id.}, \S 8.25ff; Gal, \textit{supra} note 35, Part
III(E): “Under the new [balancing weights] standard, the antitrust authority must balance between
economic efficiency and social goals such as distributive effects and loss of product choice, but
none of these factors would be assigned a fixed, a priori weight. Undoubtedly, this test significantly
increases the discretion of the antitrust authority to evaluate a merger on non-economic grounds
and it reduces the predictability of a legal outcome.” (emphasis added)
In the United Kingdom, efficiencies constitute a factor in the assessment of whether a merger substantially lessens competition. According to the merger guidelines of the Office of Fair Trading (OFT), the Office will take efficiencies that “increase rivalry in the market [...] into account in assessing whether a merger gives rise to any risk of a substantial lessening of competition.” Similarly, the Competition Commission will consider efficiencies that enhance rivalry in the assessment of the competitive effects of a merger. In addition, efficiencies may constitute a defense that justifies an anticompetitive merger. The Enterprise Act provides for such defense in case the efficiencies are passed on in the form of customer benefits. In addition, the OFT may “exercise its discretion not to refer” a merger to the Competition Commission if the “customer benefits of a merger would outweigh its adverse effects.” Also, the Competition Commission will, in deciding the question of remedies for a merger resulting in a substantial lessening of competition, consider consumer benefits.

In Israel, prior to the introduction of merger provisions in the Restrictive Trade

153 Competition Bureau, supra note 122, p. 20ff.
158 Id., §§30(1), 35(5), 36(4).
159 Mergers - substantive assessment guidance, supra note 155, par. 7.7 – 7.10.
160 Merger references: Competition Commission guidelines, supra note 156, p. 43-45.
161 Unlike many Western jurisdictions, no substantive merger guidelines have yet been promulgated in Israel. However, the Israel Antitrust Authority has publicized procedural guidelines, available
Practices Law, the Mergers and Conglomerates Committee (the recommendations of which constituted the basis for these provisions) expressed preference for the view according to which efficiencies should be taken into account within merger control. The position of the General Director is that efficiency gains may be taken into account only if consumer welfare is enhanced thereby. The Antitrust Tribunal held that the anticompetitive effects of a merger should be balanced against efficiency considerations. Section 10 of the Restrictive Trade Practices Law, albeit in reference to restrictive arrangements, enumerates the considerations that the Antitrust Tribunal will consider upon implementation of the “public interest” test for approval of such arrangements, and includes “efficiency in the production and marketing of goods or services” among such considerations.

**Economic Efficiency and Non-Efficiency Concerns: Friends or Foes?**

Conflicts (of varying kinds and degrees) between economic efficiency and non-efficiency objectives do arise. A merger that enhances efficiencies while increasing market concentration faces off the efficiency objective with the political objective of decentralizing power. In this respect, an oft-raised argument against the incorporation of efficiencies is that it might be used to justify mergers in an attempt to strengthen market players’ bargaining power. This reasoning may have some merit if the gains in efficiency as a result of efficiencies are minimal or if the gains are outweighed by the anticompetitive effects of the merger.

---

162 Report, Mergers and Conglomerates Committee, 32 Hapraklit 559, 562 (Hebrew).
164 Appeal 2/94 Tnuva v. General Director of the Israel Antitrust Authority, Compendium of Antitrust Decisions (Israel Bar, 1996), Vol. II, p. 159 (see par. C1). The matter was further appealed to the Supreme Court, which preferred to refrain from any decisive statement on the role of efficiencies in merger analysis; see Civil Appeal 2247/95 General Director of the Antitrust Authority v. Tnuva, P.D. 52(5)213, par. 18 (per Justice Barak). See also: Appeal 1/00 Food Club Ltd. v. General Director of the Antitrust Authority et al. (unpublished, 2003).
non-efficiency objectives in competition law is that such incorporation may undermine efficiency. As Foer comments, “arguably, if non-economic goals play a significant role in antitrust decisions, the economy will be less and less efficient, which in the end will be harmful to consumers.” One research concluded that “in general the use of competition policy to achieve non-competition objectives was likely to weaken the effectiveness of competition policy.” The protection of small, inefficient, businesses constitutes a simple, though important, example. In the U.S., the prohibition upon price discrimination was set forth and has been enforced (albeit less so nowadays) due to populist motivations, particularly the protection of competitors rather than competition. Consequently, price discrimination has not been assessed on the basis of economic criteria that analyze market share or anticompetitive effects, and thus inefficient competitors have been protected and competition-enhancing price reductions prevented.

Nevertheless, there is no necessary contradiction between economic efficiency and non-efficiency objectives. “In most cases, the conflict between the economic efficiency and other policy objectives may not be significant or can be reasonably balanced.” Moreover, arguably, non-efficiency objectives may be promoted by ensuring market

---


168 See also infra, p. 126.


170 OECD, supra note 90, p. 3; Hilmer, Rayner & Taperell, National Competition Policy: Report by the Independent Committee of Inquiry, AGPS, Canberra, Australia (1993): “The promotion of competition will often be consistent with a range of other social goals.” Van den Bergh & Camesasca, supra note 68, p. 6: “To some extent non-economic goals are consistent with efficiency considerations.”
efficiency, and thus there is no room (or need) for specific or unique consideration of such objectives within competition law. As maintained, “the pursuit of the correctly defined economic goals of antitrust will generally advance the social and political objectives of the law as well.” Indeed, “frequently, the antitrust laws’ concern for protecting and improving economic efficiency also serves to further social and political goals.” Equity goals, as maintained, “are indirectly and costlessly promoted by a direct attack on inefficient, anti-competitive market structures and practices.” For instance, efforts to prevent, reduce or contain market power may also serve the non-efficiency objective of decentralizing economic and political power. As far as income redistribution is concerned, Elzinga maintains that such equitable objective is consistent with “the pursuit of efficiency goals through antitrust enforcement.” Areeda and Hovenkamp maintain that “populist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a pro-competitive policy framed in economic terms.” Blake and Jones concede that “there is some truth to the […] position that the same rule of law may promote both the economic and noneconomic objectives of antitrust; otherwise the strains upon antitrust policy might

171 Brodley, supra note 41, p. 1021. See also Brodley, “Joint ventures and antitrust policy”, 95 Harv. L. Rev. 1521, 1523 (1982).
172 Baxter, supra note 17, p. 619. See also: See: Van den Bergh & Camesasca, supra note 68, p. 6, who suggest that under certain circumstances, monopolies and mergers may be denounced both for efficiency and distributional motives. See also: Fox, “Monopoly and competition: tilting the law towards a more competitive economy”, 37 Wash. & Lee L. Rev. 49 (1980). Compare with: Graham & Richardson, supra note 68, p. 9: “Efficiency and fairness, like oil and water, do not mix easily. Under most circumstances, neither objective can be met without some sacrifice on the other.”
173 Elzinga, supra note 15, p. 1202.
174 Id., p. 1195.
175 Areeda & Hovenkamp, supra note 9, p. 98. See also id., p. 107: “Populist values are served, to a considerable extent, by the antitrust policies that promote economic efficiency and progressiveness.”
In fact, economic efficiency may be considered as the direct goal of competition, while socio-political and other non-economic concerns may be considered as ultimate goals. My impression is that the views according to which the socio-political benefits of antitrust enforcement may be achieved by promotion of economic efficiency, while factually substantiated in many cases, are meant, in essence, to deprive non-efficiency objectives of any significant role within competition analysis. Moreover, such views ignore the fact, as demonstrated in the previous paragraph, that under certain circumstances, inconsistency between efficiency and non-efficiency objectives is inevitable.

One of the ways to tackle the tension between economic and non-economic considerations is to regard the latter as falling outside the scope of competition law altogether, thereby evaporating the tension. For instance, the provisions of Articles 81 and 82 EC apply only to “undertakings”, which were defined as entities engaged in economic activity. Accordingly, the European Court of Justice has held that in the field of social security, certain bodies that pursue exclusively social objective and do not engage in economic activity do not constitute “undertakings” and are not subject to competition law. Nevertheless, the majority of cases involve economic activity by commercial

177 Ehlermann & Laudati, supra note 89, p. 30; Evenett, supra note 63, p. 2, distinguishes between intermediate and final goals.
178 See: Case C-41/90 Höfner and Elser [1991] ECR I-1979, par. 21; Case C-218/00 Cisal [2002] ECR I-691, par. 22. Compare with: Section 2 of the Israeli Restrictive Trade Practices Law, supra note 165, according to which “a restrictive arrangement is an arrangement entered into by persons conducting business […]”. In the case of A.M. Hanayot (Jerusalem) 1993 Ltd. v. Jerusalem Municipality, P.D. 57(2)590, Justice Rivlin of the Israel Supreme Court ruled that the Law did not apply to restrictions imposed in the interest of public welfare, since such restrictions lacked a business purpose (id., p. 600).
179 See: Case C-264, 306, 354, 355/01 AOK Bundesverband and Others v. Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others. In the context of U.S. antitrust law, see Goldman, “The
entities, so the application of the aforesaid is limited in scope.

**Failing Firm Doctrine**

The failing firm doctrine (or defense) provides for an illuminating example of an intersection (or perhaps collision) between the efficiency objective and non-efficiency considerations, and is thus of particular relevance to the paper. The defense recognizes that in some cases and under certain circumstances, as defined and specified by the respective legal systems, the acquisition, by a competitor, of a firm that has encountered business failure may be approved, notwithstanding the anticompetitive consequences of such acquisition.\(^\text{180}\)

In the U.S.,\(^\text{181}\) the defense was first applied in the *International Shoe* decision.\(^\text{182}\)

The two primary prerequisites for application of the defense were determined by the courts to be (a) imminent business failure of the target firm\(^\text{183}\) and (b) unavailability of alternative options (e.g. alternative purchaser; reorganization through receivership or bankruptcy proceedings) that involve less of an anticompetitive effect.\(^\text{184}\) The defense is expressly

---


\(^{183}\) The probability of business failure must be demonstrated to be strong and grave. See, e.g., *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir., 1991); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir., 2001).

included in the Horizontal Merger Guidelines, and is also recognized, *inter alia*, by the competition laws of the E.U., Canada, U.K., and Israel. Essentially, the prerequisites for the application of the doctrine within these jurisdictions follow U.S. antitrust law.

The doctrine is based upon two, potentially conflicting, approaches:

According to the social approach, the doctrine is applied in order to prevent the adverse effects that business failure may bring upon employees, creditors, communities and other groups; in other words, the importance of efficiency (or competition) is *superseded* by the importance inherent in the compelling social implications of business failure. The social approach was expressed by the U.S. Supreme Court in *International*
In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, *with resulting loss to its stockholders and injury to the communities where its plants were operated*, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser) not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and *with the effect of mitigating seriously injurious consequences otherwise probable*, is not in contemplation of law prejudicial to the public, and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.\(^{194}\)

According to the **competitive approach**, the doctrine serves economic efficiency (or competition), and expresses preference (in the absence of an alternative option that is preferable as far as efficiency or competition) for a horizontal merger (and the lessening of competition such a merger entails) over the departure of a competitor, along with the assets and means of production thereof, from the market.\(^{195}\) According to the competitive approach, proposed mergers – even whereupon a failing firm is involved - may only be justified on competitive grounds. The competitive approach does not altogether ignore the social costs that business collapse involves, but rather prefers that such costs be addressed by loosening, on a case-by-case basis, the prerequisites for application of the doctrine.

The application of the social approach raises practical difficulties. **First**, such application effectively taxes consumers (through higher prices potentially brought about by the merger), a widely distributed group, for the benefit of localized groups (employees, communities and, oft-timed, shareholders).\(^{196}\) **Second**, quantification and assessment of the interests that are compromised as a result of business failure are complex (*e.g.* the

---

\(^{193}\) Supra, note 182.

\(^{194}\) Id., p. 302 (emphases added).

\(^{195}\) See: von Kalinowski, “Section 7 and competitive effects”, 48 Va. L. Rev. 827.

collapse of a firm may involve adverse employment consequences for a certain town, while creating jobs for another community).\textsuperscript{197} Third, ranking the various interests that the social approach seeks to protect poses a significant challenge: ought the interests of employees, for instance, to reign supreme, or rather the interests of creditors?\textsuperscript{198} Due to these difficulties, \textit{inter alia}, the social approach to the failing firm doctrine is not universally accepted. For instance, the U.S. Horizontal Merger Guidelines explicitly embrace an exclusive efficiency-oriented approach to the defense.\textsuperscript{199} Likewise, the FTC has expressly clarified that social costs should not be an express factor in failing firm analysis (but could be considered implicitly by loosening some requirements).\textsuperscript{200} The competitive approach is also embraced by Canadian\textsuperscript{201} and Israeli\textsuperscript{202} competition law.

\textsuperscript{197} See: Valentine, \textit{Horizontal Issues: What’s Happening and What’s on the Horizon} (FTC, 1995): “There [is] difficulty determining the extent of social costs in a failing firm context and how to account for them. To begin with, jobs may be lost whether a merger is blocked or allowed to proceed. If a merger is blocked and a company fails, the lost jobs obviously stem from plant closure. But if a competitively problematic merger is allowed to proceed, according to oligopoly theory, jobs may be lost when the industry raises prices and reduces output”; available at: \url{http://www.ftc.gov/speeches/other/dvhorizontalissues.shtm#N_9}.


\textsuperscript{199} According to the Guidelines, \textit{supra} note 72, §5.0: “a merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances, post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market.”


\textsuperscript{201} Merger Enforcement Guidelines, \textit{supra} note 151, §9.2: “Probable business failure does not provide a defence for a merger that is likely to prevent or lessen competition substantially. Rather, the loss of the actual or future competitive influence of a failing firm is not attributed to the merger if imminent failure is probable and, in the absence of a merger, the assets of the firm are likely to exit the relevant market.”

\textsuperscript{202} See Orlite, \textit{supra} note 163, §F1: “The failing firm doctrine is rooted in the field of competition. The failing firm doctrine does not open the door to the introduction of external considerations such as the interests of creditors and success of the winding-up proceedings. Merger control in Israel is performed in light of, and guided by, competition considerations.” (my translation)
The foregoing analysis of the failing firm doctrine illustrates the practical differences between the efficiency-oriented and the multi-value approaches to antitrust analysis. Proponents of efficiency-oriented antitrust analysis would condone the application of the failing firm doctrine only whereupon such application may be justified on efficiency grounds.\textsuperscript{203} Otherwise, according to such approach, business failure may not justify an anticompetitive merger, and may even be desirable on efficiency grounds. Thus, as Posner maintains, “business failures are indispensable means of imparting incentives for efficient business behavior […] Condoning monopoly in order to avert business failures protects not only monopoly, but, what is worse, inefficient monopoly.”\textsuperscript{204} In contrast, proponents of multi-value antitrust analysis would allow the interests of employees, creditors and additional stakeholders to be taken into account upon assessment of whether the doctrine ought to be applied.

Even though the application of the failing firm doctrine has been relatively limited and narrow, the very formation of, and debate surrounding the rationale for, the doctrine nevertheless point to the significance that non-efficiency concerns may play in competition analysis generally, and merger control particularly.

**Objectives of Competition Law: Jurisdiction-Specific Analysis**

The objectives of competition law in general, and the significance afforded to non-efficiency objectives in particular, vary between jurisdictions. I have chosen to present and analyze the competition laws of five jurisdictions in this respect: the United States and the


\textsuperscript{204} Posner, supra note 79, p. 28.
European Union are treated not only as the two largest and most significant competition law jurisdictions, but also since the United States provides the “role model” for the attribution of primacy to the efficiency objective, and the European Union provides an illuminating example of the co-inhabitance of both efficiency and non-efficiency objectives. Analysis of Israeli competition law, as a system that is still seeking to find the appropriate place for non-efficiency concerns, demonstrates the complexity inherent in striking the right balance between the various objectives of competition law. Finally, the objectives of Canadian and UK competition will be treated briefly: Canadian competition law provides an illuminating example of the explicit inclusion of both efficiency and non-efficiency objectives within a statutory framework, and ultimate preference of the efficiency objective in practice; UK competition law exemplifies the gradual embrace of an economic approach to competition law and consequent demise of the importance attributed by statute to public interest concerns. Discussion will conclude with reference to the objectives of competition law in developing countries.

The paper does not seek to exhaustively present the diverse positions as to the objectives of competition law, but rather to provide a conceptual infrastructure that is necessary in order to analyze the link between these objectives, in general, and non-economic considerations, in particular.

**United States**\(^{205}\)

In the United States, the “generality and adaptability”\(^{206}\) of the primary antitrust statutes

---

(the Sherman Act,\textsuperscript{207} the Clayton Act\textsuperscript{208} and the Federal Trade Commission Act\textsuperscript{209}) have been the main cause of inconclusiveness as to the objectives of antitrust law.\textsuperscript{210} Indeed, “the goals of U.S. antitrust law are multiple and vary somewhat from statute to statute.”\textsuperscript{211} As explained by Scherer, “congressional views, not atypically, were muddled and often contradictory.”\textsuperscript{212} Since the intended objectives of the antitrust laws are difficult to ascertain,\textsuperscript{213} there is much debate among commentators surrounding these objectives. In addition, reliance upon original intent for statutory interpretation is held by certain commentators to be questionable.\textsuperscript{214} In addition, the Supreme Court has not resolved the uncertainty surrounding the objectives of antitrust law,\textsuperscript{215} and often contributed to such

\textsuperscript{206}See: Appalachian Coals v. United States, 288 U.S. 344, 359-360 (1933).
\textsuperscript{207} 15 U.S.C. §1 et seq. (1890).
\textsuperscript{208} 15 U.S.C. §12 et seq. (1914).
\textsuperscript{210} The upside of such “generality and adaptability” is that “such expansiveness allows for debate over interpretation as the social, political, and economic landscape changes.” Valentine, “US competition policy and law: learning from a century of antitrust enforcement”, in: Chao, San & Ho, eds., International and Comparative Competition Laws and Policies (Leiden, Netherlands: Kluwer Law International, 2001), p. 73; Calvani, supra note 30, p. 7: “it is fair to say that the historical examination of the Sherman Act does not conclusively establish that Congress had a consistent particularized goal in mind when it enacted the legislation.”; Ernst, “The new antitrust history”, 35 N.Y.L. Sch. L. Rev. 879 (1990); Morris, supra note 21, id.: “The objectives of the antitrust statutes are ambiguous, and this has led to many confusing and contradictory judicial decisions.”
\textsuperscript{211} Graham & Richardson, supra note 68, p. 235. See also: Fox, supra note 45, p. 1146: “the selection of efficiency as the only appropriate touchstone of antitrust policy is not indicated by either the statutory language, which is ambiguous, or the legislative history, which is multivalued.”
\textsuperscript{212} Scherer, supra note 101, p. 977. See also: Sullivan & Harrison, supra note 49, p. 4: “the legislative intent is conflicting and thus unclear.”; Pitofsky, supra note 22, p. 1060.
\textsuperscript{213} Lande, supra note 22, p. 81: “It is not possible to ascertain with certainty the original goals of the antitrust laws.” See also: Elzinga, supra note 15, p. 1191.
\textsuperscript{215} Lande, supra note 22, p. 67, n. 2: “The [Supreme] Court has stated on different occasions that the antitrust laws have a variety of goals. The Court has never made clear which goals were meant to prevail under what circumstances, or how conflicts among competing goals should be resolved.” See also: Schmitz, “The European Commission’s decision in GE/Honeywell and the question of the
Nevertheless, while at first adopting a multi-value approach, U.S. antitrust law has succumbed to efficiency analysis during the past four decades or so, as described below.

**The Rise of the Chicago School: Efficiency-Oriented Antitrust Analysis**

Traditionally, “members of the [Supreme] Court […] generally assumed that the goals of antitrust were complementary”. Thus, in 1958, the Supreme Court, in *Northern Pacific*, summarizing the objectives of U.S. antitrust law (as then perceived), emphasized the primacy of protecting competition, while recognizing broader non-competition objectives that were achieved by ensuring competitive markets:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, *while at the same time providing an environment conductive to the preservation of our democratic political and social institutions*.

However, court rulings since the mid-1970s express a tightening of focus upon the goals of antitrust law”, 23 U. Pa. J. Int’l Econ. L. 539, 541 (2002): “In over eighty years, the U.S. courts have never settled for long upon a definitive statement of antitrust law’s goals.”

For instance, the Supreme Court determined that upon passage of the antitrust laws, “Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent”; *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951). Such statement “conceals a diversity of possible objectives that are often inconsistent in critical respects.”; Areeda & Hovenkamp, *supra* note 9, p. 3. See also: Sullivan & Hovenkamp, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (Charlottesville, VA: Lexis Law Publishing, 4th ed., 1999), p. 4: “As the study of antitrust reveals, the Supreme Court’s interpretation of the policies and goals of the antitrust laws has not been static nor even consistent.”

This is particularly true of the Warren (Supreme) Court era. See, e.g., Sullivan, “Antitrust, microeconomics, and politics: reflections on some recent relationships”, 68 Calif. L.R. 1, 4 (1980): “The Warren Court was the custodian of a multivalued antitrust tradition. To that Court, the idea of competition included political and social objectives.”

Fox, *supra* note 45, p. 1142.


*Id.*, p. 4 (emphasis added).
objective of economic efficiency as the proper and exclusive basis for antitrust law.\textsuperscript{221,222}

This transformation was influenced by macroeconomic factors (such as inflation and growing competition with the German and Japanese markets) that prompted concern for economic efficiency in the U.S. market,\textsuperscript{223} though primarily by the rising influence of the Chicago School of antitrust analysis.\textsuperscript{224} As explained by Hovenkamp, “the rise of Chicago


\textsuperscript{222} Before the mid-1970s, few Supreme Court decisions expressed the view according to which efficiency was the paramount objective of antitrust law. See, e.g., Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958); United States v. E.I. Du Pont de Nemours Co., 351 U.S. 377, 386; Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 623 (1975). Nevertheless, Areeda and Hovenkamp analyze major early antitrust decisions and maintain that such decisions do not demonstrate that “the courts have in fact been willing to pursue populist goals at the expense of competition and efficiency.” Areeda & Hovenkamp, supra note 9, p. 125.

\textsuperscript{223} Fox, supra note 45, p. 1143. The relative leniency that characterized merger enforcement in the U.S. during the 1980s was also related to the “merger frenzy” of that time. See Eckard, “The impact of the 1980's merger movement on U.S. industrial concentration”, 40 Antitrust Bull. 397 (1995).

School antitrust policy represents the beginning of an ‘economic approach’ — that is, an approach concerned exclusively with efficiency.”\textsuperscript{225} The School promoted an anti-interventionist approach to antitrust, and regarded non-efficiency goals as “inconsistent with the notion that the antitrust laws ought to maximize allocative efficiency.”\textsuperscript{226}

Thus, along with the rising influence of the Chicago School, the Supreme Court expressed the supremacy of “consumer welfare”, which Chicago School proponents viewed as “meaning nothing more than economic efficiency”.\textsuperscript{227} Lower Courts also expressed the same approach,\textsuperscript{228} and antitrust enforcement agencies similarly embraced the Chicago School focus upon economic efficiency, particularly since the onset of the Reagan Administration. For instance, the Horizontal Merger Guidelines,\textsuperscript{229} which focus on market power, clearly adopt an efficiency-centered approach. As Lande commented in 1982, “the prevailing view is that Congress intended the antitrust laws only to increase economic efficiency.”\textsuperscript{230} And as Elzinga observed in 1977, “the judiciary and the enforcement agencies would make it seem that efficiency is their only goal.”\textsuperscript{231}

\begin{itemize}
\item \textsuperscript{226} Hovenkamp, \textit{supra} note 8, p. 242.
\item \textsuperscript{227} Kovacic, \textit{supra} note 214, p. 1448. Kovacic maintains, \textit{id.}, that the equation of “consumer welfare” with economic efficiency is questionable, and that the former may include wealth transfer effects. See also Brodley, \textit{supra} note 41, p. 1032: “The term consumer welfare is the most abused term in modern antitrust analysis. Sometimes consumer welfare is used as a synonym for economic efficiency, in which case it becomes an unnecessary and confusing redundancy.”
\item \textsuperscript{228} See, \textit{e.g.}, \textit{Rebel Oil Co. v. Atlantic Richfield Co.}, 51 F.3d 1421, 1433 (9th Cir., 1995). For additional lower federal court decisions that addressed the goals of antitrust law, see: Kovacic, \textit{supra} note 214, pp. 1413, 1446, 1447, n. 151 and 156.
\item \textsuperscript{229} \textit{Supra}, note 72.
\item \textsuperscript{230} Lande, \textit{supra} note 22, p. 68. See also: Hovenkamp, \textit{supra} note 21, p. 1: “The view that the federal antitrust laws ought to promote allocative efficiency in American business and markets has come to dominate antitrust policy in the last decade.”
\item \textsuperscript{231} Elzinga, \textit{supra} note 15, p. 1204. See also: Sullivan, \textit{supra} note 217, p. 2: “The Supreme Court is increasingly committed to a conception of competition that emphasizes efficiency as a dominant
Bork, a prominent representative of the Chicago School, in referring to the “potpourri” of antitrust values, insisted upon the supremacy of the consumer welfare consideration:

In looking to the legislative history [of the antitrust laws], one discerns repeated concern for the welfare of consumers and also for the welfare of small business and for various other values – a potpourri of other values. [...] Congress, in enacting these statutes, never faced the problem of what to do when values come into conflict in specific cases. Legislators appeared to have assumed, as it is most comfortable to assume, that all good things are always compatible. They did, however, make certain choices that suggest that in cases of conflict consumer welfare is to be preferred to small producer welfare, as well as to all other values.

More explicitly, Bork wrote that “the only legitimate goal of American antitrust law is the maximization of consumer welfare,” which he equated with economic efficiency, and that “the introduction of goals other than consumer welfare into antitrust is destructive to antitrust as law.” As argued by Bork, “the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”

Areeda and Hovenkamp conclude that, as a rule of thumb, an exclusively economic social value. This tendency is even more noticeable in lower court cases. Efficiency is not the only interest to which antitrust courts respond. But it is the primary one. Preoccupation with efficiency is changing the law.”

233 Id., p. 50-51. Bork defines “consumer welfare” as the sum of producer surplus and consumer surplus; id., p. 110. See also: Bork, “Legislative intent and the policy of the Sherman Act”, 9 J. L. & Econ. 7, 10 (1966) (the article is widely considered as the predecessor to The Antitrust Paradox). Hovenkamp notes that “Bork’s work has been called into question by subsequent scholarship showing that in 1980 [sic] Congress had no real concept of efficiency and was really concerned with protecting consumers from unfavorable wealth transfers”; Hovenkamp, supra note 8, p. 250. See also: Kovacic, supra note 214, p. 1462: “Congress conceived the antitrust system to embrace objectives reaching well beyond attainment of productive and allocative efficiency.”
234 Lande, supra note 39, p. 434, 446.
236 Bork, supra note 24, p. 91. See also: Bork, supra note 235.
approach to antitrust ought to be applied, subject to the following two conditions: (a) absence of collision with unambiguous statutory language and (b) institutional capability of “managing the information and decision-making process necessary” to implement such an approach.

Bork, Posner, as well as additional proponents of the view according to which economic efficiency is the primary goal of antitrust law, rely heavily on legislative history. Inspired by Bork, Posner asserted that “although non-economic objectives are frequently mentioned in the legislative histories, it seems that the dominant legislative intent has been to promote some approximation to the economist’s idea of competition, viewed as a means toward the end of maximizing efficiency.” Yet another commentator asserts that “an examination of the language and legislative histories of section 1 of the Sherman Act and section 7 of the Clayton Act strongly suggests a focus on economic efficiency”, as well as that “nowhere does the legislative history indicate that when amorphous social and political goals can only be achieved at the cost of economic efficiency, economic efficiency should be sacrificed.”

A stark illustration of the reflection of Chicago School analysis within Supreme Court decisions is provided by *National Society of Professional Engineers*, in which the

---

238 *Id.*, p. 119.
239 See, *e.g.*, Bork, *supra* note 235, p. 244: “An examination of the language and legislative history of the antitrust laws makes it clear that consumer welfare was at a minimum a primary intended value.”
Court expressed reservation from the inclusion of non-competition considerations in antitrust law. The Court rejected the argument that competition between consulting engineers, by leading to low prices and thus inferior quality of work, would compromise public interest and safety. As rendered, “the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”

The Chicago School Challenged

The view according to which economic efficiency is the primary objective of U.S. antitrust law is neither unanimous nor uncontested. Indeed, “nothing – not even an intellectual structure as imposing as the Chicago School – lasts forever.” Foer explains that “while the contributions of Chicago have been persuasive in many ways, there remain other important threads in the antitrust story and proponents of alternative goals have neither surrendered nor are likely to do so.” Thus, as one commentator (referring to the 1984 version of the Merger Guidelines) argued, “the Guidelines reflect a particular view of the goals of the antitrust laws that does not command universal approval. I view it as unfortunate that the new Guidelines look purely to the short-term economic consequences of the transaction, and dismiss as unimportant any social or political impact of a merger – including the loss or transfer of jobs and the increase in political influence, or the general

243 Id., p. 688 (emphasis added).
245 Foer, supra note 166, p. 8.
246 Supra, note 128.
effect of mergers on the corporate landscape.”247 In addition, even economists have challenged “the simplistic Chicago view of the world.”248 “Post-Chicago” views have emerged and challenged, inter alia, the economic premises of efficiency-oriented antitrust analysis.249

As aforesaid,250 Chicagoists rely heavily on legislative history. However, as pointed out by opponents of the Chicago School of antitrust analysis, efficiency is not widely considered as a concern that motivated the enactment of antitrust laws. Thus, according to Hovenkamp, “the legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency.”251 As commented, the argument that “economic efficiency is the only factor relevant to the enforcement of antitrust laws […] is grossly at odds with the legislative intent and content of those laws, and with their interpretation by the courts.”252 Harris and Jorde observe that “market power creates the potential for violating social, political and economic norms other than economic efficiency. The antitrust laws were enacted in large part to respond to these other concerns.”253

250 Supra, p. 54.
251 Hovenkamp, supra note 8, p. 249. See also: Areeda & Hovenkamp, supra note 9, p. 9: “The case that the framers of the Sherman Act wanted to develop an antitrust law based on essentially neoclassical conceptions of allocative and productive efficiency is minimally consistent with the legislative history, but overall is quite weak.”; May, “Antitrust in the formative era: political and economic theory in constitutional and antitrust analysis, 1880-1918”, 50 Ohio St. L.J. 257 (1989); Hovenkamp, supra note 21, p. 19: “To ascribe to the legislative histories of the antitrust laws an exclusive concern with allocative efficiency is to take an extraordinarily narrow and unrealistic view of the political process in our congressional system.”
252 Harris & Jorde, supra note 93, p. 465.
Most commentators assert that the concern that motivated the enactment of the antitrust laws was distrust of giant trusts, due to the great economic and political power such trusts were believed to hold. Fox asserts that “rather than standing for efficiency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes.” In this respect, the original intention of the framers of the antitrust laws was to counter the power as aforesaid. Graham and Richardson maintain that the enactment of the Sherman Act was inspired by the existence of “large industrial trusts [and the resultant] concerns about the unfair use of power.” Graham and Richardson further maintain that the Cellar-Kefauver Act, enacted following World War II, during which “the concentration of industries in Germany had played into the hands of fascism”, was aimed at controlling economic concentrations and thus diffusing economic and political power. The demise of small business and economic opportunity was also considered as deriving from the centralized economic and political power held by large firms. Thus, Graham and

---

254 Hence the term "anti-trust".
255 Fox, supra note 45, p. 1153. See also id., p. 1154: “the claim that efficiency has been the goal and the fulcrum of antitrust is weak at best.” See also Fox & Sullivan, “Antitrust – retrospective and prospective: where are we coming from? where are we going?”, 62 NYU L. Rev. 936, 944 (1987); Fox, “Economic concentration, efficiencies and competition: social goals and political choices”, 46 Antitrust L.J. 882 (1977).
256 Harris & Jorde, supra note 93, p. 467. See also: Amato, Antitrust and the Bounds of Power – The Dilemma of Liberal Democracy in the History of the Market (Oxford, UK: Hart Publishing, 1997), p. 96: “it seems undoubtedly to be going too far to say that the Sherman Act was inspired by grounds of efficiency such as the Chicago School has focused on. More reliable, therefore, seem to be those who trace antitrust law (as the Sherman Act was immediately called) to the fight against trusts, or against economic power, in defense of small producers and small traders who risked being crushed by it.”
257 Graham & Richardson, supra note 68, p. 235-6. See also: Lande, supra note 22, p. 137.
258 Supra, note 440.
259 Graham & Richardson, supra note 68, p. 235-6. See also: Lande, supra note 22, p. 137.
260 See: Fox, supra note 45, p. 1147-9; Lande, supra note 22, p. 94-96. See also: Lande, “Challenges to the Chicago School approach: Chicago’s false foundation: wealth transfers (not just efficiency) should guide antitrust”, 58 Antitrust L.J. 631 (1989); Kattan, “Efficiencies and merger
Richardson maintain that the Clayton Act and the Robinson-Patman Act\(^{261}\) were designed to protect small business. Scherer explains that economic efficiency, in the modern sense of the term, could not have guided Congress at the time the Sherman Act was enacted, since a notion of allocative efficiency “was just beginning to take shape” at that time.\(^{262}\) Similarly, Schwartz maintains that the will of Congress was “that putative economic gains should not be the exclusive or decisive factor in resolving antitrust controversies.”\(^{263,264}\)

Still other commentators assert that the antitrust laws were established in order to address the transfer of wealth from consumers to monopolists. In this respect, Lande asserts that the primary objective of the U.S. antitrust laws is consumer protection (or consumer choice): “While the Congresses that passed the antitrust laws also had additional goals – including greater economic efficiency – these legislatures’ overriding concern was that consumers should not have to pay prices above the competitive level. All other goals were subordinated to this concern.”\(^{265}\) Lande does not concentrate exclusively upon price


\(^{262}\)Scherer, \textit{supra} note 101, p. 977. See also: Stigler, “The economists and the problem of monopoly”, 72 \textit{Am. Econ. Rev.} 1, 3 (1982): “A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of activity combating collusion or monopolization in the economy at large.”; Lande, \textit{supra} note 39, p. 448; Lande, \textit{supra} note 22, p. 87: “Indeed, it is unlikely that in 1890 many economists, much less legislators, understood the impact of monopoly power on allocative efficiency.”; Foer, \textit{supra} note 166, p. 3: “it is fair to say that Congress was neither steeped in economic philosophy nor greatly assisted by economists.”


\(^{264}\)See also: Ross, \textit{supra} note 22, p. 947: “there is little support for the claim that any of [the antitrust statutes] were principally designed to promote aggregate social wealth through an efficient allocation of resources.”

\(^{265}\)Lande, “Proving the obvious: the antitrust laws were passed to protect consumers (not just to increase efficiency”, 50 \textit{Hastings L.J.} 959, 961 (1999). See also: Lande, \textit{supra} note 22, p. 67: “Congress passed the antitrust laws to further economic objectives, but primarily objectives of a
competition as important to consumers, but also regards *non-price* competition (relating, *inter alia*, to variety, innovation and quality) as possessing such importance. However, arguably, Lande’s position is a variation of the economic analysis of competition law that focuses on the deadweight loss caused by anticompetitive conduct: “In reality, Mr. Lande’s sect offers only a distinction without a difference.”

Areeda and Hovenkamp maintain that the view according to which the Sherman Act was framed primarily in order to address transfers of wealth away from consumers seems weak “as soon as one considers the collateral political and economic history.” Calvani points to three possible objections to the view promoted by Lande: (a) the appropriateness of income redistribution as a government objective is open to question; (b) uncertainty over the identity of consumers and producers; and (c) the inefficiency of antitrust in preventing transfer of wealth from consumers to producers.

In the mid-1980s, Hovenkamp noted that “although the Justice Department may be going through a period in which it recognizes efficiency as the exclusive goal of the antitrust laws, the Supreme Court has not accepted such a general antitrust policy, and some of its recent decisions seem inconsistent with such a policy.”

An example of consideration of non-efficiency objectives by federal courts is provided by *Brown*...

---

266 See, e.g., Lande & Averitt, *supra* note 265.
270 Hovenkamp, *supra* note 8, p. 223.
In that case, the federal circuit court recognized the importance of need-based scholarships, and reversed the decision rendered by the federal district court, according to which exchange of information between universities, which was intended to prevent the provision of most aid on the basis of merit, thus diminishing funds available for needs-based scholarships, constituted a violation of the Sherman Act. The circuit court reasoned as follows: “it is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education. There is no doubt, too, that enhancing the quality of our educational system redounds to the general good.”

In addition to case law, statutory immunities and exemptions also express the significance afforded to certain non-efficiency objectives within U.S. antitrust law. For instance, such immunities and exemptions are provided for agricultural producers and associations, the insurance sector and professional sports.

Sullivan refers to the “non-economic goals of antitrust” as “all quite tenable as policy objectives”. Among those goals, he notes, are “a preference for decentralization of economic power, reduction of the range within which private discretion may be exercised in matters materially affecting the welfare of others, enhancement of the opportunity for

272 Id., p. 661.
276 For a comprehensive review of antitrust immunities and exemptions in the U.S., see ABA Section of Antitrust Law, Antitrust Law Developments (5th ed., 2002), vol. 2, chap. XIV.
more people to exercise independently entrepreneurial impulses, and, most blatantly, a
social preference for the small rather than the large – if you will, a nostalgia for that
mythical past when social, governmental and economic organization was simpler, more
comprehensible.”

On the state level, the Horizontal Merger Guidelines of the National Association of
Attorneys General (NAAG), while emphasizing the supremacy of economic analysis in
merger control, nevertheless recognize the role of non-economic goals:

These guidelines deal only with [...] competitive consequences of horizontal
mergers, and challenges will be instituted only against mergers that may lead to
detrimental economic effects. Mergers may also have other [non-competitive]
consequences that are relevant to the social and political goals of section 7 [of the
Clayton Act]. For example, mergers may affect the opportunities for small and
regional business to survive and compete. Although such consequences are beyond
the scope of these guidelines, they may affect the Attorney General’s ultimate
effort of prosecutorial discretion and may help the states decide which of the
possible challenges that are justified on economic grounds should be
instituted.

Efficiency Dethroned?

Arguably, the Chicago School of antitrust analysis still reigns supreme in the U.S. As

Sullivan adds, id., that “thinking and writing about the law as though rational resource allocation
were the only goal can only lead to confusion.” See also: Sullivan, supra note 217.
278 Horizontal Merger Guidelines of the National Association of Attorneys General, p. 3; available
amendment to the Clayton Act, provides an additional example of the role that non-efficiency
concerns may play within U.S. antitrust law. The Act sets forth procedures that must be followed
whenever the U.S. proposes to settle a civil antitrust suit through entry of a consent judgment. In
particular, the Act establishes that before entering such judgment, the Court “will determine that
the entry of such judgment is in the public interest”; 15 U.S.C. §16(e). As set forth, while the
“public interest is to be determined in the context of the anti-trust laws whose fundamental premise
is the protection and safeguarding of free competition [...]”, other factors [...] enter into the
calculus. Any remedy should be framed with a view to causing the least possible injury to interests
of the general public and relevant private interests. The court should consider the impact of the
remedy in relation to other important public policies and avoid any unnecessary conflict or
friction.”; United States v. The LTV Corp., Jones & Laughlin Steel Inc., J & L Specialty Steels,
Inc., and Republic Steel Corp., 1984-2 Trade Cases (CCH) ¶66,133, at ¶66,343.

56
recently observed, “it is a general tenet of US antitrust law that restraints of competition are to be assessed with a view to their pro- and anticompetitive effects. Public policy goals, different from the public interest inherent in competition policy – are of no (direct) relevance in the application of Sec. 1 Sherman Act – although they are, in some cases, considered implicitly where they can be linked to pro-competitive effects.”

Indeed, the U.S. submitted to the OECD in 2003 that “after more than 100 years of practical experience and improved economic learning, the United States has achieved a strong consensus that promotion of economic efficiency and maximization of consumer welfare are the only appropriate objectives for U.S. antitrust policy.” As the U.S. submitted to the International Competition Network (ICN), “promotion of consumer welfare and the organization of the free market economy are the only goals of [US] antitrust laws […] with other economic or social objectives better pursued by other instruments.” Nevertheless, Graham and Richardson assert that “it is now clear […] that the Chicago School, although very influential, has not prevailed.” Such assertion is based primarily on the prevalence of antitrust rules (e.g. the per se rules prohibiting resale price maintenance agreements and tie-ins) that are not based upon economic efficiency. However, the per se rule prohibiting resale price maintenance was recently abolished by the Supreme Court.

280 Schweitzer, supra note 10, p. 6.
282 ICN, supra note 36, p. 31.
283 Graham & Richardson, supra note 68, p. 237.
284 Id.
285 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007). The per se rule was originally established in Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911).
Similarly, the Supreme Court recently loosened the *per se* prohibition upon tie-ins. 286 These decisions demonstrate that the conclusion reached by Graham and Richardson may have been premature, and that the allure of economic efficiency as the primary objective of U.S. antitrust law is still very much in place.

**European Union**

European Union Competition Law: Multi-Value Approach

“Non-economic goals have gained significance [in EU competition law], regardless of the fact that they are not always legally binding. Community institutions can hardly ignore concerns such as environmental protection, employment aspects, cultural interests, public health, consumer protection or industrial policy.” 287

European competition law strikingly demonstrates that competition policy does not exist in a vacuum, but is rather linked to other policies. Indeed, “EC competition policy does not exist in a vacuum, it being one of several instruments for achieving the objectives of the Community.” 288 European competition jurisprudence has embraced several objectives and has rejected the Chicago School approach, based solely on economic efficiency. As commented, “economic efficiency arguments have played a lesser role so far in the interpretation of EC law compared with U.S. antitrust law,” 289 partially since whereas in U.S., the application of efficiency-oriented antitrust analysis began in the 1970s, economic

289 Petersmann, *supra* note 221, p. 151. Compare with: Doern, “A political-institutional framework for the analysis of competition policy institutions”, 8 Governance 195, 199 (1995), according to which traditionally, European competition policy has maintained a tight focus on economic criteria, *inter alia* since, as a “political entity composed of nation states, [the EC] had to be especially careful about where and how politicization would occur.”
analysis has been playing a tangible role in European competition law only since the 1990s, upon adoption of the Merger Regulation. As further observed, “it must be acknowledged that, particularly in Europe, non-economic goals play an important role in current competition policy. Allocative efficiency (as defined in welfare economics) is not the only thing regulators have in mind when they pass competition laws and implement them. European competition policy embraces a multitude of political goals.”

Nevertheless, competition analysis in the EU is gradually embracing the economic approach. As observed, “according to the Commission, the interpretation of EU competition rules should nowadays mainly be driven by an efficiency criterion, namely the consumer welfare goal.”

The importance of free competition within the European Union is anchored in the Preamble to the EC Treaty, which recognizes that the removal of existing obstacles calls for concerted action in order to guarantee fair competition, as well as Article 3(g) of the Treaty, which sets forth that “the activities of the Community will include […] a system

290 Ehlermann & Laudati, supra note 89, p. xi.
291 Supra, note 138.
ensuring that competition in the internal market is not distorted.”

However, the Treaty contains “horizontal” clauses that require the integration of certain objectives in Community policies, including competition policy. In addition, Articles 2 and 3 of the Treaty, which set forth the central tasks and activities of the Community, include non-economic objectives, such as “a high level of employment” and environmental protection. Thus, in light of the teleological interpretation of Community law, the application of European competition law must take account of these objectives. Indeed, the European Court of Justice has held that European competition law must be implemented in light of the broader goals of the European Community. Consequently, “the debate about the relation between [the] goal [set out in Article 3(g) EC] and other, non-competition goals listed in Art. 2 and Art. 3 EC has been a reminder of the political tensions that the application of competition rules can raise at times.”

Such tensions are exacerbated by the fact that “competition law norms cannot incorporate an open balancing of all the goals set out in Art. 2 and Art. 3 of the EC Treaty without losing their meaning and effectiveness.” In addition to the EC Treaty, the Merger Regulation explicitly incorporates broad objectives within the merger review process, and sets forth that “the Commission must place its appraisal within the general framework of the achievement of

296 EC Treaty, supra note 295, §3(g). See also §4(1).
297 For instance, according to Article 127(2) of the Treaty, id., “the objective of a high level of employment will be taken into consideration in the formulation and implementation of Community policies and activities.” See also, e.g., Articles 6 (environmental policy), 151(4) (cultural diversity), 152(1) (public health), 153(2) (consumer protection), 157(3) (industrial policy). In addition, see Treaty on European Union, O.J. C-325 (1992), §2: “The Union shall set itself the following objectives - to promote […] a high level of employment.”; available at: http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf. See Monti, supra note 288, p. 1069ff.
300 Id., p. 13.
the fundamental objectives referred to in Article 2 of the [EC Treaty] and Article 2 of the Treaty on European Union.”

Normative Framework for Assessment of Non-Efficiency Objectives

Article 81(1) EC prohibits (under the terms as specified by the Article) agreements, decisions and concerted practices that “may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.” Such agreements and decisions will be automatically void, according to Article 81(2) EC. Article 81(3) EC allows any such agreement, decision and practice (under the terms as specified by the Article) “which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”. The exemption may be granted specifically or in the form of a block exemption.

As set forth by the Guidelines on the application of Article 81(3), “goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).” In other words, such goals must have an economic facet. Although Article 81(3) refers to exemptions that are related to

301 Merger Regulation, supra note 73, Preamble, par. 23.
302 Supra note 293, §42. As summarized by the Guidelines, §33:
“The application of the exception rule of Article 81(3) is subject to four cumulative conditions, two positive and two negative:
(a) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress,
(b) Consumers must receive a fair share of the resulting benefits,
(c) The restrictions must be indispensable to the attainment of these objectives, and finally
(d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.”
303 Semmelmann, supra note 38, p. 13; Komninos, “Non-competition concerns: resolution of conflicts in the integrated Article 81 EC”, The University of Oxford Centre for Competition Law and Policy Working Paper, (L) 08/05, p. 8; available at:
economic and pro-competitive benefits, and acknowledges the importance of efficiencies analysis, the European Commission has nonetheless considered, albeit arguably in an “artificial and forced” manner, non-economic goals that are set out in the Treaty in the implementation of the Article. Indeed, “Article 81(3) with its broad and general terms, potentially provides an opening of EU competition law for the consideration of non-competition related policy goals on the level of exemptions.” Thus, for instance, in the Metro decision, the European Court of Justice set forth as follows:

The powers conferred upon the Commission under Article [81(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.

See also: Wesseling, The Modernization of EC Antitrust Law (Oxford, UK: Hart Publishing, 2000), p. 104: “[the purpose of Article 81(3) is] to provide a legal framework within which the bodies competent to apply it may pursue certain non-competition policy objectives provided that competition is restricted as little as possible.”

Guidelines on the application of Article 81(3) of the Treaty, supra note 293, §33: “Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains […] [Article 81(3)] expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition.” See also id., §48ff.

Semmelmann, supra note 38, p. 13. Monti, on the other hand, maintains that Article 81(3) is “sufficiently open textured to allow for factors like employment or industrial policy to be included in a decision whether to exempt an anticompetitive agreement”; Monti, supra note 288, p. 1057.

See: Guidelines on the application of Article 81(3) of the Treaty, supra note 293, §42: “Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3).”


Schweitzer, supra note 10, p. 2.

Similarly, in the *Metropole* decision, the Court of First Instance set forth that “in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [81(3)] of the Treaty.”

“The Modernization Regulation” (Regulation 1/2003) sets forth that the competition authorities and national courts of Member States will have the power to apply Articles 81 and 82 of the EC Treaty. Certain commentators have argued that competition authorities and national courts are not authorized to exempt – based on Article 81(3) - agreements, decisions or practices that directly oppose the core principles of European competition policy, to the extent such exemption relies on public policy considerations; rather, only public policy considerations that complement the economic benefit of such agreements, decisions or practices should be directly applied by competition authorities and national courts.

The recognition of non-efficiency objectives does not extend to merger control under European law. In assessing whether a concentration would create or strengthen a dominant position, and thus be incompatible with the common market, the European Commission is required to take into account the criteria as set forth in Article 2(1) of the Merger Regulation. Such criteria embody competitive and efficiency concerns

---

312 Id., par. 118.
314 Id., §5-6.
315 See: Schweitzer, *supra* note 10, p. 11. Schweitzer contends, *id.*, that such view is “unconvincing” and “does not have a basis in Reg. 1/2003 nor, more importantly, in Art. 81(3).”
As Korah explains, “justification on non-competitive grounds was removed from an earlier draft of this Article and replaced by these provisions. The limitation to competitive criteria was controversial.”

The European law of state aid recognizes the significance of non-economic goals, and enables Member States to grant state aid serving such goals. In addition, the decision-making process of the Commission regarding state aid is dominated by political, rather than competition-related, considerations.

**Recognized Non-Efficiency Objectives**

As aforesaid, European competition policy embraces a multi-value approach, according to which efficiency constitutes but one of the considerations that are to be assessed. In order to demonstrate the implementation of such approach, the injection of three non-efficiency concerns into competition analysis in the European Union is described below.

The goal of **market integration** is expressed in Article 3(1)(c) EC as “an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.”

---

316 Motta reports that the Merger Regulation was adopted “after a debate which lasted for years, witnessing basic differences in the approach to competition and industrial policy among the different countries. In particular, Germany and the UK wanted mergers to be judged only on the basis of competition issues, whereas France wanted also to consider criteria of industrial policy and social issues. Eventually, the former approach prevailed.” Motta, *supra* note 22, p. 14.
318 Article 87(2), (3) EC, *supra* note 295.
crucial goal of Community competition policy” and even regarded by some to be of greater importance than the aim of economic efficiency, to such as extent that “efficiency may be sacrificed on the altar of the internal market.” Such integration “may come at the expense of inefficiencies in the organization of production and distribution.” For instance, vertical territorial restraints may be compatible with the economic efficiency objective, though such restraints are clearly at odds with the market integration objective. However, as recently commented, “according to the Commission […] the formerly strong inter-linkage between competition rules and the market integration goal should be softened, if not abandoned” due to the gradual completion of European economic integration.

Environmental concerns play an important role in European competition law. The Guidelines on the applicability of Article 81 to horizontal co-operation agreements set

---

321 Rodger & MacCulloch, supra note 44, p. 23. See also: Ehlermann, “The contribution of EC competition policy to the single market”, 29 Common Market L. Rev. 257 (1992); Joined Cases 56 and 58-64 Etablissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community, [1966] ECR 299, 340: “The Treaty, whose preamble and content aim at abolishing the barrier between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [81(1)] is designed to pursue this aim.”); Motta, supra note 22, p. 23.

322 Van den Bergh & Camesasca, supra note 68, p. 7. As noted by Ehlermann & Laudati, supra note 89, p. x: “market integration is a purely economic objective in a long term perspective. However, in the short and medium term, it is also – and in situations of conflict between the objective of market integration and of market efficiency even primarily – a political objective.”


324 See ABA, supra note 17, p. 24, n. 113.


326 Van den Bergh & Camesasca, supra note 68, p. 7. See also: Röller & Stehmann, “The year 2005 at DG Competition: the trend towards a more effects-based approach”, 29 Rev. Indus. Org. 281, 282: “Originally, one of the main goals of European competition policy was the promotion of market integration […] With progress made toward realization of the internal market, the relative importance of the market integration goal has declined. As a result, policy statements today stress efficiency, consumer welfare, and competitiveness.”
forth the criteria by which environmental agreements are assessed. The Commission expressed support for cooperation between competitors as to environmentally-friendly disposal of batteries, as well as for market share guarantees by the German government for small producers of renewable energy. Agreements that reduced the volume of plastic wastes, were designed to reduce consumption of energy and were designed to reduce packaging waste likewise received exemption. However, the most remarkable example of the integration of environmental concerns into European competition law is provided by the CECED decision. The case involved an agreement, between most washing machine manufacturers in Europe, designed to eliminate the marketing and sale of machines consuming high levels of energy. As Monti explains, the agreement was clearly anticompetitive as consumer choice was reduced and manufacturers that were incapable of manufacturing the energy-efficient machines were disadvantaged. In contrast to the other cases as aforesaid, the environmental concerns embodied in CECED were of a decisive weight in the decision to exempt the agreement.

The Council Resolution on fixed book prices in homogeneous cross-border


328 “Environmental agreements” are defined by the Guidelines as agreements “by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty.”


331 Exxon-Shell, O.J. 1994, L 144/21, pars. 67-68.


333 DSD, O.J. 2001 L 319/1, pars. 143-145.

334 See also: Case C-343/95 Diego Cali & Figli Srl v. Servizi egologici porto di Genova SpA (SEPG), [1997] ECR I-1547.


336 Monti, supra note 288, p. 1074.
linguistic areas clearly exemplifies the implementation of non-economic, cultural objectives (although Council resolutions are not binding, and are rather meant to define objectives and make political declarations). The resolution calls on the Commission “whilst applying European competition rules to agreements in cross-border linguistic areas, to take account of the provisions and implications of Article 128(4) of the Treaty, of the special cultural role of the book market and of the specific value of the book as a cultural object, as well as of the relevant national cultural policies” and to “accordingly to seek the solutions best suited to achieving these aims now and in the future.”

Israel

Israeli competition law demonstrates the complexity inherent in striking the right balance between the various objectives of competition law. While non-efficiency concerns are explicitly incorporated in Israeli competition legislation, the actual application of such concerns has been sporadic, inconsistent and not necessarily related to acknowledgment of their virtue or merit within the context of competition law. Moreover, the very allocation of the authority to assess non-efficiency objectives, as between the Antitrust Tribunal and the General Director of the Antitrust Authority, is yet to be resolved.

Statutory Incorporation of Non-Efficiency Objectives

“In Israel, the Restrictive Trade Practices Law includes non-competitive considerations,


337 See also: Schmid, supra note 302.

although competitive considerations are the focus of the Law.”

Certain non-economic objectives are explicitly anchored in the Restrictive Trade Practices Law. In this respect, Section 3 of the Act enumerates exemptions from the statutory provisions regarding restrictive arrangements. For instance, Section 3 provides an exemption for “an arrangement involving restraints, all of which are established by law”; such exemption enables the state to establish arrangements that may undermine efficiency in order to promote, inter alia, non-efficiency objectives. The exemptions for arrangements involving intellectual property rights and collective bargaining agreements also exemplify the significance attributed by Section 3 to certain non-efficiency objectives.

Sections 9 and 10 of the Law provide an additional concrete expression of non-efficiency concerns under Israeli competition law. Pursuant to Section 9, “the [Antitrust] Tribunal will decide on the approval of a restrictive arrangement, in whole or in part, if it believes that such arrangement is in the public interest, and it may stipulate conditions for its approval.” Section 10 enumerates the concerns that the Tribunal will consider upon implementation of the aforesaid “public interest test”. Such considerations explicitly embody non-efficiency objectives, as prevention of severe damage to an industry that is important to the national economy, safeguarding the continued existence of factories as a source of employment, and improving the balance of payments of the State. Although

341 Id., §3(1).
342 Id., §§3(2), 3(9), respectively.
343 Nonetheless, §10(1) of the Law explicitly refers to efficiency concerns. See supra, p. 39. Interestingly, neither the Tribunal nor the General Director are authorized to consider non-efficiency objectives as part of merger analysis; see: Nuriel, supra note 339, par. 3.2.
344 Restrictive Trade Practices Law, supra note 165, §§10(5), 10(6) and 10(7).
the greatest weight is attributed to competitive considerations, and the authority of the Tribunal to consider non-efficiency objectives has been construed narrowly, the Antitrust Tribunal approved, for instance, a restrictive arrangement between the major retail chains and beverage companies, regarding collaboration in order to establish and operate a recycling corporation. This case demonstrates that environmental concerns may be considered as promoting the “public interest” and afforded consideration as per Section 10.

While the authority of the Tribunal to consider non-competitive concerns is clearly provided by law, the General Director of the Antitrust Authority does not possess such statutory authority upon deciding whether to exempt parties to a restrictive arrangement from the requirement of obtaining the approval of the Tribunal, or whether to object to a merger. In practice, the position of the General Director and the Antitrust Tribunal as to the authority of the former to apply non-efficiency considerations is unclear, as immediately described.

On one hand, a stark demonstration of the General Director’s refusal to consider non-efficiency goals is provided by his objection to the merger between two major plywood companies. Regarding the argument according to which non-approval of the

345 See: Nuriel, supra note 339.
346 Id., par. 3.2.
347 Antitrust File 4445/01 Supersol Ltd., et al. v. General Director of the Israel Antitrust Authority (unpublished). The decision of the Antitrust Tribunal is brief, and thus no determination is possible as to whether environmental concerns actually trumped the efficiency consideration in this case, or perhaps were consistent with the latter. At any rate, the decision exemplifies the acknowledgement of non-efficiency, environmental, objectives within antitrust adjudication.
348 Restrictive Trade Practices Law, supra note 165, §§14, 21. See also: Appeal 1/97 (Jerusalem) Iskur Steel Services Ltd. et al. v. General Director of the Israel Antitrust Authority et al. (unpublished). Nevertheless, Halperin maintains that the General Director is authorized, in principle, to object to a merger on non-competition grounds, though such authority has not been exercised hitherto. Halperin, “The failing firm doctrine”, 3/E Taagidim (Corporations) 21, 22, n. 6 (2006) (Hebrew).
merger would lead to closure of plants and undermine domestic production, the General Director set forth as follows:

Indeed, considerations of domestic production […] raise substantial personal, social and economic difficulties; nevertheless, these are considerations that the General Director is not authorized to take into account, regardless of his personal sympathy for the matter.  

On the other hand, though, the General Director, in order to prevent heavy economic losses to the market, exempted information exchanges that would otherwise be considered as restrictive arrangements.  

In the Iskur case, the General Director approved a joint venture between three vertically-linked firms, inter alia due to the fact that the venture would prevent the closure of a plant in an unemployment-ridden town. The Tribunal overturned the Director’s decision, and set forth that the Director was not authorized to consider such non-competitive concerns. However, the Antitrust Tribunal also held – in another case - that the General Director was not necessarily obligated to object to a merger whereupon competition would be significantly compromised, and must rather consider other public interest criteria as well.

Judicial Incorporation of Non-Efficiency Objectives

Review of the rulings rendered by the Courts and the Antitrust Tribunal indicates that these institutions acknowledge the existence of significant and legitimate non-efficiency goals.

---

349 Objection to Merger between Ta’al Plywood Industries Mishmarot Ltd. and Ashkelon Plywood Ltd. (2000) (unpublished; my translation). See also: Antitrust File (Jerusalem) 5/98 Edgar Investments and Development Ltd. v. General Director of the Israel Antitrust Authority et al. (unpublished); Iskur, supra note 348; Nuriel, supra note 339.


351 Supra, note 348.

352 Id., par. 13.

353 Tnuva, supra note 164.
under Israeli competition law. Nevertheless, such acknowledgment is hesitative, sporadic, incoherent and inconsistent and, at any rate, as compared to major Western jurisdictions, Israeli competition jurisprudence has not engaged in comprehensive examination as to the role of non-competitive objectives.

In the *K.S.R. Asbestos Trade* decision, the Supreme Court examined a restrictive arrangement between plywood and timber manufacturers and marketers, regarding joint import of raw materials, as well as joint marketing and sale in Israel and abroad. The arrangement had been approved by the Antitrust Supervision Board, *inter alia* on the ground that non-approval of the arrangement would lead to adverse consequences for the employees of the firms involved. *K.S.R.* appealed to the Supreme Court, and argued that the restrictive arrangement involved the imposition of high prices in the domestic market in order to subsidize low export prices, thus compromising the public interest. The Court rejected this argument, and held as follows:

> The Restrictive Trade Practices Law does not consider free competition as an exclusive factor that determines the public interest, and certainly allows for the consideration of additional factors, which affect public interest in the broader sense; the Law seeks to balance between the various interests – the advantages of free competition as far as product quality and consumer satisfaction vis-à-vis the need for providing latitude to restrictive arrangements, once proven that the latter are efficient and advantageous to the public.  

This decision was rendered in the mid-1980s, during which the government was still heavily involved in the market and sought to protect domestic firms. Nowadays, within

---


356 As the Court explicitly set forth: “Indeed, without the restrictive arrangement, the companies included in the arrangement would most probably not be capable of competing in the global market.” *K.S.R.*, *supra* note 354, p. 42 (my translation).
the context of the liberalization, deregulation and privatization processes that the Israeli economy is undergoing, such a decision – involving the imposition of supracompetitive prices upon consumers - would arguably not be rendered.

In the Shef Hayam case (Civil Appeal),\(^{357}\) the Supreme Court examined whether a non-competition covenant constituted a restrictive arrangement and was thus void. The minority opinion held that the covenant, by prohibiting one party from competing with the other (for a period of five years) indeed constituted a restrictive arrangement. However, the majority opinion expressed the view according to which values of good faith, fairness and integrity ought to be preferred over the protection of competition; thus, competition law ought not to be employed in order to declare the non-competition covenant as void, since such declaration was sought merely in order to evade a contractual undertaking:

> When unfettered competition, the objective of which is to develop the national economy, is balanced against moral values upon which we seek to base social life, then the latter undoubtedly prevail. If the choice is between a wealth society void of values and a poor society that cherishes values, then the latter is preferable.\(^{358}\)

This preference for moral values over competition was rejected by the Supreme Court, before which a Further Hearing was heard.\(^{359}\) Nevertheless, subsequent Supreme Court decisions gradually adopted the majority view in Shef Hayam (Civil Appeal).\(^{360}\) Such view was also echoed in decisions rendered by the lower courts. For instance, in the Avrahami decision, the District Court observed as follows:

> Competition is not the exclusive factor. The Restrictive Trade Practices Act recognizes the existence of other considerations that, though not compatible with


\(^{358}\) Id. (Civil Appeal), p. 167 (my translation).

\(^{359}\) Supra note 357 (Civil Further Hearing).

\(^{360}\) Supra, note 357.
free competition, may promote the public interest. […] The Restrictive Trade Practices Act clearly provides that non-competitive and non-economic considerations ought to be taken into account upon examination of the public interest and the best interest of the market.\textsuperscript{361}

However, conclusion according to which the courts have embraced the centrality of non-economic values is premature. In Israel, the statutory prohibition on restrictive arrangements is broad, and even considers certain arrangements as presumptively restrictive.\textsuperscript{362} Violation of the Law involves criminal sanctions,\textsuperscript{363} carries liability in tort,\textsuperscript{364} and renders the restrictive arrangement illegal and thus void.\textsuperscript{365} Even restrictive arrangements that would have been exempted or approved \textit{ex ante} – i.e. arrangements that are not anticompetitive or that promote the public interest – are strictly forbidden \textit{ex post}.\textsuperscript{366} Thus, in order to avoid the harsh consequences of rendering an arrangement restrictive, particularly whereupon such an arrangement is challenged merely in order to evade contractual undertaking, the Courts turn to non-competition rationales and grounds. Such rationales and grounds do not necessarily express departure from economic analysis, and do not necessarily mean that competition considerations are being overridden or that non-efficiency values are preferred, but are rather employed in order to avoid such harsh consequences.

\textsuperscript{361} Civil File (Tel Aviv) 1574/99 \textit{Avrahami v. Matav Cable Communication Systems Ltd.} (unpublished).
\textsuperscript{362} Restrictive Trade Practices Law, \textit{supra} note 165, §2.
\textsuperscript{363} \textit{Id.}, §§47, 47A.
\textsuperscript{364} \textit{Id.}, §50.
\textsuperscript{365} \textit{Id.}, §4 and Contracts Law (General Part), 5733-1973, \textit{Sefer Hukim} 118, §30.
\textsuperscript{366} Gal, “\textit{Separating the wheat from the shaft: restrictive agreements in light of the Supreme Court’s recent decisions}”, 1 \textit{Din Udvairim} 533, 535 (2004) (Hebrew).
Canada and the United Kingdom

Within the context of this paper, the competition laws of Canada and the United Kingdom are of special relevance. Non-efficiency considerations were explicitly anchored in the competition statutes of these jurisdictions. The gradual abandonment of such considerations took similar, though non-identical, courses. In Canada, while the Competition Act refers to both efficiency and non-efficiency objectives, the efficiency objective is preferred in practice. Thus, Canadian competition law demonstrates that the explicit inclusion of non-economic objectives as an integral part of competition law does not necessarily lead to the pursuit and attainment of such objectives. In the U.K., such abandonment of non-efficiency, public interest, goals was accompanied by statutory reform.

Canada

The Competition Act includes a “purpose clause” (Section 1.1). According to that clause:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

The “purpose clause” does not prioritize the objectives of the Act. In addition, “not all of the stated purposes or objectives can be served at the same time, nor are all necessarily consistent.” However, the clause clearly regards efficiency as only one


368 Superior Propane, supra note 148, par. 105.
purpose of maintaining and encouraging competition. The Competition Tribunal, in the (first) *Superior Propane* decision, set forth that the “purpose clause” sought to achieve these objectives “by maintaining and encouraging competition”;369 that is, the Tribunal suggested that competition was the ultimate end of competition law. Nevertheless, the Tribunal also held, within that decision, that efficiency “was Parliament’s paramount objective in passing the merger provisions of the Act.”370 Also, the Economic Council of Canada supported economic efficiency as the primary objective of competition law, finding that “the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy [...] in dynamic as well as static terms [...] and the avoidance of economic waste.”371 Indeed, similarly to developments in the US, the objective of economic efficiency has achieved primacy over Canadian competition law since the 1970s.372

The primacy of economic efficiency is particularly notable whereupon the efficiency defense, as per Section 96 of the Act, is applied.373 Indeed, “the efficiency defense allows the objective of efficiency to override all of the other objectives of

---

370 *Id.*, par. 437. See also: Ross, “Introduction: the evolution of competition law in Canada”, 13 *Rev. Ind. Org.* 1, 9 (1998): “While this might not be as clear a statement of the primacy of efficiency as some economists might have wished, it probably does represent a large step in that direction.” See also: Ehlermann & Laudati, *supra* note 89, pp. 85, 388.
373 See *supra*, p. 35.
competition policy; it, therefore, contradicts the overall objectives of the Act.”  

As set forth by the Court of Appeal:

In spite of the existence of the multiple and ultimately inconsistent objectives set out in section 1.1, in certain instances the Act clearly prefers one objective over another. Thus, section 96 gives primacy to the statutory objective of economic efficiency, because it provides that, if efficiency gains exceed, and offset, the effects of an anti-competitive merger, the merger must be permitted to proceed, even though it would otherwise be prohibited by section 92.  

The subordination of non-efficiency concerns to the efficiency objective within Canadian competition policy is clearly demonstrated by the protection of small business. As aforesaid, the “purpose clause” includes the equitable opportunity of small and medium-sized enterprises to participate in the economy among the objectives of the Act. In fact, the provisions of the Act regarding predatory pricing and price discrimination were enacted and (to some degree) enforced, inter alia, for the protection of small business.  

However, compared to the US, protection of small business has not had a profound impact upon the implementation of Canadian competition law.  

Upon discussion on the objectives of Canadian competition law, Trebilcock et al. indicate that “policy analysts rarely argue that the efficiency goal of competition policy should be compromised so that small firms can survive.”  

United Kingdom

As commented, “at no time have the objectives of UK competition law been clearly stated

375 Superior Propane, supra note 148, par. 110.
376 ABA Section of Antitrust Law, Competition Laws Outside the United States (2001), chap. 4, p. 15 and n. 63.
377 Public Interest Advocacy Centre, supra note 54, p. 4.
378 Trebilcock et al., supra note 27, p. 40. Compare with: ABA, supra note 376, p. 15.
379 For a history of UK competition legislation, see: Rodger & MacCulloch, supra note 44, p. 21ff.
Nevertheless, UK merger control constitutes an illuminating example of a regime that underwent transition from “public interest” analysis, which included consideration of non-economic criteria, to an economic-oriented analysis.

The Monopolies and Restrictive Practices (Inquiry and Control) Act,\(^{\text{381}}\) and subsequently the Fair Trading Act\(^{\text{382}}\) introduced the “public interest test” for merger control,\(^{\text{383}}\) which “comprised a variety of vague economic and socio-political concerns [and] was certainly not based on the need for certainty and predictability.”\(^{\text{384}}\) For instance, the public interest test was employed, *inter alia*, for the protection of British “national champions”.\(^{\text{385}}\) Thus, “there was debate in the UK regarding the suitability of the public interest test and its concern with non-competition issues.”\(^{\text{386}}\) In addition, the Acts provided for ministerial intervention in the merger control process, which contributed to the already apparent inconsistent and arbitrary decision-making on the basis of the malleable public interest test.\(^{\text{387}}\) In 1984, the Secretary of State for Trade and Industry, Norman Tebitt, declared that the Secretary’s “policy has been and will continue to be to make references


\(^{\text{382}}\) Fair Trading Act 1973, c. 41.

\(^{\text{383}}\) *Id.*, §84(1), which sets forth five considerations that the Commission must consider in order to determine whether “any particular matter operates, or may be expected to operate, against the public interest”: maintaining and promoting effective competition; promoting the interests of consumers, purchasers and other users of products; encouraging cost reduction and innovation; maintaining the promoting the balanced distribution of industry and employment; and promoting the competitiveness of national firms on international markets. §84 was repealed by the Enterprise Act, *supra* note 157 (see Schedule 26). See: Pickering, “The implementation of British competition policy on mergers”, 1 *Eur. Comp. L. Rev.* 177 (1980).

\(^{\text{384}}\) Rodger & MacCulloch, *supra* note 44, p. 24-25. See also: Motta, *supra* note 22, p. 12: “[the objectives of UK competition legislation prior to 1998] were never clearly specified. Under the wording ‘public interest’ many different considerations can be made.”

\(^{\text{385}}\) See, *e.g.*, Hong Kong and Shanghai Banking Corp./Royal Bank of Scotland, Cmnd 8472 (1982); The Government of Kuwait/British Petroleum, Cm 477 (1988).


primarily on competition grounds”\textsuperscript{388} (the Tebitt Doctrine). Nevertheless, non-economic criteria continued to play a role in the application of U.K. merger law.\textsuperscript{389} In 1991, the Trade and Industry Committee of the House of Commons recommended that “the non-competition public interest issues referred to in section 84 of the Fair Trading Act 1973 should be given equal weight with the competition issues from the beginning.”\textsuperscript{390}

The Enterprise Act replaced the public interest test with an explicit competition-based test. The Act also limited the role of the Secretary of State in the merger control process, in order to remove political influence from that process.\textsuperscript{391}

**Developing Countries**

Hitherto, discussion focused on the competition laws of five developed countries. However, analysis would be incomplete without reference to the unique considerations and circumstances that underlie the objectives of competition law within in transition countries (\textit{i.e.} countries still lacking the preconditions for a market economy) and, more generally, in developing countries.\textsuperscript{392} Indeed, “the widespread adoption in poor countries of the antitrust laws and methods used in the developed world is likely to produce no greater

\textsuperscript{388} United Kingdom, Department of Trade and Industry, press release, 5 July 1984.


\textsuperscript{391} Wilks, \textit{In the Public Interest: Competition Policy and the Monopolies and Mergers Commission} (Manchester, UK: Manchester University Press, 1999), p. 228.

harmony than the attempt of a marching band to render a baroque string quartet. The band needs to march to a different tune.”

The general discussion will be followed by specific treatment of South African competition law.

Objectives of Competition Law in Developing Countries: General

The competition laws of most developing countries widely embrace non-economic objectives. Indeed, “in those developing countries which have introduced [competition] laws, competition laws and policies do not appear to be exclusively focused on economic efficiency.”

Commentators have identified the following reasons and justifications for the relatively broad embrace of non-efficiency goals within developing countries:

(a) Competition authorities in developing countries are often engaged in a struggle to achieve credibility and legitimacy, and consideration of public interest objectives – despite the difficulties involved in balancing such objectives against economic efficiency – may assist the authorities in gaining public support and recognition.

(b) The gradual introduction and establishment of market economies and free competition in developing countries require public support, the attainment of which may be promoted by the application of public interest considerations within competition law. As commented, “the immediate goal of competition policy in

394 Petersmann, supra note 221, p. 153.
395 Lewis, The Role of Public Interest in Merger Evaluation (2002), p. 2; available at: http://www.comptrib.co.za/Publications/Speeches/lewis5.pdf. See also: ABA, supra note 17, p. 5, n. 8: “the immediate goal of competition policy in [developing] countries may reflect a need to establish the political acceptance of a market economy and may therefore reflect aspects of competition policy that more directly support politically popular short-term objectives.”
these countries appears to be emergence of economic opportunities and entrepreneurship in a context in which more attention must be paid to establishing the political acceptance of a market economy (and therefore taking into account the populist views of competition policy). In contrast, as commented, the injection of “various vague and conflicting social policy standards [...] will almost inevitably lead to at least accusations of political influence if not corruption.”

(c) Relatively great influence by vested business interests in developing countries.

The embrace of non-efficiency goals within developing countries involves certain substantial drawbacks. First, particularly in comparison to developed countries, courts and antitrust enforcement bodies in developing countries are ill-equipped to engage in comprehensive and precise economic analysis. As commented, “the burden of ensuring rigorous economic analysis is demanding for all countries, but is likely to affect developing countries more severely.” Second, as Gal maintains, in small economies, “it is vital that [...] economic efficiency be given primacy over other goals [since such economies] are less able than their larger counterparts to afford a competition policy that sacrifices economic efficiency for broader objectives.” Since the correlation between small economies and developing countries is substantial, the foregoing arguably applies to the latter as well.

396 Ehlermann & Laudati, supra note 89, p. xi.
398 OECD, supra note 90, p. 4.
399 ABA, supra note 17, p. 21.
Objectives of Competition Law in Developing Countries: South Africa

South African competition law is particularly pertinent to the matter at hand since such law clearly demonstrates the unique role that non-efficiency objectives fulfill in transition and developing countries. As stated by the South African Competition Commission, “a fundamental principle of competition policy and law in South Africa thus is the need to balance economic efficiency with socio-economic equity and development.”

The “purpose clause” of the South African Competition Act explicitly refers to non-efficiency goals, such as promoting employment; ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promoting a greater spread of ownership, in particular in order to increase the ownership stakes of historically disadvantaged persons.

According to the Act, the Competition Commission may exempt an agreement or practice, or category of agreements or practices, from the application of Chapter 2 of the Act, which covers restrictive practices and abuse of a dominant position, *inter alia* for the

---

404 An article published in 1969 demonstrated that monopolies in the U.S. discriminated against African-Americans more frequently than enterprises that operated within a competitive market. Shepard, “Market power and racial discrimination in white collar employment”, 14 *Antitrust Bull.* 141 (1969). Whether that is still the reality today remains to be demonstrated.
406 Competition Act, supra note 405, §2. See also the Preamble; *Anglo South Africa Capital (Pty) Ltd. and Others v. Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC) (2003).
“promotion of the ability of small businesses, or firms controlled or owned by historically disadvantages persons, to become competitive.” In addition, the Act provides that the promotion of such ability must be considered by the Commission or the Competition Tribunal “when determining whether a merger can or cannot be justified on public interest grounds.” However, such “affirmative action” has not been employed as a sole criterion in merger assessment.

\[\text{\footnotesize 407\ Competition Act, supra note 405, §10(3)(b)(2).}\]
\[\text{\footnotesize 408 Id., §16(3)(2). See Shell South Africa (Pty) Ltd. and Tepco Petroleum (Pty) Ltd. [2002], ZACT 13 (22 February 2002), par. 37: “It is important to emphasize that in terms of the Act our assessment of the public interest impact of the transaction may lead to the prohibition of (or the imposition of conditions on) a pro-competitive merger. Or it may result in us approving an anti-competitive merger.”}\]
\[\text{\footnotesize 409 ABA, supra note 17, p. 18.}\]
Part II – Integration of Non-Efficiency Objectives – Practical Challenges

Quantification of Non-Efficiency Objectives

Commentators have pointed to the difficulties inherent in the quantification of non-efficiency objectives. As maintained, “public interest is an elusive and amorphous concept.”\(^{410}\) Whereas the effects of a restrictive trade practice upon efficiency may be analyzed and quantified on the basis of econometric measures, the quantification of non-efficiency considerations is rather complex. Indeed, “such concerns as community breakdown, fairness, equity, and pluralism cannot be quantified easily or even defined acceptably.”\(^{411}\) Ultimately, “because it may be difficult to convert non-economic benefits into economic terms, it is impossible to compare those benefits to the economic costs that must be incurred to achieve them.”\(^{412}\) Also, the prospects for achievement of non-efficiency objectives through courses of action that do not involve a restrictive trade practice are rather difficult to prove or measure \textit{ex ante}. In addition, non-efficiency advantages or disadvantages that are reasonably foreseen, in good faith, by the parties to the restrictive trade practice may never be realized. For instance, adverse employment consequences that are predicted as a result of a merger may turn out to be a “false alarm”.

Indeed, the effects of market structure and conduct upon economic efficiency have been extensively analyzed, and methods for determining such effects have been thoroughly developed. On the contrary, the political and social effects of market structure and conduct remain amorphous, whether inevitably or since political science has yet to fully

\(^{410}\) Khemani, \textit{supra} note 41, p. 5.

\(^{411}\) \textit{Id.}, p. 4.

\(^{412}\) Baxter, \textit{supra} note 17, p. 621. See also: ABA, \textit{supra} note 17, p. 23: “Nations that adopt social and political objectives as part of their competition rules could be imposing hidden costs on themselves, in that they may not be in a position to determine the specific costs associated with achieving a specific objective.”
comprehend and determine the exact nature of such effects.

The difficulties as aforesaid do not bother all commentators. First asserts that “the difficulty of assigning price to social goals does not mean they are valueless – quite the contrary.” As commented, even if the efficiency of a business conduct or transaction may be quantified, the gains and losses upon the various groups in society as a result of such conduct or transaction may not be quantified “except in very easy cases.” Baxter maintains that the economic costs of achieving non-economic goals are “real and generally estimable.”

Should non-economic objectives, then, be approached with skepticism and doubt, even cynicism? I believe they should not. First, the very assumption that the objectives of competition law ought to be quantified is based on the premise that the (exact) science of economics reigns over antitrust analysis. In contrast, the multi-value approach to competition law insists that economic considerations and analysis are but one piece of the great puzzle that comprises the objectives of such law. Therefore, the essence of non-efficiency concerns, rather then the measurability of such concerns, is of relevance in this respect. Second, while non-efficiency objectives may never be realized, there is also no guarantee that predicted efficiencies will materialize. Third, courts, as a routine and ordinary matter, assess “fluid” and “immeasurable” values, such as human rights, good faith, and fairness; similarly, balancing between non-efficiency and efficiency objectives does not require that both be reduced to quantified, absolute terms.

---

413 First, supra note 57, p. 967.
414 Hovenkamp, supra note 8, p. 233.
415 Baxter, supra note 17, p. 621.
The Institutional Question

Arguably, separation should be made between the authorities that assess non-efficiency objectives and those that consider purely economic considerations. As argued, (a) non-efficiency objectives ought not to be considered by the competition agency (as opposed to the ministerial level and the judiciary) (b) such objectives ought not to be considered by the judiciary (as opposed to the legislature). Analysis and assessment of this argument follow.

Consideration of Non-Efficiency Objectives by the Competition Agency

Certain jurisdictions afford exclusive status to the ministerial level, or the judiciary, to consider non-efficiency objectives, and deprive or limit the authority of the competition agency to consider such objectives. In the U.K., the Enterprise Act provides for involvement and intervention of the Secretary of State whereupon mergers or market investigations involve a public interest. So, for instance, the Act authorizes the Secretary to refer matter to the Competition Commission if she believes that one or more public interest considerations concerning a merger have arisen. National security (including public security) is specified by the Act as a public interest consideration; the Secretary may add a new public interest consideration.

In Germany, according to the GWB, “the Federal Minister of Economics and

\[416\] Enterprise Act, supra note 157, §§45, 62. Regarding mergers with a Community dimension, see id., §§67-68.
\[417\] Id., §§58, 153.
\[418\] See also: Merger references: Competition Commission guidelines, supra note 156, §§5.1-5.11; Mergers - substantive assessment guidance, supra note 155, p. 54ff.
\[419\] See also: §29(1) of the Trade Practices Act 1974 (Australia), according to which “the Minister may give the Commission directions connected with the performance of its functions or the exercise of its powers under this Act”; Section 26(1) of the Commerce Act 1986 (New Zealand), according to which “the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister.”
Labour shall, upon application, authorize a concentration prohibited by the Bundeskartellamt if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest.”

However, such authority by the Minister has rarely been employed.

In Israel, as aforesaid, the Restrictive Trade Practices Law authorizes the Antitrust Tribunal to consider the public interest upon assessment of restrictive arrangements, while the authority of the General Director to consider the public interest within the contexts of restrictive arrangements or merger control is uncertain. Also, Section 52 of the Law authorizes the Minister of Trade and Industry to “exempt a restrictive trade practice from all or some of the provisions of [the] Law, if he believes that such action is necessary on grounds of foreign policy or national security.”

Usually, competition laws of developed countries that allow for consideration of non-efficiency objectives confine such consideration to a minister or other political entity; in contrast, competition laws of developing countries usually allow the competition authority or tribunal to take non-efficiency objectives into account. Lewis suggests that in developing countries, the overruling by a political entity of decisions made by the competition authority would be regarded as “evidence of the toothlessness of the

---


422 Supra, p. 72.

423 That authorization has not been exercised hitherto.

424 OECD, supra note 90, p. 6.
competition authority”, while in developed countries, such overruling would be regarded as strengthening the independence of the competition authority.425

According to Gal, the division between the authorities of the competition agency and the courts is “a healthy one, as it minimizes pressures on the antitrust agency and it allows for a clear and consistent policy.”426 Similarly, Gal maintains that “making broad policy decisions that might carry social, political or cultural consequences is not within the mandate of the antitrust authority and may even impair democratic values.”427

In my opinion, coherence of antitrust analysis and assessment would be promoted by limiting the discretion of the competition agency to efficiency concerns. The competition agency is usually the initial “station” whereupon restrictive trade practices are assessed, and the effects of such practices upon efficiency and competition usually constitute the specific expertise of the agency. If the agency performs a comprehensive exclusively efficiency-based analysis, then the subsequent assessment of non-efficiency objectives may be simplified and enhanced. In other words, once the professional agency reaches decisions based purely on professional (efficiency) grounds, then not only may the merit of the decisions be more coherently assessed, but the merit of any subsequent decision (by the judiciary, minister or other entity) based on non-efficiency concerns may be coherently assessed in relation to the professional, efficiency-based, decision made by the competition agency.

Consideration of Non-Efficiency Objectives by the Judiciary

While, as aforesaid, consideration of non-efficiency objectives by the judiciary is arguably preferable over consideration of such objectives by the competition agency, the role of the

425 Lewis, supra note 395, p. 3.
426 Gal, supra note 35, Part III(E).
427 Id., Part IV.
judiciary (including the antitrust tribunal) in this respect is widely considered as problematic, at best, or unconstitutional, at worst.

In the U.S., by enacting broadly-formulated antitrust statutes, Congress “in effect delegated much of its lawmaking power to the judicial branch.”

In the *Topco* case, the US Supreme Court examined the suitability of the Court for assessing the effects of exclusive arrangements upon inter-brand and intra-brand competition:

Courts are ill-equipped and ill-situated for such decision-making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competing areas of the economy, the judgment of the elected representatives of the people is required.

According to Areeda and Hovenkamp, “neither the antitrust statutes nor the antitrust tribunal is in any sense a substitute for the legislative body addressing questions of misdistribution of wealth, or of economic dislocation caused by new innovation or consolidation.” Such questions require “legislative judgments and [should] not be entrusted to a judge or other tribunal acting under a statute that does not authorize them.”

As Pitofsky observes, “while the national commitment of the United States is to allocation of resources through free markets, Congress or state legislatures can accord
complete or qualified exemptions where noncompetitive considerations are clearly valid and substantial. Arguably, that is a more orderly approach and more consistent with democratic traditions than turning judges and regulators loose with a vague mandate to do justice by creating exceptions for what appear to be worthy noncompetitive considerations.”

Bork asserts that unless economic efficiency constituted the exclusive goal of antitrust, federal courts, in weighing political and social goals, would be led to public policy decision-making, which is constitutionally problematic, as such decision-making is reserved for the legislature. Judicial consideration of non-efficiency objectives would, according to Bork, lead the Courts to engage “in a task that is so unconfinedly legislative as to be ‘unconstitutional.’” Furthermore, Bork maintains that the history of antitrust law “should constitute a warning about the weakness of the adjudicative process and the danger of relying on courts to evolve major social policy.”

Baxter maintains that “although real and generally estimable, the economic costs of achieving […] non-economic goals would not be explicit. Direct taxes and subsidies would be less costly (and politically more honest) methods for achieving social and political goals. Congress is far better suited politically than courts and prosecutors to determine whether or not the benefits of social and political engineering […] are worth the

433 Pitofsky, supra note 16, p. 25.
434 Bork, supra note 24, pp. 72-79.
435 Bork, supra note 232, p. 24. See also: Bork, supra note 24, p. 79; Bork, supra note 233 (“Legislative intent and the policy of the Sherman Act”), p. 10; Bork, supra note 235, p. 244: “The functions of courts and legislatures are different, the latter making political choices. Courts inevitably make policy, but where Congress has written a statute, the policy movements of the courts are ideally molecular rather than molar.” See also id., p. 246: “A court is not the proper institution, either by equipment, responsiveness to the electorate, or specialization of function, to write ab initio detailed specifications of political compromise between conflicting and incommensurable values.”
436 Bork, supra note 24, p. 16.
toll on economic efficiency."

The Canadian Competition Tribunal asserted that “an assessment of the merits, or otherwise, of the distributive effects of a merger is a political task best performed by elected politicians, not by members of the Tribunal, who are appointed for their expertise in economics or commerce.”

As aforesaid, Article 81(3) EC requires the European Commission to consider broad public policies and balance such policies against the anti-competitive agreement, decision or practice. Schweitzer maintains that “absent a clear hierarchy of goals, a court or competition authority, in making […] value judgments, acts no longer in the role of a judge, but enters the field of policy making.”

Admittedly, the concerns regarding engagement of the judiciary in assessment of non-efficiency considerations are persuasive. However, my opinion is that such concerns do not constitute an irremovable impediment to judicial involvement in injecting public policy goals into competition law. First, such concerns stem from subjective views as to the role of the judicial branch within government, namely, views that oppose judicial activism. Recognition of broad judicial authority to engage in policy-making would also entail recognition of judicial authority to assess and weigh non-efficiency goals. Moreover, in this respect, courts in fact balance between competing interests in many fields of law, and arguably, competition law does not constitute a justifiable exception in this respect. As maintained “doubts about the ability of judges and courts to balance competition and non-competition goals are frequently rejected by pointing to other

437 Baxter, supra note 17, p. 621.
438 Paraphrased by the Federal Court of Appeal, Superior Propane, supra note 148, par. 49.
439 Supra, p. 66.
440 Schweitzer, supra note 10, p. 10.
complex balancing processes, e.g. in the context of fundamental rights." Indeed, “if judges cannot be trusted to balance conflicting interests, who can?”

Second, the assumption according to which the legislature is “better equipped” than the judiciary to consider the public interest constitutes, in my opinion, a misreading as to operation of the legislature. While the legislature enjoys the availability of greater expertise, as well as political support that the judiciary does not necessarily possess, the consideration of non-efficiency concerns by the legislature may involve the attribution of disproportional weight to such concerns, due to populist motivations or as a result of lobbying.

**Appropriateness of Competition Law for Addressing Non-Efficiency Concerns**

“Whenver competition policy is used for other purposes than efficiency, one has to wonder whether this is the optimal solution.”

Arguably, competition law is neither the ideal nor the appropriate nor the effective instrument for achievement of social, political and other non-economic objectives. As commented, “antitrust was not intended to rule the world, nor is it well suited for that task.”

Areeda and Hovenkamp, while conceding that competition may be compromised for the sake of other considerations, reject the employment of antitrust law as an instrument for achievement of non-competition goals:

As a matter of *general* legislative policy, competition is hardly foundational and government may often wish to intervene to mitigate its harsher effects. But antitrust’s purpose is to see to it that competition is promoted whatever its collateral consequences, not to make legislative judgments about when relief from the

---

441 Semmelmann, *supra* note 38, p. 15.
443 Motta, *supra* note 22, p. 28.
444 Areeda & Hovenkamp, *supra* note 9, p. 98.
excesses of competition is appropriate.\textsuperscript{445}

Elsewhere, Hovenkamp asserts that “antitrust is an economic, not a moral, enterprise […] Antitrust is a defensible enterprise only if intervention into the market is economically justified.”\textsuperscript{446}

As observed, “competition laws, and, more broadly, competition policy, are increasingly viewed as being poor tools for pursuing non-efficiency objectives. That is to say, society can ‘get a bigger bang for its buck’ by using other industrial policy tools to promote objectives such as regional development, employment, small businesses, wealth redistribution, etc., than by using competition policy to pursue those types of goals. Moreover, pursuing non-efficiency objectives such as fuller employment, the preservation of small and medium-sized businesses and vaguely defined international competitiveness can be counterproductive, because, in the long run, a market power/efficiency standard is more likely to lead to positive results in terms of these objectives.”\textsuperscript{447}

Similarly: “If non-economic goals must give way to efficiency goals in the area of competition law, this does not at all imply that society cannot pursue the former objectives by different means. It is not asserted here that fairness is not an appropriate goal for public policy. However, distributional issues, such as the protection of small firms by giving

\textsuperscript{445} Areeda & Hovenkamp, \textit{supra} note 9, p. 6 (emphasis in original). The authors also maintain, \textit{id.}, p. 7, that “the federal antitrust laws are not well designed to cure failures of our democratic governmental process.” See also, \textit{id.}, p. 98: “Direct legislation is both more effective and more appropriate for promoting [populist] objectives”, and \textit{id.}, p. 114ff.


them fair and equal chances to compete with larger rivals, are best addressed through means other than competition policy.”

Elzinga maintains that “the pursuit of egalitarian income distribution through antitrust enforcement is likely to have limited results.” Foer comments that “wealth distribution can be accomplished by tax policy; environmental protection by environmental laws; encouragement of small businesses by special subsidies.” Fox maintains that “jobs problems should be dealt with by jobs policy […] competition policy should be dealt with by antitrust.” As to protection of small business, Elzinga comments that “a high level of aggregate demand, a stable price level, a revision in the corporate tax policy, or all three would contribute more to the prospects for small business […] than antimerger cases or dissolution decrees.” Korah observes that “a better way [than through competition law] to help smaller firms may be to free them from bureaucratic controls that fall more heavily on them than on their larger competitors.” Pitofsky maintains that “inefficient small business will suffer losses regardless of how the antitrust laws are interpreted, and the income redistribution that can be achieved through antitrust channels is trivial.” Posner asserts that “antitrust enforcement is an inappropropriate method of trying to promote the interests of small business as a whole.”

449 Elzinga, supra note 15, p. 1196.
451 Fox, supra note 2, p. 733.
452 Elzinga, supra note 15, p. 1200.
454 Pitofsky, supra note 22, p. 1059. Pitofsky further asserts, id., p. 1060, that these goals “could be achieved more efficiently and with fewer adverse affects through direct subsidy, taxation, and welfare programs.”
455 Posner, supra note 24, p. 19. As Posner explains, “the best overall antitrust policy from the
small business is our chosen goal, competition policy should not be chosen as the method to achieve it. Competition law, as its name indicates, is aimed at facilitating competition among potential rivals [...] Tax measures, for example, might be better tools for achieving such goals.\textsuperscript{456}

In Canada, the Economic Council “expressed the view that competition policy should not respond to concerns about the equitable distribution of wealth and the diffusion of economic power, since other more comprehensive and faster working instruments could more effectively do so.”\textsuperscript{457} Similarly, Trebilcock \textit{et al.} comment that “government instruments such as taxes and social insurance are much better suited for the goal of distributing income equitably.”\textsuperscript{458}

I concede that competition law should not serve as the primary instrument for achievement of non-competition goals. After all, competition law is about competition. However, competition law may and should play a constructive role, to the extent possible under the specific circumstances, in the promotion of public interest concerns. True, tax benefits are probably of greater effectiveness in promoting small business, particularly due to the relatively direct and immediate effects of such benefits, but if competition law may also serve as a vehicle for the promotion of such objective, then competition law ought to serve as such. In other words, non-efficiency objectives may be achieved through social, political and economic public policies \textit{combined with} competition law. As such,
competition law is no different from other fields of law that may serve certain public policies in addition to the primary objectives pursued by such laws: e.g., tax law is primarily designed to ensure funding for government operation, and is also exercised as a redistributive instrument; the law of securities regulation seeks to regulate capital markets, and is also employed (through reporting requirements) as a means to induce firms to adopt social responsibility and environmental policies.

In addition, while competition law, as presented above, is not widely viewed as the appropriate instrument for achievement of public policy goals, “other policy instruments are not always available, or may be very costly to use. In a second-best world, it is important that competition policy, even if it should not be the primary tool to resolve problems such as income redistribution, at least should not aggravate them.” Indeed, tax benefits would not (at least in the short-run) alleviate the harsh effects brought upon by closure of a plant that is the lifeline of a community. Also, the achievement of non-efficiency goals through the instrument of competition law may produce results that, for political and other reasons, may not be attainable if other instruments are employed. Moreover, under certain circumstances, disregarding non-efficiency considerations and adhering to strict economic analysis may increase the costs that realization of government policy entails. For example, prevention of a merger due to efficiency considerations alone may bring about the closure of plants and loss of jobs, thus imposing upon the government (and society at large) pecuniary and social costs that unemployment entails.

Subjectivity, Unpredictability, Inconsistency and Politicization

Arguably, economic assessment ensures uniform terminology, promotes transparency and

459 Public Interest Advocacy Centre, supra note 54, p. 4, note 5.
allows for critical analysis. Thus, competition law based on efficiency analysis entails greater objectivity, predictability and consistency, and is less prone to political influence, in comparison to competition law that takes account of non-efficiency concerns. As Foer comments, in reference to economic efficiency, “there is indeed a yearning to find one goal, the single goal, because then one could design a system of antitrust that would appear to be scientific, objective, safe from the prejudices introduced by such human factors as politics.”

Although initially persuasive, the discussion below will demonstrate that an exclusively efficiency-based analysis is not necessarily advantageous in these respects.

**Subjectivity of Non-Efficiency Objectives**

Economic analysis of antitrust, as suggested, is based on objective criteria and methodology, and thus limits subjective and arbitrary decision-making. In contrast, and based upon the insights of legal realism, according to which “one should be aware of the ideological complexion of decision-makers,” consideration of non-efficiency objectives is said to entail subjective decision-making. Foer comments that objectivity within the antitrust context is particularly important since “the financial stakes are sufficiently high to

---

460 Foer, *supra* note 166, p. 31. Foer adds, *id.*, that “when multiple goals are acknowledged, logic is likely to suffer. Tradeoffs will have to be made. Discretion and hence politics will enter into the process. Compromise is messy. Outcomes are not necessarily predictable, although rules can be invoked to reduce this problem.”

461 See Austin, “The emergence of societal antitrust”, 47 *NYU L. Rev.* 903, 904 (1972): “Traditional antitrust ethos is firmly implanted in the principle that enforcement is neutral: antitrust policy is neither pro- not anti-business; proscription descends automatically upon the appearance of certain market disturbances; and the existence and the extent of market disruptions are to be measured by objective economic criteria.”

462 Flynn, *supra* note 20, p. 1184. See also: Holmes, *The Common Law* (Boston, MA: Little, Brown and Company, 1881), p. 1: “The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”
make corruption a distinct possibility.”

In *GTE Sylvania*, the U.S. Supreme Court, while conceding that antitrust serves political and social goals, nevertheless concluded that antitrust policy must look to market considerations for *objective* benchmarks. As Elzinga asserts, “when efficiency is compared with equity as a reference for antitrust policymaking, the virtue of efficiency is its relative objectivity.” Therefore, as maintained by Areeda and Hovenkamp, “an exclusively economic approach to antitrust policy is significantly more coherent than any alternative policy emphasizing fairness, protection of particular interest groups, ‘populism’ or some other noneconomic goal.” Antitrust analysis that is based primarily upon economic efficiency is perceived as “scientific and rigorous, as contrasted with the softer values of a more inclusive approach that would encompass non-economic values.” In fact, proponents of efficiency as the primary goal of competition law regard the (supposed) purely scientific economic analysis as “freeing us at last from the heretofore frustrating vagaries of antitrust enforcement policy, judicial decision-making and legislative policy-making.” The “mixture” of economic analysis and non-economic

---

463 Foer, *supra* note 166, p. 23.
464 *GTE Sylvania*, *supra* note 221.
465 *Id.*, p. 53, n. 21: “Competitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks.”
468 Brodley, *supra* note 41, p. 1020.
469 See *infra*, p. 113.
analysis, as argued, “can make it more difficult to assess the objectivity and fairness of the analysis.” Bork maintains that the consideration of non-efficiency objectives would inevitably lead to arbitrary adjudication, due to the judicial tendency to arrive at rigid rules rather than engage in “case-by-case compromises between the values.”

The ABA Report on Antitrust Policy Objectives clearly summarizes the advantages of antitrust analysis based primarily on economic criteria, as providing “a common language, which furthers transparency and facilitates understanding and critical appraisal; and recognized/objective criteria and modes of analysis, which can limit discretion of decision-makers and increase transparency.”

Baxter maintains that “generally, non-economic standards are stated in vague, subjective terms. As a result, it is impossible to articulate well-defined operational rules based on such standards and to evaluate the success or failure of the rules in achieving their objectives. That is, while one can estimate the approximate economic costs and benefits of a merger and readily compare the two, there is no objective measure for valuing social and political costs and benefits.”

As observed, “the use of competition policy to achieve not merely efficiency but an equitable distribution of wealth would result in an excessively complex and non-transparent set of legal rules that would be both uncertain and arbitrary – being determined by the opinions and values of whoever was sitting on the tribunal in a particular case.”

471 ABA, supra note 17, p. 23.
472 Bork, supra note 24, p. 86.
473 Supra, note 17.
474 Id., p. 20 (emphasis added).
475 Baxter, supra note 437, p. 621. See also: OECD, supra note 447, p. 61, n. 1: “A public interest test also inevitably introduces a good deal of subjective judgment and with it extra uncertainty and delay into merger review.”
476 Trebilcock, et al., supra note 27, p. 40.
Unpredictability and Inconsistency of Non-Efficiency Objectives

Arguably, attribution of exclusive or primary significance to the economic efficiency objective entails predictability. If the criteria for assessment of restrictive arrangements, monopolies and mergers are solely economic, then market actors may predict the legal consequences of business decisions as far as competition law is concerned.\(^{477}\) To be sure, the actual legal consequences may not always correlate with such predictions; however, if merger control, for instance, were based exclusively upon the HHI (Herfindahl-Hirschman) Index\(^ {478}\) and other econometric instruments, and disregarded the implications of the merger as far as employment, then firms would be better equipped to make educated plans. Indeed, “attempts to take into account multiple objectives in the administration of competition policy may give rise to conflicting and inconsistent results.”\(^ {479}\) Thus, historically, the amorphous nature of social and political objectives led, in the U.S., to “a more conservative alternative that promised superior implementation, clarity and predictability:\(^ {480}\) Chicago School antitrust analysis. Indeed, “one of the great achievements of Chicago School antitrust policy based on the market efficiency model is a claim to consistency that cannot be made by any alternative approach that requires the ‘balancing’

\(^{477}\) See Flynn, \textit{supra} note 20, p. 1188: “So long as courts countenance […] non-economic goals, prediction of results will be an art rather than a science, dependent upon a sophisticated understanding of the limits, as well as the capacity, of formal economic analysis, and the balance to be struck with other sources of wisdom perhaps not subject to quantification.” Bork eloquently described the importance of predictability within the antitrust context: “The judicial process itself must be responsible. That requires the decision of cases upon criteria which are judicially administrable, give fair warning to those required to obey the law, permit sufficient predictability so that desirable conduct is not needlessly inhibited, and permit rational explanation of the application of the criteria so that judicial performance may be evaluated and controlled.” Bork, \textit{supra} note 235, p. 244.


\(^{479}\) Khemani, \textit{supra} note 41, p. 4.

\(^{480}\) Lande, \textit{supra} note 39, p. 432.
of competing interests, such as consumer welfare and small business welfare.\textsuperscript{481}

The injection of non-economic objectives into competition law may compromise certainty in the business world, and thus lead to hesitative and inhibited decision-making that may, in the long run, impede economic efficiency and consumer welfare.\textsuperscript{482} Also, consideration of non-efficiency concerns may undermine the legitimate business interests of the parties to an assessed engagement or transaction, since an economic assessment is usually expected.\textsuperscript{483} As eloquently articulated by Posner, “no businessman can know what the law is if the ‘law’ depends upon the sympathies and prejudices of any one of the hundreds of federal judges before whom he may find himself arraigned at some uncertain date in the future.”\textsuperscript{484}

Unpredictability does not stem only from weighing non-economic considerations, but also from weighing such vis-à-vis economic efficiency. As argued, not only are non-efficiency objectives often difficult to assess, but antitrust analysis that combines assessment of such considerations and assessment of efficiency concerns is likely to be complicated: “The introduction of additional objectives into competition reviews based on economic analysis complicates analysis by requiring consideration of additional issues.”\textsuperscript{485} Indeed, in the absence of any common denominator, balancing between the various non-economic objectives, and between such objectives and efficiency, is susceptible to subjectivity. As maintained, “coexistence of the social-policy argument with the pro-

\textsuperscript{481} Hovenkamp, \textit{supra} note 8, p. 234.
\textsuperscript{482} Valentine, \textit{supra} note 210, p. 74.
\textsuperscript{483} Testimony of Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, ICPAC (International Competition Policy Advisory Committee) Hearings (1998), Hearings Transcript, p. 142: “You have these two companies that want to proceed to that finish line as quickly as possible. That doesn't mean that that's an opportunity to extract a toll from these companies.”
\textsuperscript{485} Posner, \textit{supra} note 24, p. 81.
\textsuperscript{485} ABA, \textit{supra} note 17, p. 22.
competitive rules would introduce so vague a factor that prediction of the courts’ behavior would become little more than a guessing game.”

As Foer comments, “if we import [...] goals that do not relate to competition into antitrust, such a mismatch would make antitrust decisions much more difficult to predict.” Indeed, “the inclusion of multiple objectives [...] increases the risks of conflicts and inconsistent application of competition policy.”

As Clougherty asserts, “akin to the difficulty of predicting firm-behavior when firm objectives involve multiple goals [...], it is far more difficult to predict the actions of a government agency charged with multiple policy goals.”

Areeda and Hovenkamp maintain that “even where there is no evident conflict [between populist goals and economic efficiency], injection of populist goals [...] would multiply legal uncertainties and threaten inefficiencies not easily recognized or proved.”

If non-efficiency considerations constituted an integral part of competition law, then, as argued, “clear standards would be unlikely to emerge, thereby leading to uncertainty and distortions in the marketplace and the undermining of the competitive process.”

The unpredictability and inconsistency associated with attribution of weight to non-efficiency objectives are often linked to the subjectivity inherent in such attribution. The link is eloquently described as follows:

487 Foer, supra note 166, p. 24.
488 OECD, supra note 90, p. 2.
490 Areeda & Hovenkamp, supra note 9, p. 99. See also id., p. 113: “Once antitrust rules are properly framed in terms of competitive and efficiency considerations, there is little room left for non-conflicting additional prohibitions; avoiding conflict would require difficult if not elusive efficiency determinations that in many instances would otherwise be unnecessary.”
491 Khemani, supra note 41, p. 4.
Whereas the potential market power and efficiency implications of proposed initiatives or past conduct to a large degree can be objectively assessed in terms of producers’ surplus and consumers’ surplus, the weighing of non-efficiency goals is entirely subjective. The same is necessarily true of regarding any balancing of social and political effects against market power/efficiency effects, because these two classes of effects are not commensurable on any standard and cannot be assessed pursuant to operational rules. As a result, it is difficult, if not virtually impossible, to achieve consistency over a period of time with such a policy. This in turn leads to substantial costs associated with uncertainty. Furthermore, as predictability decreases and the decision-making process increasingly is perceived to be somewhat arbitrary, public confidence in a competition policy is difficult to maintain. Finally, the costs of administering a broad standard that embraces non-efficiency goals are probably significantly higher than the costs of administering a market power/efficiency standard.  

The differences among various jurisdictions as to the objectives of competition laws are considered as an impediment to the internalization of competition law. Indeed, among the arguments articulated against the establishment of an international competition regime is the fear that such regime will inevitably be injected with non-competition values. Consideration of non-efficiency objectives, as asserted, may lead to the attribution of disparate weights by different enforcement authorities to such objectives, depending on the economic and social circumstances that prevail in each particular jurisdiction. Thus, “the introduction of multiple objectives can seriously complicate multinational efforts to align antitrust reviews.”

Economic analysis of antitrust, as argued, promotes consistency among competition law jurisdictions, thus facilitating globalization and harmonization between competition law enforcement authorities, as well

\[492\] Crampton & Facey, supra note 447, p. 31.

\[493\] However, see Ehlermann & Laudati, supra note 89, p. xii (presenting the view according to which disparities between competition law do not constitute an impediment to internationalization).


\[495\] See ABA, supra note 17, p. 22: “When multiple countries are involved, there is no reason to believe that the weights will be the same, especially since the economic and political circumstances of the different countries are likely to be significantly different.”

\[496\] Id., p. 22.
as greater legal certainty with which international business may be carried out. As maintained, “increasing reliance on an economic analysis by jurisdictions worldwide also helps to achieve greater convergence among competition enforcers, which may increase business certainty globally.”497 Similarly, “cooperation in merger control may call for restricted domestic action and increased transparency, thus preventing the occasional use of competitive policy as a tool to advance non-competitive objectives.”498 However, even if economic efficiency were the sole objective that guided competition laws, harmonization of competition law would not be ensured, inter alia due to disparity as far as enforcement levels.

Politization of Competition Law
The subjectivity inherent in consideration of non-efficiency objectives may lead to politicization of competition law. A competition policy injected with multiple objectives may suffer from vagueness, and is thus susceptible to misuse or capture by interest-groups that possess political power. Thus, non-efficiency objectives may serve such groups, rather than the public interest. Indeed, “broadly specified policy objectives can be ambiguous and as such are subject to ‘capture’ or ‘hijack’ by the politically strongest private interests, usually those of producers or workers. Thus de jure public interest objectives may de facto serve private interests”.499 As Schmidt notes, “the case studies have shown that political influence and non-competition factors exist in the decision-

497 Id., p. 21. Nevertheless, “even if all jurisdictions were to adopt the promotion of competition based on efficiency as a fundamental competition law objective, significant choices (for example, as to the level of enforcement within the jurisdiction) continue to exist and can lead to differing analytical results as between jurisdictions.” Id.
498 Ezrachi, supra note 12, p. 438.
499 OECD, supra note 447, p. 3. On the political influences exerted upon merger control by the European Commission, see Schmidt, supra note 319, p. 5ff.
making process always and everywhere.”

Gal explains that politicians and political considerations influence (a) antitrust enforcement, (b) outcomes of antitrust proceedings, and (c) formation of antitrust immunities and exemptions. Such influence may be relatively great once public interest, non-efficiency, considerations are concerned, since such considerations often serve specific groups, whether explicitly or implicitly. As commented, “implementation of competition policy itself risks becoming captive to the political process if it attempts to serve different interest groups,” as “the interests of different stakeholders may severely constrain the independence of competition policy authorities, and lead to political intervention.”

Politicization of competition law is not necessarily undesirable: transition economies, for example, require a strong competition authority that participates in the political processes that shape the economic policy of the state and that is capable of promoting efficient transition to a market economy. According to Gal, the political influences upon competition policy cannot be ignored, but should rather be contained and even employed to promote the objectives of competition policy. Gal suggests that political influences upon the antitrust agency may be combated through autonomy of the agency; non-political nomination of the Director; an independent budget for the agency;

---


501 Gal, supra note 35, Part II.

502 Khemani, supra note 41, p. 5.

503 OECD, supra note 90, p. 2.


505 Gal, supra note 35, Part II.
juridical scrutiny of the agency’s decisions; legal limitations of the discretion of the agency; cooperation with other governmental bodies; transparency of the agency’s decisions; empowerment of consumer groups; competition advocacy; and criminalization of antitrust proceedings.\footnote{Id., Part III.}

**Economic Efficiency – Objective, Predictable, Consistent, Apolitical?**

May economic efficiency “be derived as rigorously as any theorem in economics”?\footnote{Bork, supra note 24, p. 51.}

Certain commentators point to the uncertainty, unpredictability and even subjectivity that efficiency analysis entails. First points to the difficulty in accurately predicting “the magnitude (and sometimes the existence) of efficiencies in particular transactions” as sufficient reason to attribute “a rather low priority” to efficiency as a value of competition law.\footnote{First, supra note 57, p. 968.} Even Areeda and Hovenkamp, proponents of economic efficiency as the guiding light of antitrust law, admit that “economic theory is inadequate in some areas, and in conflict in others,”\footnote{Areeda and Hovenkamp, supra note 9, p. 99. See also id., p. 118.} as well as that “economic science also has gaps in theory and problems with empirical verification.”\footnote{Id., p. 130.} Similarly, even Bork admits that economic analysis “must prove rough and may change over time as economic understanding progresses”, though maintains that “these kinds of uncertainties we must always live with in a legal system.”\footnote{Bork, supra note 235, p. 253.}

The application of the efficiency objective may lead to different outcomes in cases that, through legal eyes, seem identical, thus undermining legal certainty: “within the legal

\footnote{Id., Part III.}
\footnote{Bork, supra note 24, p. 51.}
\footnote{First, supra note 57, p. 968.}
\footnote{Areeda and Hovenkamp, supra note 9, p. 99. See also id., p. 118.}
\footnote{Id., p. 130.}
\footnote{Bork, supra note 235, p. 253.}
community there may be objections to the efficiency goal, if its attainment implies a
different treatment of what (to most non-economists) appear to be identical cases. Such
considerations stem mainly from concerns of legal certainty. Courts may be very hesitant
to accept arguments based on probability statements, conceptions of frequency, and on
hypotheticals such as potential entry.”

While economic efficiency as expressed by consumer welfare is measurable, “with
the various types of non-price competition, consumer welfare becomes more multi-
dimensional and includes aspects such as the quality of the product, the speed and security
of the supply and so on. Most of these aspects are not measurable and value judgments are
necessary.” As Stucke maintains, “any competition policy […] in a world with
transaction costs is built upon the legal institutions’ normative judgments.” Also, “there
is intense debate among economists about what types of market structure and business
environment are likely to yield the most efficient, dynamic, and innovative economy.” The debate, in part, revolves around the desirable result of economic efficiency (consumer
surplus, producer surplus or total surplus). Noël comments that efficiency arguments (in
the context of mergers) “are indeed difficult to quantify and may be influenced by the

---

512 Van den Bergh & Camesasca, supra note 68, p. 6. However, the authors ultimately assert, id., p.
7, that “the objections based on deliberations of legal certainty have become less pressing due to the
development of more advanced measurement techniques. Indeed, economic science has in the
meantime cultivated a range of sophisticated empirical tools, enabling a more direct estimation of
most competitive parameters’ consequences.” See also: Areeda & Hovenkamp, supra note 9, p.
118: “while there is broad consensus about many of the applied economic conceptions relevant to
antitrust, the consensus is not universal, and different assumptions can yield different outcomes.” See also, ABA, supra note 17, p. 21: “reliance on economic assessment can lead to less certainty in
individual cases in comparison to the use of simpler legal rules, such as per se prohibitions.”
513 Jacquemin, supra note 58, p. 18.
514 Stucke, supra note 98, p. 46. Stucke goes on, id., to argue that “competition policy cannot be
beyond the judgmental”, and presents moral issues that lie behind “allocative efficiency’s façade of
positivism.”
515 Khemani, supra note 41, p. 5.
Moreover, even assuming the objectivity of economic-oriented antitrust analysis, such analysis “requires appropriate staffing and economic expertise within competition authorities, without which the application of competition rules risks not only inconsistency but also incoherence.”

Schwartz refers to the “uncertainties of many economic measurements.” According to Fox, “the notion that efficiency should be the guide to antitrust analysis on the theory that it provides a clear and certain path and eliminates the need for difficult choices among conflicting policy values is false.” Lande asserts that “even though the efficiency school gained many adherents because of its promise of superior administration, its practical implementation cannot be shown to be superior.” Pitofsky maintains that “an exclusively economic approach reflects an unrealistically optimistic view of the certainty introduced by that kind of analysis”, as “antitrust enforcement along economic lines already incorporates large doses of hunch, faith and intuition.” In this context, measurement and assessment of dynamic efficiency are particularly challenging.

Due to the disassociation of efficiency from equity concerns, consideration of the former as the exclusive or primary objective of competition law is considered to be
This point deserves further analysis. Does the efficiency objective in fact concern economic science, and is thus apolitical, or deeper, subtler, political beliefs as to the role of government in regulating markets? Arguably, proponents of the apparently scientific economic efficiency objective actually promote an ideological, or political, view that advocates limited government intervention in the market. Indeed, “outsiders regard this Chicago School claim of freedom from political interest with a good deal of skepticism, and some believe it to be simple hogwash, or perhaps even a cover for a very strong, pro-business political bias that works to the benefit of the rich.”

In addition, as Foer comments, “adoption of neoclassical economics as the sole determinant of antitrust policy is itself a political decision, if only because it displaces decisions made over a long period of time by the Congress and the courts.” As Areeda and Hovenkamp maintain, “one must not exaggerate economics' political neutrality or freedom from bias.” Thus, the problem of politicization is not exclusively related to non-efficiency objectives, but may rather also “taint” the consideration of efficiency as the exclusive or primary objectives of competition law.

---

525 Hovenkamp, supra note 8, p. 232. Hovenkamp also notes that “it is easy to identify the beneficiaries of Chicago School antitrust policy – probably big business, certainly vertically integrated firms, perhaps some consumers. Likewise, one can predict that small business, less efficient firms, and perhaps some other consumers will be losers”; id., p. 233.
526 Foer, supra note 166, p. 25.
Part III – Framework for Integration of Non-Efficiency Objectives

As demonstrated in Parts I and II, the approaches towards the injection of non-efficiency vary among jurisdictions and commentators. Ultimately, the view according to which competition law should be based, exclusively or primarily, upon efficiency not only ignores reality (whereby non-efficiency objectives underlie, to varying degrees, competition legislation and judicial decisions), but also ignores public socio-political preferences and the democratic process. Even considering the challenges that the consideration of non-efficiency concerns entails,\(^{528}\) the fact that such considerations have been recognized by legislatures and judiciaries, and reflect public choice and preferences, would seem to evoke uneasiness towards any approach that deprives any objectives other than efficiency of any role within competition law and policy. Accordingly, the exclusivity of economic efficiency as the objective of competition law is – and should be - far from being universally accepted. Additionally, as shown, the pragmatic challenges that consideration of non-efficiency concerns entails are also faced, to a considerable degree, by the efficiency-oriented approach.

Nevertheless, an exclusively non-efficiency, public interest, analysis would, of course, undermine the very purpose of competition law in promoting competition and efficient markets. Indeed, “few, if any, regimes, specify, let alone employ, a pure public interest test to evaluate mergers – even those competition statutes that explicitly require a consideration of public interest generally also specify that the competition impact be determined by reference to one or other of the dominant paradigms, these being the

\(^{528}\) See supra, Part II, p. 88ff.
substantial lessening of competition test or the dominance test.” 529 Ultimately, balance needs to be struck between the economic efficiency objective and non-economic concerns.

Indeed, “economic concerns, although properly of paramount importance, should not control exclusively.” 530 As Elzinga maintains, “efficiency should not be absolute, to be sure, though each of us might place different values on particular tradeoffs.” 531 Accordingly, I now turn to suggesting a framework for the integration of non-efficiency objectives in competition law, in an attempt to find such balance. Building on my conclusion, as aforesaid, that, *a priori*, neither economic efficiency nor non-efficiency concerns ought to reign supreme, the discussion below proceeds as follows: first, methodology for the integration of non-efficiency objectives in competition law is suggested, and then, practical issues that effective implementation of such methodology requires are addressed.

**Integration of Non-Efficiency Objectives: Methodology**

“It is one thing to suggest broader purposes [than efficiency] for the antitrust law […] The problem is to transform these sentiments into an analytic structure capable of ‘solving’ particular cases.” 532

Indeed, “the difficult question is not whether non-economic considerations are a proper, indeed conventional, component of the antitrust calculus, but how to take them into

---

529 Lewis, *supra* note 395, p. 1. See also: Hovenkamp, *supra* note 8, p. 1: “No viable jurisprudence holds that antitrust policy ought to be concerned exclusively with distributive questions; indeed, in no area of laws are efficiency concerns completely irrelevant.”

530 Pitofsky, *supra* note 22, p. 1052.

531 Elzinga, *supra* note 15, p. 1

532 First, *supra* note 57, p. 968.
Understandably, proponents of economic efficiency as the primary objective of competition law leave little room for consideration of non-efficiency concerns. The ABA suggests that the consideration of non-efficiency objectives within antitrust law meet the following conditions: (a) implementation through a priori rules or designated and distinct legislation, rather than as operational rules in deciding cases; (b) transparency and segregation from the consideration of efficiency. Pitofsky, in referring to the introduction of political concerns into antitrust law, suggests that such concerns be secondary (to economic analysis) and influence “the way in which prospective rules are designed to accomplish antitrust objectives.”

Commentators that do not share such an exuberant efficiency-based approach hold otherwise. Fox suggests a framework for the integration of non-efficiency goals within antitrust law. According to Fox’s suggestion, the implementation of antitrust law should serve consumer interests, achieved through efficiency, as well as the four historical goals of antitrust (power dispersion, entrepreneurial opportunity, satisfaction of consumers, and protection of the competition process as market governor), unless pursuit of the historical goals undermines long-run consumer interests (in which case consumer interests are to prevail) or if “hard-core violations”, such as market divisions, are concerned (in

533 Schwartz, supra note 22, p. 1080. See also: Blake & Jones, supra note 176, p. 437: “since the objectives of antitrust are not always compatible, the significant problem is to determine how these objectives may be accommodated in order to achieve an effective operational policy.”

534 ABA, supra note 17, p. 25.

535 Pitofsky, supra note 22, p. 1067. See also id., p. 1075: “Although economic concerns would remain paramount, to ignore […] non-economic factors would be to ignore the bases of antitrust legislation and the political consensus by which antitrust has been supported.”

536 Power dispersion, entrepreneurial opportunity, satisfaction of consumers, and protection of the competition process as market governor; Fox asserts that these “non-consumer values” and consumer values “are compatible and mutually reinforcing”. Fox, supra note 45, pp. 1182, 1185.
which case “no defense of efficiency would be allowed”). As Fox maintains, “the law should be responsive to societal needs for enhanced efficiency, in the interest of consumers. At the same time, antitrust should and can retain compatibility with its multivalued, flexible charter, tested by more than ninety years of history, and still the richest framework for progressive, pluralistic free enterprise.”

I propose that conventional (i.e. efficiency-based) competition law should be compromised to accommodate only substantial non-efficiency considerations. Also, non-efficiency justifications for anti-competitive conduct should be recognized only with respect to relatively minor antitrust violations; once flagrant violations are concerned, such justifications should not outweigh competition concerns. Indeed, as commented, “clearly there are circumstances - the national security situation is as good as any - where the antitrust laws could be adjusted to permit marginally anticompetitive arrangements when justified by strong noncompetitive considerations.” At any rate, non-efficiency considerations should be narrowly construed and implemented, whether employed for justifying an anti-competitive practice or for blocking an efficiency-enhancing practice. The foregoing constitutes, in my opinion, the proper balance between the economic efficiency objective and non-economic concerns.

Inevitably, the injection of non-efficiency objectives in competition law should vary – and, in fact, does vary - among jurisdictions and over time. Competition policy reflects “society’s wishes, culture, history, institutions, and perceptions of itself, which

537 Id., pp. 1180, 1182-4.
538 Fox, p. 1181.
539 Pitofsky, supra note 16, p. 25 (emphases added).
cannot and should not be ignored in competition law enforcement.”

As further commented, “like all social regulations, competition policy reflects history and culture. Therefore, it is constantly changing, and it always differs among countries.”

For instance, as Gal demonstrates, the evolution of Israeli competition law was influenced by social and economic ideologies regarding the enforcement of such law. Indeed, competition law, as law in general, reflects specific circumstances, as well as prevalent political, social and economic theories. Rodger asserts that “competition law or policy has no fixed content and is dependent to a great extent upon the particular political and social emphases of the legal system in which it operates.”

As commented, “establishing a goal or the priority of multiple goals is not a once-for-all-time decision, but rather reflects a temporary consensus that is likely to morph over time to accord with changing political and economic realities, advancing knowledge, and general fashions in political and economic thought.” Valentine maintains that “by definition – antitrust laws will reflect as well as help to define a country's larger social, political, and economic issues.”

As Stucke comments, “the objectives of competition policy will be continually shaped by […] the existing legal, social, ethical and moral norms” of the jurisdiction.

In this respect, the broad wording that often characterized competition statutes “allows a degree of

---


542 Graham & Richardson, supra note 68, p. 7. As noted by the OECD, competition policies “reflect the changing nature and adaptability of competition policy so as to address current concerns of society.” OECD, supra note 90, p. 2.


545 Foer, supra note 166, p. 2.

546 Valentine, supra note 210, p. 71.

547 Stucke, supra note 98, p. 51.
flexibility and the adaptation of the law to changing circumstances.”

Consideration of circumstances, as well as current economic and political policy as part of antitrust analysis ensures that such analysis remains dynamic.

An illustration of the manner by which the objectives of competition law correlate with specific circumstances is provided by the *Appalachian Coals* decision. In the midst of the Great Depression, the US Supreme Court found that the establishment of a company by 137 coal manufacturers, for the sale of coal at optimum prices and division of output, did not violate the antitrust laws. The Court found that that such an arrangement constituted a reasonable response to protect the market from destructive forces (e.g. surplus supply and diminishing demand in the unindustrialized Appalachian region). The decision may not be severed from the historical context and, as Elzinga comments, “would be cited today in defense of a cartel only by a novice attorney.”

During times of economic downturns, competition law is often relaxed, particularly by enabling (or pardoning) the establishment and operation of “crisis cartels”. Indeed, “realities must dominate the judgment.”

Should non-efficiency objectives be considered only if such objectives do not conflict with economic efficiency? From an economic perspective, the matter poses considerable difficulty: “In some cases economists might find equity and efficiency

---

548 COMPPRESS, supra note 293, id.
549 See, e.g., Sullivan, supra note 277, p. 2: “To prevent a static theory of antitrust decision-making, the Court should balance the competitive interests and determine the competitive merits in each case in the context of political and social policy as well as economic theory.”
550 *Appalachian Coals*, supra note 206.
551 Elzinga, supra note 15, p. 1204.
553 *Appalachian Coals*, supra note 206, p. 360. See also: Ghosh, supra note 552; Pitofsky, “Antitrust and the problem of adjustment in distressed industries”, 55 Antitrust L.J. 21 (1986).
mutually supportive goals, with an increase in equity producing an increase in efficiency. In other cases, equity objectives might be preferred only so long as they can be attained without sacrificing efficiency. In still other cases, not a few economists might be willing to countenance some finite loss in the real output of goods and services to reach a particular equity objective.\textsuperscript{554} Areeda and Turner maintain that fairness, as a non-efficiency objective, should play a role in antitrust analysis only insofar as efficiency is promoted. Prices close to cost and multiple choices for buyers and sellers constitute a \textit{fair} outcome that also promotes efficiency; in such case, fairness may play a role in antitrust analysis. However, fairness may not play such a role in the context of “competitive processes and results [that are] called unfair by those who wish higher returns than competition gives them.”\textsuperscript{555}

In my opinion, consideration of non-efficiency objectives only whereupon such objectives do not conflict with efficiency would be, in fact, equivalent to absolute disregard for such objectives. If efficiency is to always prevail, even the significance of non-efficiency concerns is reduced to almost nothing. Non-efficiency objectives should not serve as mere "reinforcement" for economic efficiency, but should rather possess an independent standing, and, to the extent appropriate, prevail over and trump efficiency.

Similarly, in my opinion, non-efficiency concerns should not serve as mere “tie-breakers” whereupon the anticompetitive effects or efficiencies generated by the relevant trade practice are insignificant or unclear. Indeed, Pitofsky asserts that such an enforcement approach is “\textit{ad hoc} with respect to specific transactions and may be unfair to

\begin{footnotesize}
\begin{footnotes}
\item[554] Elzinga, \textit{supra} note 15, p. 1193.
\end{footnotes}
\end{footnotesize}
the parties.” Foer comments that consideration of any objective as a “tie-breaker” “may be a useful rhetorical device, but unless there is a scientific method for first determining a ‘tie’, invocation of the tie-breaker is ultimately someone’s discretionary act.” Schwartz affords greater weight to non-economic objectives, and considers such objectives not merely as “tie-breakers”, but rather as shifting the burden of proof so that anticompetitive conduct may be justified only upon “clear and convincing evidence of economic gain to be passed on to the public.”

**Practical Issues**

**Clear Ranking of Competition Law Objectives**

Indeed, “in most cases the conflicts between economic efficiency and other policy objectives either are insignificant or can be balanced. Nevertheless, the rank and weights attached to the multiple objectives of competition policy remain largely ambiguous and need to be defined. This is necessary to ensure both business certainty and public accountability.” As the OECD found, jurisdictions with multiple competition law objectives often do not implement a system of ranking, or afford equal weight to such objectives.

Achievement of clarity poses a substantial challenge, and “the relative importance and balance between efficiency and the various other economic-social-political objectives

---

557 Foer, *supra* note 166, p. 32.
559 Khemani, *supra* note 41, p. 9. See also: OECD, *supra* note 90, p. 3.
560 OECD, *supra* note 90, p. 10.
that competition policy can advance remain to be identified.”

Indeed, prioritization (or hierarchy) among objectives of competition law provides for a possible manner by which to address the dilemmas and problems caused by the multiple goals invoked. However, even if such prioritization were established (by each jurisdiction), some of the pragmatic difficulties presented in Part II would remain in place. Weights would need to be assigned to each goal, and rules as to the relationships and symbioses between the various goals would need to be instituted. Also, “as the application of different criteria could lead to similar results in practice, it is difficult to tell how much relative weight is assigned to different criteria.” Thus, unpredictability and subjectivity, *inter alia*, would inevitably be involved.

Accordingly, effective application of non-economic values requires that they be “clearly articulated and ranked”, as well as a “consistent theoretical structure for demonstrating how a particular decision will advance the articulated values.” As Pitofsky maintains, “if the [antitrust] rules themselves are clear, introduction of a political dimension will not generate undue uncertainty in enforcement.”

Application of non-efficiency concerns requires both certainty and flexibility. Accordingly, I believe that, at the least, competition legislation ought to determine the relative significance of economic efficiency vis-à-vis non-efficiency objectives. Such determination - which ought to be based upon the socio-political and economic heritage of the specific jurisdiction, as well as the state of development thereof - would promote clarity as to the place that public interest may assume within antitrust analysis. Due to the

---

561 Khemani, *supra* note 41, p. 4. See also: ABA, *supra* note 17, p. 22: “it can be quite difficult to identify the weights that should be assigned to each [non-efficiency] objective.”


563 First, *supra* note 57, p. 968.

multitude of non-efficiency objectives and the requisite flexibility that pursuit of such objectives necessitates, the relative ranking among non-efficiency concerns should be determined by the judiciary as per the specific circumstances at hand.

**Transparency**

The application of non-efficiency criteria – particularly whereupon an efficiency-inducing transaction is rejected or an anticompetitive transaction approved – should be transparent, *i.e.* such criteria should not be employed tacitly or implicitly. Consideration of non-efficiency objectives requires transparency as to the very existence, nature, extent and influence of such consideration. Consequently, maximal transparency as to the grounds and principles upon which antitrust decisions are based is of utmost importance. Indeed, “competition law has to be clear and specific about its socio-economic and political goals.” As commented, “Government should be honest about its actions, rather than trying to turn economically irrational policies into something they are not.”

Transparency functions, in this respect, as a “litmus test” for detection of non-efficiency considerations; such test is particularly significant within jurisdictions, such as the U.S., that do not readily accept non-efficiency objectives. Indeed, the U.S. Department of Justice Antitrust Division emphasized that one of the purposes of transparency was prevention of undue influence by non-efficiency considerations upon the enforcement of antitrust law:

> Transparency of antitrust analysis helps international enforcers understand U.S. standards for antitrust enforcement, encourages international convergence on enforcement standards, and serves to prevent noncompetition issues from

---

566 Spiwak, *supra* note 70, p. 22.
inappropriately influencing antitrust enforcement.\textsuperscript{567}

Indeed, “it is of utmost importance that it is disclosed whether a consideration of non-competition goals is based on economic grounds […] whether it corresponds to a merely political decision because the market is assumed not to lead to the politically desired results.”\textsuperscript{568}

Gal emphasizes the significance of transparency as far as minimization of political influences upon antitrust decisions.\textsuperscript{569} Accordingly, “in particular cases, overriding public interest arguments prevail over the competition principle, but the public should be well informed when that occurs.”\textsuperscript{570} As commented, “governance challenges are likely to arise when competition authorities assess explicit non-competition criteria without transparent processes for doing so.”\textsuperscript{571} According to the ABA, “the transparency inherent in segregating [analysis of non-efficiency objectives from efficiency analysis] would appear […] important for democracies, where citizens’ rights to understand public decision making are thought central to the political system.”\textsuperscript{572}

\textbf{Onus of Proof}

Generally, the burden of proof in competition cases is imposed upon the competition authority or the plaintiff, rather than the defendant.\textsuperscript{573} However, the burden ought to be imposed upon parties asserting that a non-efficiency goal justifies departure from

\footnotesize

\textsuperscript{567} Antitrust Division, United States Dept. of Justice, \textit{Issuance of Public Statements Upon Closing of Investigations} (emphasis added); available at \url{http://www.usdoj.gov/atr/public/guidelines/201888.htm}.
\textsuperscript{568} Semmelmann, \textit{supra} note 38, p. 16.
\textsuperscript{569} Gal, \textit{supra} note 35, Part III(G).
\textsuperscript{570} Ehlermann & Laudati, \textit{supra} note 89, p. 32.
\textsuperscript{571} Mehta, Agarwal & Singh, \textit{supra} note 403, p. 2.
\textsuperscript{572} ABA, \textit{supra} note 17, p. 26.
\textsuperscript{573} Spiwak, \textit{supra} note 70, p. 6.
Such assertion should be accompanied by particularly compelling evidence. As Schwartz suggests, clear and convincing evidence ought to be required for justification of anti-competitive practices by “the non-economic and non-quantitative goals of antitrust.”

574 See, e.g., the cases cited in note 22(j), supra.

575 Schwartz, supra note 22, p. 1080. For instance, as set forth by Article 2 (entitled “Burden of Proof”) of the European “Modernisation Regulation”, supra note 313, “the undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty will bear the burden of proving that the conditions of that paragraph are fulfilled.”
Part IV – Integration of Non-Efficiency Objectives: Specific Examples

Protection of Small Business

Protection of small businesses that are efficient poses no difficulty to the objective of economic efficiency or competition in general.\textsuperscript{576} Thus, even an efficiency-oriented view of antitrust would support protection of an efficient small business against exclusionary conduct, though such protection would not be afforded to an inefficient small business.

However, as Korah observes, “help required for those [small firms] that are not [efficient] reduces efficiency as it consumes resources and encourages the creation and growth of firms that are less efficient.”\textsuperscript{577} In fact, probably the most prevalent argument against the protection of small business as an objective of competition law is that promotion of such objective often impedes efficiency,\textsuperscript{578} as well as leads to higher prices and other market-distorting effects.\textsuperscript{579} Indeed, while “competition is likely to be greatest

\textsuperscript{576} Kampel explains that within small economies and developing countries, the protection of small business ought to prevail over efficiency concern, since “the legacy of economic concentration, state ownership and state protection” has had the effect of preventing smaller competitors from getting into and competing within the market in the first place.” Kampel, The Role of South African Competition Law in Supporting SMEs, p. 3ff; available at: \url{http://www.competition-regulation.org.uk/conferences/southafrica04/kampel.pdf}. See also: Motta, supra note 22, p. 22: “The favorable treatment of small firms is not necessarily in contrast with the objective of economic welfare if it is limited to protecting such firms from the abuse of larger enterprises, or giving them a small advantage to balance the financial and economic power of larger rivals.”

\textsuperscript{577} Korah, supra note 317, p. 15. See also Gal, supra note 30, p. 1446: “economic and social objectives may substantially diverge when efficiency dictates the displacement of small firms by larger business units.”

\textsuperscript{578} Protection of small business also impedes consumer welfare, as "the latter goal requires that consumers be offered the best possible price, quantity, and quality of goods, while the former, protective goal requires that low price and high quality be subordinated to preserving the existence of a particular firm." Valentine, supra note 210, p. 74.

when there are many sellers,” protection of small business disregards the efficiencies often inherent in economies of scale or network externalities. An illustration of such impediment is provided by the Kiefer-Stewart Co. case: two corporate distillers, under common ownership, fixed the maximum resale price that the wholesalers of the liquor would be permitted to charge from the retailers. The U.S. Supreme Court held that maximum price agreements, “no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.” The decision focused on the effect of the practice upon a class of small businesses, liquor wholesalers, “rather than upon the competitive process as a whole or the effect on short or long-term efficiency.”

Protection of small business, as demonstrated below, exemplifies the soundness of the framework for integration of non-efficiency objectives that is suggested above, in Part III. In the U.S., this objective was considered as being of substantial importance, and thus pursued even at the expense of efficiency. As the circumstances changed and economic thought developed, the importance attributed to this objective subsided. Other jurisdictions, being less receptive to the Chicago School approach and cherishing socio-

583 Id., p. 213. A similar ruling was rendered by the U.S. Supreme Court in Albrecht v. Herald Co., 390 U.S. 145, which involved the imposition by a newspaper company of maximum prices that the distributor would be permitted to charge from the subscribers. See id., p. 152. These cases established a per se prohibition upon maximum resale price maintenance, which was abolished by the Supreme Court in State Oil Company v. Khan, 522 U.S. 3 (1997). See also: Areeda & Hovenkamp, supra note 9, p. 103.
political values that are not necessarily shared with the U.S. or that correlate with the specific circumstances that prevail within such jurisdictions, have not experienced such demise in the importance attached to protection of small business.

Decentralization of Economic and Political Power

The goal of protecting small business is not pursued solely for the benefit of such business, but also in order to decentralize economic and political power. Several commentators stress the political objectives of competition law, particularly the decentralization of power possessed by large firms. In the U.S., such power was considered (primarily pursuant to Thomas Jefferson’s vision of society) as threatening the very fabric of democracy and social stability. As Senator Sherman declared, “if we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life.” The U.S. Supreme Court, in the Alcoa case, provided a clear expression of the importance attributed to decentralization of power: “Great industrial consolidations are inherently undesirable, regardless of their economic results.”


586 See Pitofsky, supra note 22, p. 1053: “Congress has in its antitrust enactments […] exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime.” See also: Valentine, supra note 210, p. 73; Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911): “the main cause which led to the legislation [of the Sherman Act] was the thought that it was required by the economic conditions of the time; that is, the vast accumulation of wealth in the hands of corporations and individuals […] and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.” Barnes, supra note 22, p. 809ff.

587 21 Cong. Rec. 2457 (1890).

588 United States v. Aluminum Company of America, 148 F.2d 416, 428 (1945). See also id., “in the debates in Congress Senator Sherman himself[…] showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the
Indeed, democratic systems of government, in sharp contract to totalitarian systems, are associated with de-concentrated market economies. Monopolization and cartelization constituted primary economic measures implemented by the Nazi regime in order to attain control over the German economy. Thus, following World War II, the US imposed decentralization measures upon the German and Japanese markets. Such measures were not designed to pursue economic objectives, but rather to disperse industrial power so that the same would not be recruited by totalitarian regimes. In addition, monopolistic and concentrated markets are often – though not necessarily correctly associated with manipulation of the political process in order to obtain special privileges at the expense of the public interest. Noël notes, in the context of the Clayton Act, that the “objective of ‘decentralization’ was […] considered as fundamental to attain, even at the individual before them.” In addition, see id., p. 427: “[Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.” Nevertheless, the Court conceded that market power achieved through superior skill, foresight and industry was legitimate; id., p. 428. See: McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1497: “In passing antitrust legislation, Congress’s purpose was not only an economic one, but was also a political one, a purpose of curbing the power some individuals and corporations had over the economy.”

589 Pitofsky, supra note 22, p. 1055.
590 See Mestmäcker, “Competition policy and antitrust: some comparative observations”, 136 Zeitsschrift für die gesamte Staatswissenschaft 387, 388: “The Nazis had shown how to transform a highly concentrated and cartelized economy into a central planning system […] boycotts and collective discrimination were applied against outsiders in order to discipline them in the public interest. If the more traditional measures of economic coercion proved insufficient for the purpose, even the formal transformation of private cartels into compulsory cartels was provided for after 1933.” See also: Motta, supra note 22, p. 10; Jacquemin, supra note 58, p. 17.
592 See Posner, supra note 24, pp. 18-19. Calvani maintains, in this context, that “anecdotal evidence would appear to suggest that broad-based organizations of small businesses have been uniquely successful in obtaining political influence.” Calvani, supra note 30, p. 11.
price of economic efficiency.”

Nevertheless, Calvani maintains that “while the argument that large firms have political clout disproportionate to their size is appealing, there is little systematic empirical evidence to support or reject the thesis.” Areada and Hovenkamp comment that while dispersion of economic power “has rhetorical appeal to some, […] the social costs of a consistent antitrust policy of dispersing economic power would be unimaginably high.” In addition, these commentators maintain that the pursuit and attainment of economic efficiency already ensures the dispersion of power.

Protection of Small Business: United States

For many years, the premise that antitrust law should legitimately be exercised in order to promote the interests of small businesses (though, as Lande argues, not at the expense of consumers) was widely accepted in the U.S. The protection of “small dealers and worthy men” is often considered as a primary objective that guided the framers of the Sherman Act. The Clayton Act is considered to have been enacted in order to “unclog
the channels of competition so that small firms would not be fenced out of business opportunities by larger and powerful competitors. The Robinson-Patman Act, which amended the price discrimination provisions of the Clayton Act (in the wake of the Great Depression), was designed to protect small businesses from preferential prices afforded to large businesses. The Cellar-Kefauver Act, which amended and extended the coverage of the anti-merger provisions set forth by the Clayton Act, was motivated by “the dangers of increasing economic concentration, not [...] grounds of the virtue of efficiency.”

In the landmark Brown Shoe decision, the Supreme Court, clearly favoring small business over efficiencies, observed that “Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.” Brown Shoe demonstrates the traditional U.S. antitrust theory, according to which “social and political

---

601 Graham & Richardson, supra note 68, p. 236.
602 Supra, note 261.
603 See: FTC v. Sun Oil Co., 371 U.S. 505, 520 (1963); Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1153-58 (1988); Hansen, supra note 169; ABA, supra note 17; Bok, supra note 191, p. 233-38. Hovenkamp notes that the Robinson-Patman Act was “designed to protect small, inefficient retail grocers from large chain stores, which has lower costs and would drive the small grocers out of business in a competitive market” and that the Cellar-Kefauver Act was “designed primarily to protect small business from horizontal and vertical mergers that produced more efficient rivals”; Hovenkamp, supra note 8, p. 253. See also: Elman, “The Robinson-Patman Act and antitrust policy: a time for reappraisal”, 42 Wash. L. Rev. 1 (1966).
604 Supra, note 240.
605 See: Fox, supra note 45, p. 1150; Bok, supra note 191, p. 307. See also: Brown Shoe, supra note 125, p. 315: “The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.” Nevertheless, certain commentators maintain that pursuit of economic efficiency also inspired the passage of the Act. See: Muris, “The efficiency defense under Section 7 of the Clayton Act”, 30 Case W. Res. L. Rev. 381, 393ff (1980).
606 Brown Shoe, supra note 125, p. 344.
607 Id., id.
values are paramount, or coequal with efficiency. In the Von’s Grocery decision, the Supreme Court reiterated the observation made in Brown Shoe: “throughout the history of [the antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.” Von’s Grocery constitutes a stark illustration of the “structuralist” approach (endorsed by the so-called Harvard School). In that case, a merger that increased the market share of the two largest firms in the market by 1.1 percent was found by the Supreme Court to violate the Clayton Act.

The rise of the Chicago School brought about a significant reduction in the importance attributed to the protection of small business, since “proponents of this school tended to view […] de-concentration policies as likely seriously to undermine the attainment” of the superior efficiencies inherent in firm size and dominance. Members of the Chicago School argued that, most often, three or four firms were sufficient for effective competition. Thus, for instance, Posner rejects the notion that the interests of small business should constitute a primary concern of antitrust law and policy, and asserts that monopolistic prices actually promote the growth of small business.

---


609 United States v. Von’s Grocery Co., 384 U.S. 270 (1966), at 274-5, n.7, quoting United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), at 429. See also, id., p. 275: “Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Cellar-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business.”


611 Trebilcock et al., supra note 27, p. 33.

612 Posner, supra note 24, p. 19.
small business ought to be protected is regarded by Bork and Bowman as “an ugly demand for class privilege.”613 Indeed, the notion according to which “big is bad” has gradually demised.614 Consequently, “in current U.S. antitrust law, promotion of small business has been discredited as a policy goal.”615 As Areeda and Hovenkamp maintain, upon conflict between protection of small business and efficiency, the latter is preferred by the courts.616

Protection of Small Business: Additional Jurisdictions

While in the U.S., the importance attached to protection of small business has fallen, other jurisdictions – three of which are discussed below - still attribute significance to such objective.

In the European Union, “protection of small firms is seen as a component of a healthy competitive environment.”617 The concern for small and medium enterprises (SMEs) in the E.U. is rooted in German ordoliberalism, which sought to disperse private economic power in order to ensure individual freedom and a liberal economy.618 Ordoliberalism thus viewed economic efficiency as a secondary objective.619

613 Bork & Bowman, supra note 486, p. 370.
615 Van den Bergh & Camesasca, supra note 68, p. 4.
616 Areeda & Hovenkamp, supra note 9, p. 122: “when faced with a square choice between atomization or dispersal of power among numerous firms on the one hand, or individually pursued efficiency on the other, the courts have almost invariably chosen efficiency.”
617 Id., p. 3. Whish, supra note 38, p. 19.
619 Moschel, “Competition policy from an Ordo point of view”, in: Peacock & Willgerodt, eds., German Neo-Liberals and the Social Market Economy (Hampshire, UK: Palgrave Macmillan, 1989), p. 142: “competition policy is primarily oriented to the goal of securing individual freedom of action, from which the goal of economic efficiency is merely derived.”
the _de minimis_ notice issued by the Commission,\(^{620}\) agreements between small and medium-sized enterprises “are rarely capable of appreciably affecting trade between Member States”,\(^{621}\) and thus may not fall under Article 81(1) EC. In addition, the Commission “looks favorably upon state aid given to SMEs.”\(^{622}\)

In South Africa, the Competition Act sets out, _inter alia_, “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.”\(^{623}\)

The German Act Against Restraints of Competition (_Gesetz gegen Wettbewerbsbeschränkungen_; GWB) explicitly refers to the protection of small and medium business:

Undertakings with superior market power in relation to small and medium-sized competitors will not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or commercial services not merely occasionally below its cost price, unless there is an objective justification for this.\(^{624,625}\)

**Pragmatic Challenges**

As commented, “any notion that we can ‘protect competition by protecting competitors’ is


\(^{621}\) _Id._, §3. Small and medium-sized enterprises are defined as “undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.”


\(^{623}\) Competition Act (South Africa), _supra_ note 405, §2(e). See also: §§10(3)(b)(ii), 12A(3)(c) of the Act; _Nationwide Poles and Sasol (Oil) Pty Ltd._, [2005] ZACT 17 (31 March 2005); Kampel, _supra_ note 576.

\(^{624}\) _GWB_, _supra_ note 420, §20(4). See also §20(2), (3).

\(^{625}\) On the protection of small business according to French competition law, see: ABA, _supra_ note 17, p. 14.
entirely flawed." 626 Indeed, as the Supreme Court set forth in *Pueblo Bowl-O-Mat*, the goal of antitrust law is to protect *competition*, not *competitors*. 627

Areeda and Hovenkamp point to the difficulties in identifying “small businesses”: “‘small business’ is hardly monolithic, and small businesses show up in antitrust litigation in numerous ways.” 628 As further observed, “small businesses appear on the market as both competitors and consumers (or suppliers).” 629 Thus, these commentators assert that “an antitrust policy of protecting ‘small business’ is not likely to yield a coherent set of rules about how to resolve specific cases” 630 and the focus should be upon consumers:

Given the generality of the legislative statements and the ambiguity in identifying specific interest groups or the set of outcomes that would best serve them, any interest group approach to antitrust is best off to recognize ‘consumers’ as its protected class. But consumers are almost invariably best served by low prices, low costs, innovation, and hard competition generally – all outcomes that are completely consistent with an exclusively economic approach to antitrust law. 631

In addition, Areeda and Hovenkamp comment that protection and preservation of small business units would impose high administrative burdens upon the courts, as “more or less continuous supervision of economic conduct and performance” would be required in order to ensure that small business are not threatened by efficiency innovations and price reductions. 632

Defining the *extent* to which small business ought to be protected (at the expense of

626 Spiwak, *supra* note 70, p. 12.
629 *Id.*, p. 103.
630 *Id.*, p. 102. See also *id.*, p. 111: “it would be exceedingly difficult if not impossible to construct rational criteria to govern such decisions as to when and how much society should intervene to protect particular business-persons from competition.”
631 *Id.*, p. 105.
632 *Id.*, p. 112.
efficiency and innovation), and more generally, the optimal extent of dispersion of economic power, constitutes a noteworthy practical challenge as well. In addition, as exemplified by Areeda and Hovenkamp, “antitrust rules intended to protect small business often have precisely the opposite result.” Elzinga maintains that a strict merger policy would in fact *hurt* small business, and thus antitrust “has a limited role to play” in the protection of small business. Pitofsky maintains that “inefficient small business will suffer losses regardless of how the antitrust laws are interpreted, and the income redistribution that can be achieved through antitrust channels is trivial.” Fox opposes the “preservation of small size for its own sake” as an objective of antitrust law because of the “unusual potential for conflict between this objective and consumers’ interests.”

**Employment**

Similarly to the protection of small business, employment concerns are of *substantial* importance, both on the personal and the national level. In the context of collective bargaining, such importance in fact led to the trumping of competition concerns. However, there appears to be hesitation as far as consideration of the adverse or positive effects of restrictive trade practices upon the *level* of employment. At best, such effects are

---

633 See: Upson, “Progress and problems with the purposes and goals of antitrust”, 27 St. Louis U. L.J. 341, 344 (1983): “The idea of the desirability of fragmentation despite higher costs and prices, that is, despite lesser competition, is not operational. There is no way of determining the limits in destroying competition and hamstringing business.”
634 *Id.* p. 102.
635 As Elzinga explains, “should the small enterprise suffer financial reverses, or should aging owners wish to sell out, the number of potential buyers will be minimized by a merger policy that is too severe.” Elzinga, *supra* note 15, p. 1196.
636 *Id.*
637 *Id.*
638 Pitofsky, *supra* note 22, p. 1059. Pitofsky further asserts, *id.*, p. 1060, that these goals “could be achieved more efficiently and with fewer adverse affects through direct subsidy, taxation, and welfare programs.”
639 *Id.*
considered *together with* efficiency analysis, and usually do not constitute independent grounds for justifying an anti-competitive practice or for blocking an efficiency-enhancing practice. As protection of small business, the protection of employment exemplifies the soundness of the framework for integration of non-efficiency objectives that is suggested above, in Part III. Indeed, even whereupon this objective is invoked and plays a role in competition analysis, no flagrant violations of efficiency-based competition rules are involved, and the objective usually serves as reinforcement for the efficiency objective or other public interest objectives.

Business decisions and practices that fall within the realm of competition law may affect the level of employment. For instance, mergers and restructurings may (though not necessarily do) adversely affect employment, at least in the short run.\(^{640}\) Such effect may be national or regional, and is intensified during times of recession and rising unemployment. Certain legal systems attribute significance to the protection of employee interests in this context, while other jurisdictions afford lesser consideration to these interests, primarily in order to ensure the flexibility and adaptation capabilities of economic systems in a world of dynamic changes. Indeed, “using merger control to require continued operation of local plants (*i.e.* conditioning approval of the merger on the undertaking not to reduce employment) is an example of the potential conflict between the promotion of competition and efficiency on one hand, and social and political objectives on the other.”\(^{641}\) Joint ventures, on the other hand, may promote employment. In addition, collective agreements pose a challenge to the promotion of competition, since such


\(^{641}\) ABA, *supra* note 17, p. 24.
agreements often include restrictive provisions. The discussion below will focus particularly, though not exclusively, upon the effect of mergers upon the level of employment.

According to Article 127(2) of the EC Treaty, “the objective of a high level of employment will be taken into consideration in the formulation and implementation of Community policies and activities.” Competition policy is, of course, subject this provision. In the European Albany case, the European Court of Justice, while recognizing that “it is beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers,” nevertheless determined that –

the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [81(1)] of the [EC] Treaty when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [81(1)] of the Treaty. 

Likewise, in the Metro decision, the Court ruled that provision of employment was included “in the framework of the objectives to which reference may be had pursuant

---

644 Supra, note 309.
to Art. [81(3)] EC.”

In the *Ford/Volkswagen* case, the Commission set forth that Article 81(1) EC did not apply to a joint venture in Portugal (named AutoEuropa) between the two car manufacturers, for the development and manufacturing of a multi-purpose vehicle (MPV). Had exclusively economic considerations guided the Commission, then arguably a different decision would have been rendered, since the car manufacturers possessed sufficient capabilities and resources to develop and manufacture such a vehicle. The decision was based upon non-economic objectives, including employment. As the Commission maintained:

In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, *inter alia*, to the creation of about 5,000 jobs and indirectly create up to another 10,000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also furthers European market integration by linking Portugal more closely to the Community through one of its important industries.

The extent to which employment concerns significantly affected the decision of the Commission to grant an exemption is questionable. Indeed, employment concerns, as

---

645 *Id.*, par. 43. See also: Case 42/84, *Remia*, [1985] ECR 2545, par. 42; *Synthetic Fibres*, O.J. 1984, L 207/17; Case T-12/93 *Comité Central d’Entreprise de la Société Anonyme Vittel and Comité d’Etablissement de la Pierval and Fédération Generale Agroalimentaire v. European Commission*, [1995] 2 ECR II-1247, par. 38: “in the scheme of Regulation No. 4064/89 [the (first) Merger Regulation], the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the [EC] Treaty. The Commission may therefore have to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the level or conditions of employment in the Community or a substantial part of it.”


647 *Id.*, par. 36.

such, usually do not justify an exemption, but rather confirm or strengthen the granting of such an exemption on the basis of the four conditions set forth by Article 81(3) EC.

The European law of state aid also recognizes the importance of mitigating unemployment. Although Article 87(1) EC prohibits Member States from granting aid which distorts or threatens to distort inter-State trade by favoring certain undertakings or the production of certain goods, Article 87(3)(a) EC sets forth an exception for aid to promote the economic development of areas where there is serious underemployment.

In the U.S., preservation of jobs constituted a primary ground for the establishment of the failing firm defense.\textsuperscript{649} Also, the application of antitrust law to labor unions was limited.\textsuperscript{650} Section 6 of the Clayton Act sets forth that antitrust laws are not applicable to labor unions.\textsuperscript{651} The Supreme Court, in \textit{Apex Hosiery},\textsuperscript{652} held that the Sherman Act did not apply to “restraints on the sale of the employee’s services to the employer.”\textsuperscript{653} According to the Final Report of the International Competition Policy Advisory Committee (ICPAC), the states have “used their enforcement power to block business restructurings that would reduce employment within their borders.”\textsuperscript{654} Calvani refers to a consent agreement between West Point Pepperell and two state attorneys general in a merger case, according

\begin{footnotesize}
\textsuperscript{649} ABA, \textit{supra} note 17, p. 16.
\textsuperscript{650} However, at first the Supreme Court held that the Sherman Act applied to labor unions. See: \textit{Gompers v. Bucks Stove & Range Co.}, 221 U.S. 418 (1911); \textit{Loewe v. Lawlor}, 208 U.S. 274 (1908).
\textsuperscript{651} 15 U.S.C. §17: “The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws will be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor will such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”
\textsuperscript{652} \textit{Apex Hosiery Co. v. Leader}, 310 U.S. 469 (1940).
\textsuperscript{653} \textit{Id.}, p. 503. See also: \textit{United States v. Hutcheson}, 312 U.S. 219 (1941).
\end{footnotesize}
to which the acquiring party undertook, *inter alia*, to “give preferential treatment to the former employees of the acquired party […] and not to close local facilities.”

Calvani maintains that “labor dislocation has become the centerpiece of objection to recent mergers and joint ventures […] Indeed, no principled way exists to determine whether a transaction that eliminates jobs in one location while creating employment in another is in the public interest. Accordingly, it is not surprising that this [objective has] not been embraced by federal law enforcement officials of late.”

While the consideration of employment concerns as part of antitrust enforcement is within the authority of states and state attorneys general, such consideration does not reflect federal antitrust policy, but rather “local political considerations, local economic conditions and local employment.”

Thus, the cases discussed above reflect an *exception* to the general (federal) efficiency-oriented approach.

In the U.K., the enactment of the Monopolies and Restrictive Practices (Inquiry and Control) Act in 1948 was motivated by the notion that competition would reduce the level of unemployment that persisted following World War II.

Section 84 (entitled “Public interest”) of the Fair Trading Act, which was repealed by the Enterprise Act, required the Monopolies and Mergers Commission, in determining “whether any particular matter operates, or may be expected to operate, against the public interest”, to “take into account all matters which appear to them in the particular circumstances to be relevant”,

658 *Supra*, note 381.
659 Motta, *supra* note 22, p. 11.
including the maintenance and promotion of balanced distribution of employment in the United Kingdom.  

Article 1 of the Japanese Antimonopoly Act sets forth that one of the purposes of the Act is to “heighten the level of employment.” In South Africa, the promotion of employment is specifically included in the “purpose clause” of the Competition Act. Accordingly, employment constitutes a factor that must be assessed by the Competition Commission or the Competition Tribunal upon determining whether a merger can or cannot be justified on public interest grounds. In addition, a party to a notifiable merger must submit notification not only to the Commission, but also to “any registered trade union that represents a substantial number of its employees or the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.”

In Israel, Section 10 of the Restrictive Trade Practices Act, which enumerates the public interest considerations that the Antitrust Tribunal must consider upon deciding whether to approve a restrictive arrangement, refers to “safeguarding the continued existence of factories as a source of employment in areas in which substantial unemployment may be created as the result of their closure or a reduction in their activity.”


662 See supra, note 42.

663 Id., §12A(3)(b).

664 Id., §13A(2).  The inclusion of labor union in the merger control process may distort analysis of the effects on employment as a whole (including outsiders who enter employment) due to focus upon the effects on existing workers (insiders).  See: OECD, Substantive Criteria used for Merger Assessment (2003), p. 207; available at: http://www.oecd.org/dataoecd/54/3/2500227.pdf.
The attribution – according to competition law - of significance to the implications of mergers upon employment is reinforced by, and correlates with, a growing trend in corporate law according to which the fiduciary duties (duty of care and duty of loyalty) of directors and officers ought to be directed towards employees (and creditors in general), and not shareholders exclusively, particularly under circumstances of structural changes (e.g. mergers). While the traditional and (arguably) the dominant view in this respect is that the fiduciary duties are directed only towards the shareholders, during recent decades momentum has been accumulated by the opinion according to which such duties apply, under certain circumstances, to the interests of creditors as well.

666 Restrictive Trade Practices Act, supra note 165, §10(6).
668 See, e.g., Walker v. Wimborne (1976) 50 ALJR 446, 449: “It should be emphasized that the directors of a company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them”; Nicholson v. Permakraft (NZ) Ltd. [1985] 1 NZLR 242, 249: “The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors”; Lonrho Ltd. v. Shell Petroleum [1980] 1 WLR 627, 634: “The best interests of the company [are] not exclusively those of its shareholders but may include those of its creditors”. In the Unocal case (Unocal Corp. v. Mesa Petroleum Co., 493 A. 2d 946 (Del., 1985)), the Delaware Supreme Court ruled that management facing a hostile takeover was entitled to consider the effects thereof upon creditors, though in the Revlon case (Revlon Inc. v. MacAndrews and Forbes Holding Inc., 506 A.2d 173 (Del., 1986)), the Court ruled such consideration must be linked to the long-term welfare of shareholders. See also: Ziegel, “Creditors as corporate stakeholders: the quiet revolution - an Anglo-American perspective”, 43 U. Toronto L. J. 511 (1993).
Conclusion

Despite the allure of economic efficiency as the primary or exclusive objective of competition law, non-efficiency objectives have been playing a meaningful role as well. That role is manifested by the simple fact – demonstrated through analysis of the competition laws of five jurisdictions and developing countries, as well as two specific non-efficiency objectives - that socio-political grounds constituted the grounds for the enactment of competition laws and have gained judicial recognition, as well as the fact that competition laws do not afford exclusivity to efficiency. While the injection of non-efficiency concerns into competition law involves practical challenges and substantial questions, as presented in Part II, such challenges and questions are either answerable, reflect subjective perspectives or apply to an efficiency-oriented analysis as well.

Recognizing the significance of efficiency analysis within competition law, I suggested that efficiency be compromised to accommodate only substantial non-efficiency considerations, as well as that non-efficiency justifications for anti-competitive conduct be recognized only with respect to relatively minor antitrust violations. Thus, at times, non-efficiency concerns, which ought to be clearly articulated, should (transparently) trump economic efficiency. The contours of such framework for balancing between efficiency and non-efficiency objectives ought to be drawn on the basis of the specific jurisdiction and circumstances at hand.
Bibliography

Legislation and Regulation

United States
- Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) Para. 13, 104 (April 2, 1992; revised April 8, 1997).

European Union
- Commission Notice, Guidelines on the applicability of Article 81 to horizontal co-operation agreements, O.J. C-3 (06.01.2001), p. 2.

Canada
- Competition Act, R.S. 1985, c. C-34.

United Kingdom
- Fair Trading Act 1973, c. 41.

Israel
Case Law

United States

- Appalachian Coals v. United States, 288 U.S. 344 (1933).

European Union


Canada

- Canada (Commissioner of Competition) v. Superior Propane Inc (2000), 7 C.P.R. (4th) 385 (Comp. Trib.).

Israel

- Civil Appeal 2247/95 General Director of the Antitrust Authority v. Tnuva, P.D. 52(5)213.
- Clubmarket Marketing Chains Ltd. – Supersol Ltd., Reasons for resolution regarding conditional approval of merger (2005), Antitrust 5000155.
- Appeal 1/97 (Jerusalem) Iskur Steel Services Ltd. et al. v. General Director of the Israel Antitrust Authority et al. (unpublished).
- Antitrust File (Jerusalem) 5/98 Edgar Investments and Development Ltd. v. General Director of the Israel Antitrust Authority et al. (unpublished).
- High Court 588/84 K.S.R. Asbestos Trade Ltd. v. Chairman of the Antitrust Supervision Committee, et al., P.D. 40(1)29.

Books
• Graham & Richardson, Global Competition Policy (Washington, DC: Peterson Institute, 1997).
• Trebilcock et al., The Law and Economics of Canadian Competition Policy (Toronto, ON: University of Toronto Press, 2nd ed., 2003).

Articles
• Austin, “The emergence of societal antitrust”, 47 NYU L. Rev. 903 (1972).
• Barnes, “Noneconomic goals in the antitrust law of mergers”, 30 Wm. & Mary L. Rev. 787 (1989).
• Crampton, “Alternative approaches to competition law - consumers' surplus, total surplus, total welfare and non-efficiency goals”, 17 World Competition 55 (1994).


• Lande, “Proving the obvious: the antitrust laws were passed to protect consumers (not just to increase efficiency)”, *50 Hastings L.J.* 959 (1999).

• Lande, “The rise and (coming) fall of efficiency as the ruler of antitrust”, *33 Antitrust Bull.* 429 (1988).


