



ASSOCIATION YEAR
2002-2003

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Robert T. Joseph
8000 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6342

CHAIR-ELECT
Kevin E. Grady
One Atlantic Center
1201 West Peachtree St., NW
Atlanta, GA 30309-3424

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1 Microsoft Way
Redmond, WA 98052-6399

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Katherine A. Havely
Washington, DC

SECTION DIRECTOR
Joanne Travis
(312) 988-5575
travisj@staff.abanet.org

AMERICAN BAR ASSOCIATION

Section of Antitrust Law
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5550
FAX: (312) 988-5637
e-mail: antitrust@abanet.org
<http://www.abanet.org/antitrust>

February 12, 2003

Via Federal Express, Facsimile and E-mail

Timothy J. Muris
Chairman
Federal Trade Commission
Room 440
600 Pennsylvania Avenue, NW
Washington, DC 20580-0002

R. Hewitt Pate
Acting Assistant Attorney General
Antitrust Division
Room 3109
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Report on Antitrust Policy Objectives

Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association ("the Section"), I am pleased to submit the enclosed Report on Antitrust Policy Objectives. Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Robert T. Joseph
Chair, Section of Antitrust Law

REPORT

ANTITRUST POLICY OBJECTIVES

The views in this Report are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association (“ABA”) and should not be construed as representing the position of the ABA.

I. INTRODUCTION

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.

This Report discusses the more important policy objectives that have been asserted as underlying antitrust laws, focusing particularly on their strengths and weaknesses. Several Recommendations are offered in light of these advantages and disadvantages, at the conclusion of the Report. In particular, the Report recommends that economic analysis, *i.e.*, in terms of efficiencies, should play a central role in the application and enforcement of antitrust laws. Whereas the Report does not recommend that specific objectives are inappropriate, it notes that the “promotion of competition” expressed within efficiency

terms is a necessary and critical fundamental objective.¹ This does not imply that objectives that do not lend themselves to economic analysis (referred to herein generally as “social and political objectives”) should be ignored. Instead, the Report recommends that such social and political objectives are best employed either: 1) in the formulation of stand alone legislation or *a priori rules*, rather than as operational criteria in individual antitrust cases; or 2) that the examination of such social and political objectives should be transparently separated from the economic analysis engendered by the promotion of competition objective.

As part of this discussion, the Report provides, in Section II, a brief overview of the reasons for which certain jurisdictions have adopted competition laws, and examines how such choices inform the application of competition rules. Section III describes certain selected objectives, mainly: (i) the promotion of competition in terms of efficiencies; (ii) the promotion of business rivalry and entrepreneurial opportunity; and, (iii) additional social and political objectives, including the protection of small business, the creation of national champions, employment, enhanced exports, environmental protection and improvements to safety, affirmative action, protection of intellectual property rights, assistance to industries in crisis and the favoring of specific industries. Section IV provides a discussion of these varying objectives. Section V then offers suggestions as to how best to account for this range of objectives, suggesting that the separation of social and political factors from competition objectives relying on economic analysis is appropriate. Section VI, the concluding section to this Report, summarizes these findings in the form of Recommendations.

¹ Because the promotion of competition in terms of business rivalry objective lacks the precise analytical tools generated by the efficiencies/welfare model and because the business rivalry objective can reflect social and political considerations that are not necessarily consistent or coherent with the efficiencies model or objective, the business rivalry objective should be used with caution.

II. REASONS FOR ADOPTING COMPETITION RULES IN SELECTED COUNTRIES OR REGIONS

There is an ancient lineage of prohibitions of cartels and, to a somewhat lesser extent, monopolies. Indian regulations circa 300-400 B.C.E, a Roman code at the time of Julius Caesar and legislation during the French Revolution contained price-fixing bans. These laws did not rest on refined economic theory and "competition" was not defined in modern economic terms. Rather these early laws rested more on the intuitive notion that cartels and monopolies increase prices and exclude other traders.²

The modern antitrust era can be said to begin with the passage of the Sherman Act in 1890.³ Since then there has been a proliferation of antitrust or competition laws and enforcement throughout the world. Today, many jurisdictions have the three basic elements of a modern antitrust law, *i.e.*, provisions governing restrictive agreements, monopolization/abuse of dominance and merger control.⁴

While most jurisdictions maintain that their competition laws "preserve competition," the preservation of competition does not always mean the same thing in different jurisdictions and is sometimes only one of several objectives pursued under a country's antitrust laws. In particular, some countries use the phrase to signal the preservation of competitors, not efficient competition.

² See DR. ROMAN PIOTROWSKI, *CARTELS AND TRUSTS; THEIR ORIGIN AND HISTORICAL DEVELOPMENT FROM THE ECONOMIC AND LEGAL ASPECTS*, 1978.

³ While the United States was among the countries that first adopted and enforced antitrust laws, Canada was the first western industrialized nation to enact a law. In May 1889, Canada enacted An Act for the Preservation and Suppression of Combination formed in Restraint of Trade, S.C. 52 Vic., c 41 (1889).

⁴ William J. Kolasky (Former Deputy Assistant Attorney General Antitrust Division, U.S. Department of Justice), notes that over 90 countries have antitrust laws, and over 60 have antitrust merger notification regimes. See "International Convergence Efforts: A U.S. Perspective," Address before the International Dimensions of Competition Law Conference, Toronto, Ontario, Canada, March 22, 2002, available at <http://www.usdoj.gov/atr/public/speeches/10885.htm>.

Moreover, countries that use the term “preservation of competition” to mean the promotion of efficient markets often consider other objectives as part of their antitrust policies.

The variation in competition policies is seen both across time and across jurisdictions. The history of antitrust policy in the United States, for example, illustrates the differences in policy objectives underlying the application and enforcement of antitrust over time. It is suggested that economic efficiency was not even a significant focus of the Congressional debate surrounding the passage of the Sherman Act and subsequent federal antitrust legislation.⁵ Nevertheless, over time, the evolution of constitutional and economic theories and their perceived importance to antitrust review in combination with political, social and economic events, have led U.S. courts and antitrust agencies to adopt the current, more efficiencies-oriented, understanding of U.S. antitrust policy objectives as part of their interpretation and enforcement of federal antitrust legislation.⁶

Policy objectives also vary across jurisdictions. A broad spectrum of economic, social and political objectives have informed and continue to inform the application of competition rules in different countries, such as: consumer welfare, total welfare, economic efficiency, protection and promotion of business rivalry as such, economic freedom of traders, fairness, diffusion of economic power, protection of small business, promotion of business opportunity, pluralism, social cohesion, macroeconomic goals

⁵ See e.g., James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Ohio St. L.J. 257 (1989); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); and, Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L.Rev. 1140 (1981). In describing the context in which the early U.S. antitrust rules were adopted, Justice Harlan wrote, in 1911, that: All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery... - but the conviction was universal that the country was in real danger from another kind of slavery... that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. *Standard Oil of N.J. v. U.S.*, 31 S. Ct. 502 at 525 (Justice Harlan concurring in part and dissenting in part).

⁶ A number of factors have contributed to this evolution, for example, changes in political and economic vision, including a recent emphasis on industrial organization and game theory in economic study. See e.g., James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Ohio St. L.J. 257 (1989); William Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA.L. Rev., 1221 (1989); and RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992, HISTORY, RHETORIC, LAW*, 1996.

such as employment, consumer protection, industrial policy, creation and promotion of “national champions,” export promotion, and productivity growth.⁷

Antitrust policy objectives may also vary depending on the stage of economic development. For example, in developing countries or countries in transition (*i.e.*, countries in which the preconditions for a market economy are not fully established), the immediate goal of competition policy can be much broader than efficiency, often emphasizing the emergence of economic opportunities and entrepreneurship.⁸ The size of the economy also can affect the objectives underlying the application and enforcement of the antitrust laws.⁹

Why nations adopt competition laws and what they expect to achieve by the application of those laws are overlapping questions. An examination of reasons for adopting competition laws may give context to the variety of objectives, including some in addition to those noted above such as, in Europe, market integration.

A. Examples
1. *The United States*

⁷ The European Community uniquely adds market integration as an objective. Articles 81 and 82 (ex Articles 85 and 86) of the EC Treaty address agreements between competitors and abuse of a dominant position, respectively, and have been held to support the market integration objectives stated in Articles 2 and 3 of the EC Treaty. *See e.g.*, *Consten & Grundig v. Commission* 56 & 58-64 ECR 1966 in which the European Court of Justice held that “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 [...]” at p. 340.

⁸ Competition policy in a developing country often takes a more regulatory approach, to support a desired transformation of economic structures and behavior. However, there may be less consensus among public policy officials or politicians about the desirability of competition policy in such countries than elsewhere. The economic, legal, social or political structures of developing countries may be less conducive to the development of a free market economy; and the public may place greater weight on the short-term disruptions from a market economy than on its long term benefits. As a result, the immediate goal of competition policy in such 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. *See* Comments and paper of Professor Anna Fornalczyk, Discussion at Chapter I (Competition Policy Objectives) of Claus Ehlermann & Loraine Laudati eds., *European Competition Law Annual 1997: The Objectives of Competition Policy*, 1998 and *ADVOCACY AND COMPETITION POLICY*, A Report prepared by the Advocacy Working Group for the ICN’s Inaugural Conference, Naples, Italy, Sept. 2002 available at <http://www.internationalcompetitionnetwork.org/Advocacyfinal.pdf>.

⁹ *See* Michal S. Gal, *Size does matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev 1437 (2001). (Small economies can support only a limited number of competitors in industries with scale economies and high entry barriers, but such concentrated market structures adversely impact price, output and research and development. Thus, the balance between permitting a limited number of larger firms and promoting effective rivalry between firms is particularly challenging for such economies.)

The Sherman Act was adopted in 1890 to constrain the growth of industrial combinations. The statutory language was and is broad, however, and interpretation was left to the courts.¹⁰

In later years, Congress adopted more specific statutes to: (i) prevent powerful firms from foreclosing market opportunities to their less advantaged competitors (Clayton Act §3, 1914); (ii) address unfair methods of competition to benefit consumers (Federal Trade Commission Act §5, 1914; extended to address unfair or deceptive acts or practices in 1936); (iii) protect small businesses from being disadvantaged by larger competitors' buying power (Robinson-Patman Act, 1936);¹¹ and, (iv) forestall industrial concentration, in part, as an attempt to shield democracy from totalitarianism (Celler-Kefauver Amendment to Clayton §7).

2. *Germany & Japan*

The United States exported the diversity and anti-concentration roots of its law to Germany and Japan in the wake of World War II. Post-war allied occupation policies and reconstruction efforts, including the Marshall Plan, helped to assure the dispersion of economic power as a means of preventing the reemergence of totalitarianism.¹²

3. *European Union*

In 1957, six Western European nations established the European Economic Community – an ambitious effort to enhance peace in Europe by promoting seamless trading within one “common market.”¹³ The framers of the constituting treaty, the Treaty of Rome, understood that permitting the maintenance of numerous national competition and industrial policies would have frustrated the creation of the common market. The founding nations included, within the Treaty, competition provisions addressing both agreements between competitors and abuse by dominant firms (including certain state-owned firms) to support internal market policies.¹⁴

4. *Asian, Central and Eastern European Countries*

While a number of other nations enacted antitrust laws in the decades before the fall of Soviet communism and the Berlin wall, the years beginning in 1990 marked a new wave of adoptions.¹⁵ Nations with new market economies undoubtedly had mixed motives in adopting antitrust rules. Some may have sought to improve opportunities for indigenous businesses to take root and grow. Others may have wanted to

¹⁰ RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992, HISTORY, RHETORIC, LAW*, 1996, at 26.

¹¹ Changes in U.S. case law in the last quarter century have overridden the non-consumer-welfare objectives of all but secondary-line discrimination under the Robinson-Patman Act. *See e.g.*, ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* (5TH ED. 2002) at vol. 1, Chapt. V.

¹² *See e.g.*, Alex Y. Seita and Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, U. Ill. L. Rev. 115 (1994); HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS OF JAPAN*, 1983; Lawrence A. Sullivan, Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 Berkeley J. Int'l L. 197, (1998).

¹³ The original members of the European Coal and Steel Community (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) signed the Treaty of Rome on March 25, 1957 to create the European Economic Community (or EEC). The Treaty of Rome has been amended on a number of occasions and additional countries have joined the EEC, now called the European Union or EU. The EU comprises fifteen members at present, but is expected to extend membership in the immediate future to as many as thirteen or more countries, predominantly in Central and Eastern Europe. *See* <http://www.europa.eu.int/comm/enlargement/index.htm> for additional information on the EU's enlargement process.

¹⁴ *See supra.* at n. 7.

¹⁵ *See e.g.*, Tibor Varady, “The Emergence of Competition Law in (Former) Socialist Countries,” 47 Am. J. Comp. L. 229 (Spring, 1999) (cites to the laws of Yugoslavia, Poland and Hungary, adopted in 1990, noting that a number of other countries adopted such laws thereafter).

curtail the single-minded pursuit of wealth sometimes ascribed to markets and capitalism. Many Central and Eastern European countries, aspiring to join the European Community, acceded to EC demands to adopt national competition laws that would mimic (“approximate”) EC law.¹⁶ A number of Asian nations, e.g., Taiwan, Japan and Korea saw the adoption and revision of antitrust rules as a combined set of competition and unfair competition laws that would regulate business behavior.¹⁷

5. *South Africa*

South Africa had had a competition law,¹⁸ for many years before apartheid fell and the African National Congress came to power, but it was sporadically enforced and appeared to have little impact. Leaders of the new government considered a new law that would break up the (white-owned) conglomerates and bring the newly empowered majority into the mainstream of economic life. Ultimately, business, labor and government leaders, wishing to preserve South Africa’s economic strengths while also limiting the restrictive effects of previous economic policies, adopted a competition law that is essentially market-promoting, but accords special opportunities to the historically-disadvantaged. The latter principle is mandated in all laws of post-apartheid South Africa.¹⁹

6. *Bretton Woods Institutions and the Adoption of Competition Rules*

Meanwhile, numerous less developed and developing nations experienced deep economic downturns in the late 1990s and sought rescue funds from Bretton Woods institutions, in particular the IMF and the IBRD. In at least certain instances, availability of the rescue packages required, among other economic reforms, adoption of competition law. For example, in 1998, the IMF required Indonesia to adopt a competition law as a condition to receipt of rescue funds.²⁰ The law the Indonesian legislature adopted, in 1999, recites that it is intended to ensure economic democracy, equal opportunities for market actors, economic efficiency, and the welfare of the people.²¹ It appears that Indonesian policy makers had been entertaining the idea of a law against monopolistic and unfair business practices that would protect Indonesian businesses from the large (ethnic Chinese) conglomerates, and that the 1999 rules may be enforced with this latter approach in mind.²²

¹⁶ See *id.* and Roger W. Mastalir, “Regulation of Competition in the New Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republics, and their Models,” 19 N.C.J. Int’l L. & Com. Reg. 61 (Fall 1993).

¹⁷ See generally “Symposium on APEC Competition Policy,” Washington U. Global Studies L. Rev., V. 1, Nos. 1 & 2, Winter/Summer 2002, individual articles available at <http://law.wustl.edu/Publications/WUGSLR/>.

¹⁸ See Regulation of Monopolistic Conditions Act, 1955 (Act No. 24 of 1955).

¹⁹ See e.g., South African Competition Commission “Towards a Fair and Efficient Economy For All,” available at <http://www.compcom.co.za/AboutUs/Introduction.asp>.

²⁰ Michael Richardson, An Empire Imperiled, INT’L HERALD TRIB., May 26, 1998, at 1. See also Clive S. Gray and Anthony A. Davis, “Competition policy in developing countries pursuing structural adjustment,” 38 Antitrust Bull. (2), 425 (Summer 1993), (for additional background and history on World Bank approaches to competition rule conditionality of loans).

²¹ See recitals of Law of the Republic of Indonesia No. 5 of 1999 concerning the Ban on Monopolistic Practices and Unfair Business Competition, available at [http://www.globalcompetitionforum.org/regions/asia/Indonesia/uu_monopoli_\(english\)1.pdf](http://www.globalcompetitionforum.org/regions/asia/Indonesia/uu_monopoli_(english)1.pdf).

²² Eleanor Fox, “Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia,” 41 Harv. Int’l L.J. 579, 589 (Spring 2000).

The stated reasons for adopting competition law usually inform its application and may be responsible, in large part, for differing interpretations and emphasis of objectives as between jurisdictions. For example, Germany adopted its law to ensure dispersion of power and to provide a kind of economic democracy. The German Law Against Restraints of Competition (GWB), in Section 20 IV, prohibits unfair behavior that endangers the existence of small and middle-sized competitors, and enforcement of this rule may not always lead to efficient outcomes.²³

Similarly, as noted earlier, the European Community adopted the competition provisions of the Treaty of Rome, in part, to pursue market-integration objectives. European analysis focuses on, among other things, preserving “the competitive structure of markets” and prohibiting uses of leverage by dominant firms to win additional market share.²⁴ Such use of leverage is said to “distort competition,”²⁵ but, again, this analysis may not necessarily lead to an efficient outcome.²⁶

III. A RANGE OF POLICY OBJECTIVES FOR COMPETITION RULES AROUND THE WORLD

Even though the jurisdictions discussed above, among others, adopt competition rules for differing reasons, each tends to regard its competition law initiatives in the same manner, as measures to “preserve competition.” However, they define “preserving competition” in different ways. Some, like contemporary U.S. antitrust law, treat “preserving competition” primarily as a way to enhance efficiency and consumer welfare. Other systems focus somewhat more on the preservation of rivalry among more than a few market actors, to preserve market opportunities as such, or to protect small or medium-sized firms. These approaches are explained more fully in the next sections. This is followed by a description of some additional social and policy objectives that also inform the application of antitrust laws.

A. Promotion of Competition in Terms of Efficiency

²³ Under this provision, for example the Bundeskartellamt (Federal Cartel Office, the German national antitrust-law enforcement authority) enjoined supermarket chains, including Wal-Mart’s, from undercutting the prices of small competitors by selling below cost. (Following reversal by the Düsseldorf Higher Regional Court, the German Federal Supreme Court upheld the Bundeskartellamt’s interpretation of Germany’s competition rules on below cost pricing.) See *Unterbieten von Wettbewerbern durch Unterschreiten von Einstandspreisen I*, Bundeskartellamt (Federal Cartel Office), Beschluss (decision) vom 1.9.200 (9/1/2000), B 9-74/00-Wal-Mart, WuW DE-V 316 and Press Release of Nov. 12, 2002, “Rules on ban on sales below cost price prove effective” available at http://www.bundeskartellamt.de/12_11_2002englisch.html. Also, the Bundeskartellamt recently decided that the large integrated oil companies engaged in unfair price squeezes of independent filling stations. (The decision was preliminarily set aside on the basis of a poor record, and became moot.) See *DEA, Aral, Shell, Esso, BP, Elf, Price Squeezing gegenüber freien Tankstellen*, Bundeskartellamt, Beschluss vom 9.8.200, B8-77/00 – Freie Tankstellen, WuW DE-V 289.

²⁴ See generally Arts. 81 and 82 EC Treaty and the EU Commission’s explanation of these provisions and their enforcement at http://europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/en.pdf.

²⁵ See, e.g., *Tetra Pak International v. Commission*, case C-333/94P, [1996] ECR I-5951, at para. 44.

²⁶ See discussion of market integration, *infra.* at § IV.C.4.

The notion that antitrust law involves the protection of competition appears indisputable.²⁷ However, as indicated above, beyond agreement on this basic approach, the term “competition” appears to mean somewhat different things to different people. To the layperson, “protecting competition” can mean “preserving competitors,” rather than “promoting a competitive process” that rewards efficient behavior. The legislative history of U.S. antitrust law, for example, provides a basis for arguing that politically popular objectives distinct from efficiency motivated early antitrust law.²⁸

Nonetheless, as is explained in more detail below, in most western industrial countries, there is a growing acceptance that a fundamental purpose of competition policy is the promotion of economic efficiency and consumer welfare, broadly defined.²⁹ Indeed, given recent trends, this appears to be truer today than it was in the past. As a leading antitrust treatise points out:

Today it seems clear that the general goal of the antitrust laws is to promote ‘competition’ as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or improved products.³⁰

More specifically, fundamental objectives of antitrust law include not only the protection of price competition and associated productive and allocative efficiency, but also the protection of innovation competition to promote dynamic efficiency through the development of new products and processes.³¹

1. Efficiencies

²⁷ With respect to the passage of the early U.S. antitrust statutes, for example, the U.S. Supreme Court found that “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).

²⁸ See *supra* n. 5 and accompanying text. See also Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966); E. Fox and L. Sullivan, *Antitrust – Retrospective and Prospective: Where are We Coming From? Where are We Going?*, 62 NYU L.Rev. 936 (1987), T. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INTL. REV. OF L. & ECON. 73 (1985). This point is also recognized in leading treatises on U.S. antitrust law. See, e.g., PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 112a (1997) (“in our democracy fidelity to the Constitution and to clear statutory language is essential, and some statutory provisions simply cannot be reconciled with prevailing conceptions of economic efficiency.”)

²⁹ For example, the final report of the Second Workshop on European Competition Law, held in Florence in 1997, finds agreement that the direct goals of competition policy should be “limited to economic efficiency and consumer benefit.” Claus Ehlermann & Loraine Laudati eds., *European Competition Law Annual 1997: The Objectives of Competition Policy*, 1998, ix.

³⁰ PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW at ¶ 110a (1997).

³¹ See e.g., Antitrust Guidelines for the Licensing of Intellectual Property, at § 1.0, available at <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm> (“The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare”). See also, D. Turner, *Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights*, 53 ANTITRUST L. J. 485 (1984).

a. PRODUCTIVE OR “TECHNICAL” EFFICIENCY

Productive efficiency means the production of a given output at the lowest possible cost.

Economists have linked productive efficiency to competition because competition pressures firms to lower costs or suffer displacement by those who do.³² As Hicks commented, “the best of all monopoly profits is a quiet life,”³³ which implies that insulation from competition may lead to inefficient production and higher costs. In contrast, competition prods “quiet-life” firms into action by threatening their existence.³⁴

In a variety of formal economic models, a characteristic of competitive markets in long-run equilibrium is that each firm produces its output at minimum social costs (assuming the market has the characteristics required, *inter alia*, to support competition).³⁵ This is because firms that fail to operate at the lowest cost cannot survive. This implies that production efficiency is maximized by competition.

b. ALLOCATIVE EFFICIENCY

Allocative efficiency means the production and distribution of that quantity of each specific product such that the total value of all products is at a maximum, given the productive resources available and the preferences of consumers. Again, formal economic models have shown that, in competitive markets characterized by profit-maximizing firms,³⁶ the cost of producing the last incremental unit of output (which is defined as marginal cost) equals the price that consumers are willing to pay for that product (which reflects the social value of the product).³⁷ This implies that resources are allocated efficiently, assuming that consumer tastes accurately reflect social preferences.³⁸

c. DYNAMIC EFFICIENCY

Dynamic efficiency means the appropriate level of investment in each form of innovation. While much antitrust literature has focused on productive and allocative efficiency, economists have recognized for some time that, in the long run, technical progress has contributed more

³² See e.g., WILLIAM G. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION*, 4TH ED. 1999, pp. 43-47.

³³ See J.R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 *ECONOMETRICA* 8 (1935).

³⁴ Some have also argued that competition supports productive efficiency by offering a benchmark against which performance can be evaluated, which can help discipline firm production behavior. See e.g., John Vickers, *Concepts of Competition* OXFORD ECON. PAPERS 1, 4 (1995).

³⁵ See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 20 (1990).

³⁶ If a market is characterized by cost curves that do not allow more than one firm to survive given the nature of demand (*i.e.*, if the market is a “natural monopoly”), a competitive market may not be efficient. *Id.* at 30-31.

³⁷ *Id.* at 20. See also WILLIAM G. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION*, 4TH ED. 1999, p. 35.

³⁸ See *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW*, ED. Peter Newman, Vol. 1, pp. 410-415 (1998) (on consumer protection). For an early discussion of consumer sovereignty, See Tibor Scitovsky, *On the Principle of Consumer Sovereignty*, 52 *AM. ECON. REV.* 262 (1962).

to consumer welfare than efforts to eliminate productive and allocative inefficiencies caused by monopolistic pricing.³⁹ The recognition of the importance of dynamic efficiency is often reflected in antitrust law through the encouragement of innovative efforts by leading firms or by firms that would take over markets if their innovations prove successful.⁴⁰

These efficiency objectives drive an economics-based competition analysis.

B. Promotion of Business Rivalry and Entrepreneurial Opportunity

While many countries articulate the promotion of competition as a key objective of their antitrust policy, others emphasize the preservation of rivalry among firms in assessing the promotion of competition.⁴¹ The promotion of business rivalry and entrepreneurial opportunity, e.g., facilitating a process of rivalry and creating conditions that facilitate market access and economic opportunity for firms without an established market presence, may include a check on power (not necessarily technically defined) and on high levels of industrial concentration to: (i) maintain more freedom, autonomy, firm diversity, and economic opportunity; (ii) reduce coercion and commercial exploitation; (iii) reduce the degree of control exercised by small numbers of business people or government officials.⁴² The perspective on competition law as a freedom and democracy-enhancing instrument may entail:

- Maintaining open channels for economic opportunity and otherwise protecting competitive opportunities of firms without market power.
- Legislating “fair” rules of the game, which may include prohibitions of certain conduct thought to harm less-powerful firms.
- Sometimes, protecting markets of small and middle-sized businesses from “encroachments” (*i.e.*, from competition) by large-scale businesses that threaten to destroy them.⁴³

³⁹ See, e.g., J. Markham, *Concentration: A Stimulant or Retardant to Innovation?*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 247, 253-54 (H. Goldschmid, H. Mann & J. Weston ed. 1974). Some economists have argued that firms may need protection from competition to bear the risks associated with invention and innovation. See, e.g., JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 88, 103 (1942).

⁴⁰ In U.S. antitrust law, see, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (monopoly achieved or maintained by superior product or business acumen is not unlawful); *E. I. DuPont de Nemours & Co.*, 96 F.T.C. 653, 748 n. 40 (1980) (monopolist under no duty to license or disclose technology to rivals).

⁴¹ See e.g., *COMPETITION LAWS OUTSIDE OF THE UNITED STATES*, 2001 ABA, Chapt. 8 (Italy) (“In enforcing the Competition Law, the Competition Authority is essentially protecting competition and maintaining the correct operation of market forces. Thus, consumers are only protected indirectly through the preservation of a competitive environment.”) at p. 11. Similarly, the German Bundeskartellamt notes that the German Competition Law “is intended to protect competition. Restrictive practices by companies should be prevented to protect the market opportunities of other companies from interference.” *The Bundeskartellamt and its tasks*, available at http://www.bundeskartellamt.de/Broschure_engl.Jan02.pdf.

⁴² See paper prepared by Allan Fels, Chairman, Australian Competition and Consumer Commission (ACCC), and Geoff Edwards, of the ACCC, as published in Claus Ehlermann & Loraine Laudati eds., *European Competition Law Annual 1997: The Objectives of Competition Policy*, 1998, 53, at 54.

⁴³ By preserving or creating a certain balance of economic opportunities, the business rivalry objective can even be said to act as an instrument for the redistribution of wealth, in that it aims to promote more opportunity (for participation and thus wealth) by non-powerful actors vis-a-vis more powerful ones. The Philippine Constitution 1987, Art. XII, Sec. 6, is one of the few examples where this redistribution function is recognized, providing that:

According to competition recitals, rules and statutes, the process to be maintained is frequently said to be desired for equity and efficiency reasons, and to serve consumers and small business, without recognition of the tensions between the objectives.⁴⁴

The competition-process model described above may also embed additional objectives. For example, because the model attempts to create opportunity for competitors with impaired capacity to survive and prosper, it may be seen (as it is in South Africa) as an instrument helpful to economic advancement of those who previously had been systematically excluded from the economic system.⁴⁵

C. Other Economic, Social and Political Objectives

There are numerous policy objectives (other than promotion of competition and business rivalry and entrepreneurial opportunity) that have informed the application and enforcement of antitrust laws. Nearly all nations—whether they adopt an efficiency model, a distortion-of-competition model, or some other model—make some allowance for competition objectives to be subordinated to or outweighed by other public policy objectives.⁴⁶ The legislature may decide—or an agency, minister or court may be empowered to decide—that some other objective is

“the right to own establish, and operate economic enterprises [is] subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.”

⁴⁴ See e.g., Canada, COMPETITION ACT, R.S. 1985, c. C-34 at Part I, § 1.1 (“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.”) See also COMPETITION LAWS OUTSIDE OF THE UNITED STATES, 2001 ABA Publication, which examines the general policies underlying the competition laws of ten jurisdictions.

⁴⁵ This objective is discussed more fully *infra.* at § III.C(1)(f).

⁴⁶ For example, a number of statutory exemptions from antitrust law or qualifications or extensions of antitrust analysis exist for a variety of industries under U.S. law. As concerns agriculture, U.S. legislation provides antitrust immunity for the collective processing, preparing for market, handling and marketing in interstate and foreign commerce of agricultural products and the acquisition and exchange of past, present and prospective pricing, production and marketing data by agricultural producers and associations (See *The Capper-Volstead Act* and *The Agricultural Marketing Agreement Act*, 7 U.S.C. §§ 291-292 and § 455 (2000), respectively). In addition, the McCarran-Ferguson Act, (15 U.S.C. §§ 1011-15) grants insurers an exemption from federal antitrust laws for practices constituting the “business of insurance” that are regulated by state law, provided it does not concern boycott, coercion or intimidation. Similar antitrust exemptions pertain to a number of different regulated sectors, including elements of the communications, energy, transportation, banking and health care industries as well as organized labor. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (5TH ED. 2002) at vol. 2, Chapt. XIV, for a more complete examination of such exemptions. Moreover, the Supreme Court has recognized the “state action” and “Noerr-Pennington” doctrines, which respectively grant immunity from federal antitrust enforcement for conduct undertaken by state or private actors pursuant to a state policy, and for acts constituting the petitioning for government action..

more important than preservation of competition.⁴⁷ In other cases, despite *de jure* supremacy of competition objectives, there may be *de facto* derogations from competition by virtue of informal or non-transparent forms of government action.⁴⁸ The following section does not purport to provide an exhaustive list or summary of all these social and political objectives or the frequency with which they are applied. Rather it aims to provide a few examples of the many social and political objectives underlying antitrust laws in order to give a flavor of their breadth and variety.

1. *Examples*

a. PROTECTION OF SMALL BUSINESS

A number of jurisdictions use competition rules to protect small and medium-sized businesses pursuant to explicit authority, through various enforcement practices, or both. While this objective may be stated in varying forms, it is often addressed through abuse of dominance provisions.

For example, elimination of excessive concentration of power and “promotion of the democratic and wholesome development of the national economy” are objectives of Japan’s competition law.⁴⁹ Japanese abuse of dominance provisions, in conjunction with the regulation of unfair trade rules, are often employed to address such concerns.⁵⁰ According to one expert, enforcement is “often synonymous with a political struggle of the small against the large, such as the fight of small retailers against supermarkets.”⁵¹

In Germany, several provisions of the GWB also address the protection of small and medium-sized businesses. For example, Sections 20(3) and 20(4) of the GWB, respectively, prohibit dominant firms from using their market positions to force small and medium-sized companies to grant them preferential terms, and from using their market power to unfairly hinder smaller competitors, provided that there is no objective justification for such activities. The Federal Cartel Office enforces these provisions diligently.⁵²

⁴⁷ See David Lewis, *The Political Economy of Antitrust, Fordham Conference on International Antitrust*, Oct. 25-26, 2001. See also, *Final Report, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General* (ICPAC Report), pp. 48-64 (2000).

⁴⁸ See e.g., Mannesmann/Valourec/Ilva, Case No. IV/M315, European Commission Decision of Jan. 31, 1994. See also, Shubba Ghosh, *Relaxing Antitrust During Economic Downturns: A Real Options Analysis of Appalachian Coals and the Failing Defense*, 68 ANTITRUST L.J. 111 (2000).

⁴⁹ See Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947) at Sec. 1. See also Harry First, *Antitrust in Japan: the Original Intent*, 9 Pac. Rim L. & Pol’y J. 1 (2000); and, Alex Y Seita and Jiro Tamura, *The Historical Background of Japan’s Antimonopoly Law*, 1994 U. Ill. L. Rev. 115, 172 (1994).

⁵⁰ Dominance provisions and unfair trade rules address, e.g., concerted refusals to deal, discriminatory pricing, unjustly low-priced sales or unjustly high-priced purchases, abuse of a dominant bargaining position, interference in a competitor’s transactions or its internal operation. See e.g., § 14 of JFTC Notification 15 of June 18, 1982, General Designations for Unfair Trade Practices.

⁵¹ Hiroko Yamane, *Deregulation and Competition law Enforcement in Japan: Administratively Guided Competition?*, *Journal of World Competition* 23(3), p. 141, 181-182 (2000). These provisions are supported by Section 22 of the Antimonopoly Act, which exempts a cooperative or federation of cooperatives formed by small business entities and consumers from competition rules to allow it to compete on equal terms with large firms.

⁵² In addition to recent actions taken pursuant to Section 20(3) GWB described above in § II.6, *supra*, text corresponding to n. 23, the Bundeskartellamt prohibited Metro (a supermarket chain) from causing suppliers to adjust their

Section 22(2) of the GWB also supports the protection of small businesses by exempting recommendations issued by associations of small and medium-sized enterprises from competition law provisions, provided that such recommendations serve to improve the parties' ability to compete with large enterprises or other forms of large-scale business.⁵³

A number of French competition law provisions also provide protection for smaller enterprises. As part of its abuse of dominance prohibition, Article 420-2 of the Commercial Code also prohibits an entity from abusing a state of economic dependence of a customer or supplier.⁵⁴ One of the principal objectives of the recent reform of the French competition law, brought into effect by the New Economic Regulations (NER), was "to reinforce protection of small and medium-sized enterprises, in particular, suppliers of consumer goods which are subject to the buying power of large distributors."⁵⁵ For example, the NER modified the Commercial Code to make such abusive conduct easier to prosecute (by eliminating the requirement that the victim show that it had no alternative to the terms imposed by the dominant entity).⁵⁶ It also prohibited a dominant firm from taking advantage of a business partner, or of its bargaining powers, by imposing unfair trading conditions.⁵⁷ Similarly, the newly modified Article

terms retroactively in Metro's favor to meet the terms offered to Metro's recently acquired Allkauf group pursuant to Section 20(4) GWB. See Press release of March 2, 1999, "Bundeskartellamt prohibits Metro from having terms adjusted retroactively" available at http://www.bundeskartellamt.de/02_03_1999_english.html.

⁵³ Additionally, the GWB exempts *de minimis* arrangements from its cartel and merger provisions. See GWB at § 4 and the Federal Cartel Office's information leaflet relating to the German Control of Concentrations, available at <http://www.bundeskartellamt.de/MerkblattFuKoD2000-E.pdf>.

⁵⁴ See *Code de Commerce* at Art. 420-2 (text available in French at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0000038RP4>).

⁵⁵ The New Economic Regulations (NER) were adopted by the French Parliament on May 2, 2001. Loi no 2001-420 due 15 mai 2001 relative aux nouvelles regulations économiques, J.O n° 113 du 16 mai 2001, at 7776. See Lucie Carswell Parmentier, *Reform of French Competition Law: Adoption of a Mandatory Pre-Merger Control Regime*, E.C.L.R., p. 99 (2002).

⁵⁶ See Article 66 of the NER (French text available at <http://www.finances.gouv.fr/DGCCRF/concurrence/index.html>), modifying Article L. 420-2 of the Code de Commerce (text available in French at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0000038RP4>). See also Dominique Voillemot and Antoine Choffel., *The French Competition Law*, Ch. 16, *The European Antitrust Review 2003*.

⁵⁷ See Article 56 of the NER (French text available at <http://www.finances.gouv.fr/DGCCRF/concurrence/index.html>), modifying Article L. 442-6 of the Code de Commerce (text available in French at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0000038RP4>). See also Dominique Voillemot and Antoine Choffel., *The French Competition Law*, Chapt. 16, *The European Antitrust Review 2003*.

420-4 of the Commercial Code exempts certain categories of agreements designed to improve the management of small and medium-size enterprises from the provisions on anti-competitive practices.⁵⁸

The objective of protecting small business is not isolated to these jurisdictions. For example, one of the most recent decisions on substantive merits by the Indonesian Business Competition Supervisory Commission found Indomaret, a large, discount supermarket chain, responsible for “not pay[ing] appropriate attention to the existence of the neighboring small shops” and for failing to “observ[e] the balance” between large-scale and small-scale retailers, and ordered Indomaret to cease its expansion in traditional markets where it is directly facing small-scale retailers.⁵⁹ Similarly, the Canadian Competition Act expressly provides, in Section 1.1, that one of the purposes of the Act is to “ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.”⁶⁰ Reportedly, the Competition Act’s provisions regarding price discrimination, and predatory pricing provisions, for example, were enacted and are enforced today with the aim of protecting small businesses, even at the cost of efficiency.⁶¹

b. CREATING NATIONAL CHAMPIONS

Competition-law provisions may also be used to maintain and/or create national champions may also include the use of competition-law provisions. For example, Italian competition law provides that agreements may be authorized if they lead to improvements that may guarantee undertakings the necessary level of international competitiveness.⁶²

In addition, the Fair Trading Act of the United Kingdom, which governs merger control, sets out a public interest test for merger review. This test provides, as one of the factors for review, the desirability “of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom.”⁶³ In reviewing the Hong Kong and Shanghai Banking Corp./Royal Bank of Scotland transaction, for example, the Competition Commission held that there was a public interest detriment in that the merger would cause responsibility for an important part of the banking sector to pass out of UK control.⁶⁴

Moreover, the protection of national champions may occur without specific acknowledgement or authorization. For example, Europeans accused the United States of creating a national champion by clearing Boeing’s acquisition of McDonnell Douglas (while, in the

⁵⁸ See *Code de Commerce* at Art. 420-4 (text available in French at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0000038RP4>).

⁵⁹ PT Indomarco Prismatama, Decision No. 03/KPPU-L-1/2000, decision of Business Competition Supervisory Commission of the Republic of Indonesia.

⁶⁰ Competition Act, R.S.C. 1985, C-34, Part I, §1.1

⁶¹ ABA Section of Antitrust Law, *Competition Laws Outside the United States* (2001), Chapter 4, p. 15 and n. 63.

⁶² Section 4 of Law n° 287, October 10, 1990.

⁶³ The Fair Trading Act of 1973 at §84 (1)(e). While the proposed changes to the UK’s merger-control regime would not eliminate public interest criteria, they aim to limit the political involvement of the Secretary of State in such cases to defined public interest and security measures. See Enterprise Bill, available at <http://www.publications.parliament.uk/pa/ld200102/ldbills/116/2002116a.pdf>.

⁶⁴ Hong Kong and Shanghai Banking Corp./ Royal Bank of Scotland, Cmnd 8472 (1982); See also, The Government of Kuwait/ British Petroleum, Cm 477 (1988) (merger in the petroleum sector). Richard Whish, *COMPETITION LAW*, 2001, 827.

same matter, Americans accused Europeans of bolstering their national champion, Airbus, by nearly prohibiting and ultimately conditioning the merger),⁶⁵ though these allegations were disavowed by the respective agencies.⁶⁶

c. EMPLOYMENT

Another non-economic objective that informs the application of competition law involves the preservation of employment opportunities. This was one of the original reasons for the failing firm defense in the United States⁶⁷ (although contemporary U.S. antitrust authorities do not apply this reasoning). In addition, preserving jobs was one initial objective of Central European merger policies.⁶⁸

Moreover, pursuant to Section 84 of the UK's Fair Trading Act of 1973, the Competition Commission may consider a merger's implications for the level of employment. According to at least one commentator, "[a] merger which would increase employment without seriously impairing competition would have a good chance of being permitted."⁶⁹

Employment considerations also may be assessed with respect to the enforcement of the EU's Articles 81 and 82, concerning restrictive agreements and dominance, respectively.⁷⁰ The Court of First Instance has also stated explicitly that such considerations are relevant to the Commission's merger assessment, noting in *Comité Central d'Entreprise de la Société Anonyme Vittel v. Commission* that:

in the scheme of Regulation No 4064/89, 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 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.⁷¹

⁶⁵ See Eleanor Fox, *Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus*, 16 BROOKINGS REVIEW 30 (Winter 1998).

⁶⁶ See e.g., IP/97/400, press release of May 13, 1997 "Our analysis of the Boeing-McDonnell Douglas file is conducted strictly on the basis of the European Merger Regulation, and nothing else" Mr Karel Van Miert says."

⁶⁷ See *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

⁶⁸ See, e.g., *Tchibo Freisch-Roest-Kaffee Gmb/Bilírný Jihlava*, reported in Czech Ministry of Economic Competition Annual Report for 1993, para. 82. See, J. Fingleton, E. Fox, D. Neven, P. Seabright, *Competition Policy and the Transformation of Central Europe*, pp. 131-34 (CENTRE FOR ECONOMIC POLICY RESEARCH 1996). The CEECs have now revised their laws to track the EC law.

⁶⁹ The UK Competition Commission has considered the preservation of employment as an efficiency gain in the context of mergers, e.g., *Swedish Match AB/ Allegheny International Inc.*, Cm 227(1987); *Ladbroke Group plc/Coral Betting Business*, Cm 4030 (1998). See Richard Whish, *COMPETITION LAW*, 2001, p. 828; See also, Barry J. Rodger, *Competition Policy, Liberalism and Globalization: a European Perspective*, 6 Colum. J. Eur. L. 289, p. 309-310 (2000).

⁷⁰ See e.g., *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, 25 October 1977, Case 26-76, ECR 1977 p. 1875, para. 43; *Stichting Baksteen*, Case, Case IV/34. 456, OJ L 131/15, 26/5/1994, paras. 27-28; and, *Matra Hachette v. Commission*, 15 July 1994, T-17/93, ECR II-595, paras. 96 and 139. For example, when considering whether to exempt a joint venture to produce a multi-purpose vehicle in Portugal, the European Commission noted the "exceptional circumstances" of the case, in that the joint venture would bring a large number of jobs and substantial foreign investment to one of the poorest regions of the European Community. *Ford/Volkswagen*, Case IV/33.814, O.J. L 20/14, 28/01/1993, paras. 23, 28 and 36.

⁷¹ *Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and Fédération Générale Agroalimentaire v Commission of the European Communities*, April 27 1995, Case T-12/93, ECR II-1247, para 38. With this employment objective in mind, it should be noted that European competition law concerning mergers also

Similarly, the Bulgarian authority accounts for employment retention as part of its merger review. For example, according to the contribution of Bulgaria to the OECD's October 2001 Global Forum highlights, in authorizing the merger of TBI Holding HB Ltd., Holland and DZI 2000, the Bulgarian Commission held TBI's obligation "to keep, with minimal discharges, the employees of the acquired society" to be an important consideration.⁷²

d. **ENHANCED EXPORTS**

Canadian law expressly authorizes the Competition Tribunal to consider whether a proposed merger will result in "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products," as part of an examination of efficiency gains.⁷³ This supports the general purpose clause of the Competition Act, which states, that one of the goals of the Act is to "expand opportunities for Canadian participation on world markets. . ."⁷⁴ Reportedly, this objective was an underlying reason for the Commissioner of Competition's decision not to oppose the sale of DeHavilland to the ATR joint venture in 1991.⁷⁵

The French Competition Council also considers the promotion of French firms on the international market as part of its merger assessment.⁷⁶ Moreover, many nations have exemptions for anticompetitive acts that may harm predominantly foreign residents, e.g., export cartels.⁷⁷ Justification for such provisions is often grounded on the geographic limits of the coverage of the law, as the acts are subject to the laws of the importing countries.⁷⁸ Alternatively, such exemptions may be viewed as measures to promote exports, to create market power or facilitate its exercise by indigenous producers against foreign purchasers.⁷⁹

e. **ENVIRONMENTAL PROTECTION/IMPROVING SAFETY**

The European Commission, for example, may consider the preservation of the environment and/or improvements to safety, in granting an exemption under Article 81(3). The Commission's Horizontal Cooperation Guidelines suggest that agreements in this area usually commit the parties to achieving environmental targets and are normally considered to fall outside the scope of Article 81(1) or are exempted under Article 81(3), because they are a necessary policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty and

recognizes, in limited circumstances, the availability of a failing firm defense. *France v. Commission*, March 31, 1998, Joined Cases C-68/94 and C-30/95, ECR I-1375, paras. 109-125. The burden is on the firms claiming the defense. *See*, Giorgio Monti and Ekaterina Rousseva, *Failing Firms in the Framework of EC Merger Regulation*, 24 *ELRev.* 38, (1999).

⁷² The submission can be found at http://www1.oecd.org/daf/clp/GFC_October2001/wd-bulgaria.pdf. *See* description of Decision Nr. 60/10.05.2001 on pp. 6-7.

⁷³ Canada, COMPETITION ACT, R.S.C. (1985), Part VIII, § 96(2).

⁷⁴ *See id.* at Part I, § 1.1.

⁷⁵ *See* paper prepared by Calvin S. Goldman, Q.C. and Milos Barutciski, of Davies Ward & Beck, Canada, published in Claus Ehlermann & Loraine Laudati eds., *European Competition Law Annual 1997: The Objectives of Competition Policy*, 1998 at 388.

⁷⁶ *See e.g.*, Competition Council, Avis no 99-A-02, Jan. 20, 1999, acquisition of Alfa Laval Holding AB by Vicarb, BOCCRF No 20, Dec. 11, 1999.

⁷⁷ *See* Waller, Spencer, *The Internationalization of Antitrust Enforcement*, 77 *B.U.L. Rev.* 343, 397 and notes. 280 - 282.

⁷⁸ *See* Diane Wood, *Remarks, Panel II: International Law & Federalism: What is the Reach of Regulation?*, 23 *Harv. J.L. & Pub. Pol'y* 97, 107-110.

in Community environmental action plans.⁸⁰ In limited instances, regard for these objectives may permit an otherwise anticompetitive agreement to go forward.⁸¹

f. **AFFIRMATIVE ACTION**

The South African competition authorities are required by statute to review public interest criteria, including the empowerment of historically disadvantaged persons, regardless of whether the merger is found to lessen competition.⁸² Nevertheless, the South African competition authorities have taken a cautious approach such that public interest factors have not, on their own, determined the outcome of a merger evaluation.⁸³

g. **PROTECTING INTELLECTUAL PROPERTY RIGHTS**

Nations may grant antitrust immunity to refusals to license intellectual property.⁸⁴ Moreover, nations may exempt intellectual property and its uses from competition law.⁸⁵ These immunities or exemptions may derive from a concern that exposing intellectual property rights to antitrust may undercut incentives to invent and thus harm innovation.⁸⁶

Section 21 of the Japanese Antimonopoly Act, for example, confirms that the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act do not violate the Act's competition provisions. This Section does not exempt intellectual property rights from the Antimonopoly Act's scope, but confirms that "while patent rights are guaranteed just like other general property rights, they are fully subject to Antimonopoly Law regardless of whether inherent rights are exercised."⁸⁷

Similarly, the EU block exemptions concerning categories of research and development and technology transfer agreements limit the application of Article 81(1) to certain intellectual property licensing arrangements.⁸⁸

⁷⁹ See e.g., Issues Paper on Cross-border Competition Issues in the Context of the DOHA Agenda, issued by the Consumer Unity and Trust Society (CUTS), available at <http://cuts.org/Cross%20Border%20Competition%20Issues.DOC>.

⁸⁰ European Commission Notice-Guidelines on the applicability of article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3/2, 6/01/2001, paras. 179-197.

⁸¹ See, e.g., *Diego Cali & Figli Srl v. Servizi egologici porto di Genova SpA (SEPG)*, 18 March 1997, Case C-343/95, ECR I-1547, where the ECJ held that a private company engaged in anti-pollution surveillance in the port of Genova would not be acting as an undertaking and should not be caught by Articles 81 and 82 of the EC Treaty, since this was a task in the public interest, forming part of one of the essential functions of the state in protecting the maritime environment.

⁸² COMPETITION ACT OF SOUTH AFRICAN, 1998, Act. No. 89, para. 10 § 3, para. 16 § 3. For an analysis see, Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 *Harv. Int'l L.J.* 579 (2000). See also "Merger Review: an overview of the analytical framework utilized in South Africa," <http://www.internationalcompetitionnetwork.org/AFSGsouthafrica.pdf> at p. 6.

⁸³ See "Merger Review: an overview of the analytical framework utilized in South Africa," <http://www.internationalcompetitionnetwork.org/AFSGsouthafrica.pdf> at p. 7-8.

⁸⁴ See e.g., *In Re Independent Service Organizations Antitrust Litigation* (CSU v. Xerox Corp., 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1077 (2001)).

⁸⁵ See e.g., Law No. 5 of 1999, Republic of Indonesia, Art. 50.

⁸⁶ See e.g., Commission Evaluation Report on the Transfer of Technology Block Exemption No 240/96, at § 3, available at http://europa.eu.int/comm/competition/antitrust/technology_transfer/en.pdf.

⁸⁷ ABA SECTION OF ANTITRUST LAW, *COMPETITION LAWS OUTSIDE THE UNITED STATES* (2001), Chapter 9, 56.

⁸⁸ Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements O.J. L 31/2, February 9, 1996, point 3 and Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the

h. **AIDING INDUSTRIES IN CRISIS**

Certain jurisdictions may authorize crisis or depression cartels. For example, the European Commission may grant an exemption to a crisis cartel under particular conditions.⁸⁹ Japan had, but repealed, exemptions for both types of cartels.⁹⁰ These provisions may be animated by desires both to help industry members in distress and to help resolve an industry crisis for the good of the market, including consumers.⁹¹

i. **FAVORING OR ENABLING SPECIFIC INDUSTRIES OR SECTORS**

Nations commonly have exemptions or partial exemptions from their competition laws. Some of these exemptions pertain to regulated industries, where competition is replaced, at least in part, by regulation to obtain better prices, service or choice for consumers or to satisfy ideals of universal public service (e.g., utility,⁹² transportation, and financial institutions⁹³).

Some exemptions protect defense and security.⁹⁴ Some are intended to provide countervailing power to individual buyers or sellers engaging in transactions with substantial firms (agriculture,⁹⁵ labor⁹⁶). Some partial exemptions allow collaboration where collaboration is deemed necessary to accomplish specific industry-related goals, e.g., insurance industry data exchange.⁹⁷ Other exemptions derive from historic accident. Thus, American baseball fell outside of the early, narrow view of activities "in commerce," and the exemption outlived the expansion of the Commerce Clause.⁹⁸

application of Article 81(3) of the Treaty to categories of research and development agreements, O.J. L 304, Dec. 5, 2000, p. 7-12. See also Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements, O.J. C 3/2, Jan. 6, 2001, p. 2, at points 3, 32.

⁸⁹ See, *Stichting Baksteen* (Dutch brick makers), Case IV/34.456 O.J. L 131/15 (May 26, 1994) (European Commission).

⁹⁰ Japan, ANTIMONOPOLY ACT OF 1947, as amended 1953, §§ 24-3 and 24-4, repealed 1999.

⁹¹ See e.g., Decision of the French Competition Council, 88-D-30, May 3, 1988, distribution of salt, BOCCRF 1988, No. 11, p. 140 authorizing a crisis cartel.

⁹² See *Criminal Proceedings Against Corbeau*, May 19, 1993, Case 320/91, ECR I-2533, para. 15 (concerning the postal administration).

⁹³ E.g., in Germany, Section 130(1) GWB exempts the Bundesbank and the Kreditanstalt für Wiederaufbau from its application.

⁹⁴ See e.g., Art. 462-9(4) of the French Code de Commerce. In addition, Art. 296(1) (b) of the Treaty of Rome provides that an EU Member State may take such measures as it considers necessary in matters of security connected with its defense industry. See, *British Aerospace/VSEL*, Case IV/M.528, O.J. C 348/6, Dec. 9, 1994; *GEC / Thomson-CSF (II)*, Case No IV/M.724, O.J. C 186/2, June 26, 1996.

⁹⁵ See e.g., Section 28 of the German GWB and Art. 420-4 of the French *Code de Commerce*. In addition, Arts. 32 to 38 of the EC Treaty subject agriculture to a special regime. Article 36 provides that the rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council. The Council has adopted Regulation 26/62, which provides derogations for the application of Article 81(1) concerning national market organizations and common market organizations.

⁹⁶ See e.g., *Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999, Case C-67/96 etc., ECR I-5751, para. 59.

⁹⁷ Section 29 of the German GWB; See also, Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector O.J. L 398/7, Dec. 31, 1992.

⁹⁸ See, *Flood v. Kuhn*, 407 U.S. 258 (1972). In contrast, in the European Union, the practice of sport is subject to competition law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. See e.g., *Walrave and Koch v. Association Union Cycliste Internationale*, Case 36/74, (1974) E.C.R. 1405; *Union Royale Belge des Sociétés de*

IV. DISCUSSION OF THE VARYING OBJECTIVES

Having described the objectives generally employed in competition analysis, the following provides a brief discussion of their application in antitrust cases.

A. Promotion of Competition in terms of Efficiency

While the increased importance of economic analysis in U.S. antitrust law during the last 30 years is well-known, similar trends are evident outside the United States, particularly in jurisdictions that have the promotion of the competitive process as a key objective of antitrust policies.⁹⁹ For example, the EC's new block exemptions rest on this emphasis on economic analysis and promotion of competition.¹⁰⁰ Another example is the international debate concerning the EC Commission's decision in GE/Honeywell, in which disputants rest their arguments on economic analysis and competition grounds and abjure resort to social and political objectives.¹⁰¹ Moreover, in Canada, the Competition Act of 1986 was passed for a number of reasons, including the promotion of efficiency and adaptability of the Canadian economy and the provision of consumers with competitive prices and product choices.¹⁰² This Act was passed only after a vigorous debate, which led to a consensus that competition policy should focus on the goals of protecting and preserving competition and promoting economic efficiency.¹⁰³

Increased economic analysis in the examination of competition cases has helped to narrow and focus the antitrust debate. For example, the perennial issue of whether the "foreclosure" of competitors will lead to long-term consumer harm has been the focus of much of the discourse, with the debate centering on likely economic outcomes in the particular factual situation. This trend toward greater reliance on economic analysis provides:

- 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.

football association, *Royal Club liegeois et UEFA v. Jean-Marc Bosman*, Case C-415/93, 1995 ECR I-4921. However, "[t]he Commission applies the competition rules in this sector in a manner that does not undermine the regulatory authority of the sporting organizations with respect to sporting rules per se, i.e. rules which are intrinsic to a particular sport or are necessary for its organization or for the organization of competitions." European Commission, XXXth Report on Competition Policy 2000, point 229, available at http://europa.eu.int/comm/competition/annual_reports/2000/.

⁹⁹ For example, the Irish merger control rules were recently revised to rely on the "substantial lessening of competition" test, which is to include an assessment of economic efficiencies. See "Guidelines for Merger Analysis: A Consultative Document," Aug. 2002 available on the Irish Competition Authority's website at <http://www.tca.ie/>. In addition, the Venezuelan National Assembly is in the process of drafting a Law on the Promotion of Free Competition and Efficiency, see Juan D. Alfonzo P, *The draft Law on the Promotion of Free Competition and Efficiency*, at Chapt. 15 of *The Antitrust Review of the Americas 2003*, A Global Competition Review Special Report.

¹⁰⁰ See e.g., Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector *Official Journal L 203*, Aug. 1, 2002, p. 30.

¹⁰¹ See e.g., Comments of FTC Commissioner Muris (differing results attributable to divergent views concerning, e.g., the competitive effects of bundling), in "FTC Chairman Muris Stresses Commitment to Cooperation with European Commission," press release of Nov. 14, 2001, available at <http://www.ftc.gov/opa/2001/11/euus.htm>.

¹⁰² Competition Act R.S.C., ch. C-34 (1985) (as amended).

¹⁰³ See paper prepared by Francine Matte, Q.C., Canadian Competition Bureau, and paper prepared by Calvin S. Goldman, Q.C. and Milos Barutciski, of Davies Ward & Beck, Canada, published in Claus Ehlermann & Loraine Laudati eds., *European Competition Law Annual 1997: The Objectives of Competition Policy*, 1998 at 85 and 388, respectively. (Matte notes that subsequently, concern with economic efficiency has evolved to include the goal of international competitiveness, at 85.)

Increasing reliance on an economic analysis by jurisdictions worldwide also helps to achieve greater convergence among competition enforcers, which may increase business certainty globally. However, 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. For example, limited enforcement of an economics-based competition objective could lead to acceptance of a leading firm's activities that may otherwise be deemed anti-competitive or abusive. Thus, while divergent results as between jurisdictions are not eliminated merely by the selection of the economics-based competition objective, increased reliance on such an objective as a common antitrust tool helps to limit the scope for significantly divergent outcomes as between authorities.

One potential drawback in relying on economic analysis (such as are undertaken in U.S. "rule of reason" cases) is that it requires appropriate staffing and economic expertise within competition authorities, without which the application of competition rules risks not only inconsistency but also incoherence. The burden of ensuring rigorous economic analysis is demanding for all countries, but is likely to affect developing countries more severely.¹⁰⁴ In addition, 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. This is particularly the case when facts are difficult to identify and the analysis is complicated, such that it can be problematic to achieve consistent and predictable outcomes, especially in an adversarial system.

B. Promotion of Business Rivalry and Entrepreneurial Opportunity

The promotion of business rivalry and entrepreneurial opportunity as such can be contrasted with the promotion of competition in terms of efficiency in important ways. In particular, the latter provides for more precise analytical tools (by focusing on efficiency and welfare effects based on changes in price, output and quality that are measurable at least in principle) than the business rivalry objective, which often includes a multifactor assessment the outcome of which is subject to a wide range of discretion and the effects of which may not be measurable.¹⁰⁵ This suggests that the business rivalry objective may generate relatively less precise and predictable legal rules.

To the extent that this objective is employed in conjunction with an economic analysis in an effort to "promote competition," there is a risk that the business rivalry objective may cause the focus on efficiency and consumer welfare to be distorted or superseded without adequate examination. One example is the tendency of the business rivalry objective to blend into claims for protection of small firms or specific classes

¹⁰⁴ Technical assistance, assessed by Task Force IV, may offer such countries the necessary tools to help to alleviate these burdens.

of firms. This can lead to the preservation of “competitors,” rather than the efficient outcomes associated with the promotion of competition in terms of efficiency.

In addition, to the extent that the business rivalry objective reflects social and political considerations, the weaknesses discussed below concerning the use of political and social considerations also apply.

C. Social and Political Considerations in applying Competition rules

As identified in Section III, above, social and political objectives generally are used to supplement other factors aiming to promote competition, specifically an economic analysis. These objectives can be neutral toward or can conflict with an economic analysis engendered by the promotion of competition in terms of efficiency. This section elaborates on these conflicts and discusses the difficulties that arise where social and political objectives are employed as part of a competition review to supplement the objective of promotion of competition.

1. Increase in Analytical Complexity

The introduction of additional objectives into competition reviews based on economic analysis complicates analysis by requiring consideration of additional issues. Some of these may be more complicated to analyze than the efficiency issues. In many cases, such as the analysis of employment effects, the analytical difficulty appears comparable to the fundamental efficiency issues and, in fact, may involve quite similar approaches. In other cases, such as the acceptance of refusals to license as part of intellectual property rules, they are clearly much easier. But in still others, such as the promotion of national growth, the issues can be much more complicated, since multi-market, dynamic effects must be considered.

Even if the inclusion of additional objectives did not raise new analytical issues that had to be assessed, the consideration of multiple objectives outside of an economic review will be more complicated than an analysis based in a single economic framework, in particular because of the need to weight each of the objectives that are being considered. This is a significant issue because it can be quite difficult to identify the weights that should be assigned to each objective.¹⁰⁶ 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.¹⁰⁷ As a result, the introduction of multiple objectives can seriously complicate multinational efforts to align antitrust reviews.

¹⁰⁵ See §III B, *supra*.

¹⁰⁶ For a discussion of this issue compare Robert Bork and Ward Bowman, *The Crisis in Antitrust*, COLUM. 65 L.REV. 363 (1965), with Blake and Jones, *In Defense of Antitrust*, 65 COLUM. L.REV. 377 (1965). For a more recent exposition, See Kenneth Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?* and Lawrence Sullivan, *Economic and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust? In Antitrust Jurisprudence: A Symposium on the Economic, Political & Social Goals of Antitrust*, 125 U.PENN. L.REV. 1182 (1977).

¹⁰⁷ It has been suggested that, to achieve efficiency in new market economies, it may be necessary to bring left out segments of society into the economic mainstream. Ethan Kapstein and Dimitri Landa, *The Pluses and Minuses of Globalization*, in Plattner and Smolar, eds., *Globalization Power and Democracy*, p. 133 (2000). Also, in emerging market

2. Impact of Social and Political Objectives on Predictability and Legal Certainty

The increased analytical complexity, examined above, generally makes it more difficult to predict the legality of certain actions, thereby reducing legal certainty. When more problems have to be analyzed, especially if some of these problems are particularly difficult, it becomes more complex to determine what the appropriate answer will be to each of the relevant questions. When one also has to determine how the multiple objectives have to be weighed, especially if these weights are somewhat subjective, it becomes even more difficult to predict outcomes.

3. Impact of Social and Political Objectives on Objectivity and Fairness

The mixture of economic analysis under the promotion of competition objective and the non-economic analysis under the social and political objectives also can make it more difficult to assess the objectivity and fairness of the analysis. When the basic facts that are used in the analysis are not available to everyone who is participating in the process or reviewing the outcomes of the process, the increase in complexity can have serious implications for the ability of third parties to participate in and assess the process.

4. Effect on Ability to Achieve the Promotion of Competition Objectives

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. For example, they may believe that the benefits of the trade-off (e.g., more opportunity for historically disadvantaged persons) are worth the costs; but they may not know or try to know the costs of adopting such an approach.

Moreover, as described below, there are numerous circumstances in which social and political objectives can undermine the goal of promoting competition in terms of efficiency.

Price discrimination laws, such as the Robinson-Patman Act, for example, often have their roots in populist concerns. In particular, they have a legislative history that suggests that at least some of the laws' prohibitions were adopted in order to protect "competitors," rather "competition."¹⁰⁸ Because of this different focus, cases brought under these provisions have historically not required courts to engage in the types of detailed economic analyses that are designed to demonstrate the defendant's market power or market-wide anticompetitive effects, which are central to other aspects of antitrust law.¹⁰⁹ There has been some movement in case law that reduces long-standing inconsistencies

economies, efficiency concerns may counsel a focus on open markets for emerging producers, and predation problems can be more serious because of poor capital markets and barriers to reentry. *See*, Fingleton et al., *supra* n. 68, at p. 67.

¹⁰⁸ *See* Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *FORDHAM L. REV.* 1114, 1133-38 (1983). *See also* *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1153-58 (1988) (aspects of the Act's legislative history "set Robinson-Patman apart from antitrust law" such that there is an "inherent tension" between them) (Mikva, J., dissenting).

¹⁰⁹ *See* Hansen, *supra* n. 108, at 1133.

between price discrimination law and productive, allocative, and dynamic efficiency objectives.¹¹⁰ Moreover, the U.S. Supreme Court, for example, has noted on several occasions that “the Robinson Patman Act should be construed consistently with broader policies of the antitrust laws,”¹¹¹ but inconsistencies remain. In particular, the law can have the effect of protecting small, inefficient competitors and deterring competitive price cuts.¹¹²

In addition, 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.

Moreover, market integration, which is an important objective underlying competition policy in the European Union, can lead to antitrust decisions that are not efficiency enhancing. For example, the consideration of market integration in antitrust analysis may discourage territorial restraints. Because tight territorial restraints can sometimes be efficiency enhancing,¹¹³ a competition policy that restricts territorial restraints may reduce market efficiency.¹¹⁴ While there may be particular market circumstances where integration and efficiency conflict, this need not always be the case. Indeed, it is likely to be the case that efforts to integrate markets will facilitate entry into areas that were previously insulated because of regulatory or other structural barriers. When this is the case, the integration goal is likely to be consistent with the fundamental efficiency goals of competition policy.

V. CREATING A BETTER BALANCE

The foregoing discussion provides a basis for the re-assessment of the manner in which differing and sometimes conflicting competition law objectives are balanced/reviewed. The following focuses on the need for economic analysis in antitrust law and suggests that other objectives should be segregated from such a competition review centered on economic analysis.

¹¹⁰ Recent cases suggest that market power analysis may play a more important role in future Robinson-Patman cases. The Supreme Court’s decision in a recent primary-line case, moved the Robinson-Patman Act law closer to Sherman Section 2 case law. *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209, 220-227, 250 (1993).

¹¹¹ *Great Atlantic & Pacific Tea Co.*, 440 U.S. 69, 80 n.13 (1979). *See also*, *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63, 74 (1953).

¹¹² *See e.g.*, Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, *Antitrust L.J.*, 125 (Vol. 68, Issue 1).

¹¹³ Territorial constraints can be efficiency enhancing if they allow firms to limit the effects of free-riding behavior that, in certain market contexts, may prevent the optimal provision of a product and associated services. While intra-brand competition may be reduced, inter-brand competition may be sufficient that consumers, as well as firms, benefit from the elimination of the inefficiencies associated with free riding behavior.

¹¹⁴ Moreover, the prohibition of territorial restraints may even discourage market integration, since this policy may deter firms that have historically served one country (or a portion of one country) from entering into distribution relationships in another area because, in some market environments, the distribution of products across areas may only be economic if there are exclusive territories.

A. Economic Analysis is a Critical and Necessary Element of Antitrust Law Application and Enforcement

As is made clear above, countries are increasingly relying on economic analysis to frame their competition reviews. This is to be applauded. To the extent that a jurisdiction's competition law is based on the objective of the promotion of competition in terms of efficiency, this will help to ensure the benefits of economic analysis, cited above, (notably, 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) particularly in terms of convergence of multi-jurisdictional reviews. According to many commentators, recognizing the essential role of economics as part of a rigorous enforcement of antitrust laws is essential to preserving and extending the benefits of the global economy.¹¹⁵ However, these benefits can only be realized if the jurisdictions espousing this objective ensure proper economic expertise and staffing within their competition authorities.

B. Separation of Other Objectives from the Competition Analysis based on Economics

If economic analysis is accepted as a fundamental center or core of competition law, then the question becomes how to account for the additional objectives often examined within a competition review. As should be clear from the discussion of the weakness of other social and political factors, much of the analytical confusion and unpredictability results from combining these factors with an economic approach. The lack of certainty or predictability resulting from this combination can be moderated to the extent that these social and political objectives are separated from the economic-based competition analysis. This suggests that social and political objectives either 1) should be used only in the formulation of *a priori* rules, e.g., creation of a certain number of local positions that trump competition concerns, such as the media concentration rules of a number of European countries,¹¹⁶ and not be used as operational criteria in deciding cases or 2) they should be used transparently and separately from the promotion of competition and its attendant economic analysis. Segregation of these objectives will also permit nations to gain greater information for themselves and greater transparency

¹¹⁵ See e.g., William J. Kolasky, Former Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice, *Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies – New and Old*, Speech presented on March 18, 2002 available at <http://www.usdoj.gov/atr/public/speeches/10845.htm>.

¹¹⁶ See e.g., Italian Broadcasting Act n. 249 of 1997 and German Interstate Agreement on Broadcasting, 1996, as amended. See also Overview of European Media, European Journalism Centre, available at http://www.orst.edu/Dept/pol_sci/fac/sahr/ps415/euromed.pdf, last updated on July 1, 2002.

for market actors about the decision-making process surrounding social and economic objectives, which should permit them to better assess the costs of adopting such policies.

Separating such social and political objectives from the competition analysis does not mean that the former cease to exist. One need not go outside the United States for examples. The approval of railroad mergers by the Surface Transportation Board over the objections of the Antitrust Division of the Department of Justice is one.¹¹⁷ Department of Transportation approval of airline mergers opposed by the Department of Justice is another.¹¹⁸ While one can argue that policies may ultimately be more pro-competitive where secondary objectives are blended by the competition agency (that, it is presumed, is more sensitive to efficiency considerations),¹¹⁹ the transparency inherent in segregating these concerns would appear equally if not more important for democracies, where citizens' rights to understand public decision making are thought central to the political system. Moreover, combining the analysis of these factors in a single assessment may imply that competition considerations ought to trump competing concerns in the final analysis, which is not always the case.

Even with the potential for conflict between agencies and duplication of review, separation of these social and political objectives from the promotion of competition relying on economic analysis is preferable. This is because the conflict and basis for the any resulting decisions are usually transparent when the secondary objectives are separate from antitrust policy. One may quarrel with a decision by a bank regulator to permit an anticompetitive merger to proceed on the basis of the safety and soundness of the banking system, but the rationale for the decision is at least patent. While other policies, e.g., national security, will sometimes trump antitrust, it is important that those policies too be transparent.

VI. RECOMMENDATIONS

1. Economic analysis is a critical and necessary element of antitrust law application and enforcement and it is essential that antitrust authorities and other bodies responsible for antitrust have adequate expertise and economic staffing resources.
2. The promotion of competition in terms of efficiencies is the antitrust objective best suited to incorporating economic analysis within a competition review and, accordingly, is a fundamental and

¹¹⁷ See these and other examples provided in the International Competition Policy Advisory Committee Report, at Chapt. 3, pp. 149-150 of the hard copy of the Final Report. The Report is also available at <http://www.usdoj.gov/atr/icpac/finalreport.htm>

¹¹⁸ See *id.*

¹¹⁹ See e.g., “Merger Review: an overview of the analytical framework utilized in South Africa,” <http://www.internationalcompetitionnetwork.org/AFSGsouthafrica.pdf> at pp. 7-9, as an example of this approach.

necessary competition law objective. Because the promotion of competition in terms of business rivalry objective lacks the precise analytical tools generated by the efficiencies/welfare model and because the business rivalry objective can reflect social and political considerations that are not necessarily consistent or coherent with the efficiencies model or objective, the business rivalry objective should be used with caution.

3. Social and political objectives (such as fairness, diffusion of power, protection of small business, pluralism, creation of national champions, environmental protection, employment effects, industrial policy, promotion of exports and social cohesion and others) either 1) should be used primarily in the formulation of separate legislative or *a priori* legal rules,¹²⁰ and generally should not be used as operating criteria in adjudicating or assessing individual antitrust cases; or 2) to the extent that social and political objectives are used as operating criteria in individual cases, they should be clearly articulated and analyzed separately from the promotion of competition analysis.

¹²⁰ In discussing antitrust policy objectives, an important distinction between ultimate goals and operational enforcement criteria should be kept in mind. Frequently, there is a considerable gap between the rhetoric of antitrust law objectives and the reality of their implementation. Much of the reason is a failure to distinguish between fundamental, ultimate objectives of competition law and operational enforcement criteria. The Recommendation on social and political objectives follows this distinction in the sense that these objectives should be used only as ultimate goals relevant to the formulation of *a priori* rules and should not be used as operational criteria in individual cases.