

Should economic efficiency be the primary consideration for competition law?



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Q. 3 should economic efficiency be the primary consideration and priority for the enforcement of competition law? It is widely accepted that economic efficiency is the primary consideration and legitimate doctrine when contemplating the goal of competition law. This is agreed upon by both legal and economist scholars. [1] Economic efficiency brings about monumental benefits; it stimulates the economy, reduces the prices of products, and improves development innovation and creativity, creating new sources of capital.[2] Schweitzer has argued that competition law can never stand alone with just economic efficiency in a democratic society.

The inclusion of public policy choices is inevitable.[3] This implements an idea that competition law is a myriad of broader national and public policies, strategies, priorities and interests. This suggests that it may not be such a good idea to place economic efficiency as the prime consideration of competition law. Merger regulations provide a good example to foster the idea that the governments' goal for competition law goes beyond the maintenance of market competitiveness and towards a more social one.[4] Governments may find themselves inclined to prefer non-efficiency motivators due to pressure by interest groups accounting for their social needs.[5] Since there is influence from these non-economic objectives then it would seem that suggesting a framework to accommodate for these objectives would be necessary. However, although this would seem to show that non-efficiency objectives are indeed integrated into the internal part of competition law, this doesn't mean that such objectives are followed by the judiciary or the competition law enforcement bodies.[6] This idea brings to life the understanding that although non-efficiency objectives are mentioned

and voiced, it may only be done to please the many voices for it, as at the end of the day the enforcers have the discretion to pursue the objective which they see more suitable. More often than most being an economic one. In order to be able to appreciate the objectives of competition law, it is important to look at the specific legal system in question, as different systems have different priorities.[7] In less developed countries the focus of competition law policy falls on mostly social objectives. They usually have a liking in the protection of small businesses and decentralization of political & economic power. [8] This would mean then that the idea of economic efficiency being the prime focus of competition law is frustrated. With that being said the question over the objective of competition law policy would be whether to achieve moral goals or to insure that the promotion of competition and economic efficiency is maximised.[9] Government intervention also has an important role to play in indentifying the priority of competition law policy in a country. Conservative and libertarian views are in favour of minimal government intervention and thus would opt for the objective of competition law to be based on economic efficiency.[10] Contrary to that, the more liberal views are more prone to support non-efficiency objectives such as the welfare of small businesses and the dispersion of power, in consequence, they are suspicious of corporate power. [11] When focusing on the economic efficiency, there is a usual disregard for the distribution or equity implications involved.[12] This is why we have the liberals who endeavour to protect those rights. There appears to have been a shift and focus on the objectives taken by different jurisdiction. This change has been towards a more economic efficiency base.[13] This was demonstrated by the UN conference of Trade and Development (UNCTAD), <https://assignbuster.com/should-economic-efficiency-be-the-primary-consideration-for-competition-law/>

which indicated, ' the trend is towards relatively greater emphasis upon competition, efficiency and competitiveness objectives.'[14] It has been stated that the allure of economic efficiency may have taken a global turn by different jurisdictions following under the same steps but this does not mean that other non-economic objectives don't need to be considered.[15] Michael Porter argues that construing an entire body of law solely on consumer welfare theory could result in the overlooking important benefits for society. Competition law would not perform at its best and to its full promise if it did not account for society's benefit.[16] Porter is not the only believer that a solely economic efficient objective would not be appropriate for competition law policy. Professor Robert Pitofsky, supports this stance and adds that an entirely economic approach would lead to market domination by few corporate giants.[17] As a solution, Maurice Stucke suggests that different objectives of competition law should be accepted ' because these multiple goals reflect the various stakeholders'[18] interests and concerns, which they want addressed.[19] It must be noted that judicial and legislative approaches towards non-efficiency goals are troubling. We have mentioned that economic efficiency is the preferred objective. However, it must also be determined that if the judicial and legislative bodies were against non-economic efficiency all together, they would enact or amend so as to provide primacy to economic analysis. This demonstrates that non-economic considerations should play a role within competition law.[20] On top of that, it is maintained by John Flynn that ' although economic analysis provides valuable insights into business dynamics and the probable effects of a commercial practice in the market place, economics is not law.'[21] The competition policies are passed by politician and not by economists. In order

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to fulfil the aspiration of the people competition law ought to take into account all the peoples aspirations.[22] Professor Harry First also states that in pursuing consumer welfare we inevitably satisfy the desire of citizens as a consumer only and that we ignore the inclination registered politically which consequently does not show up in the analysis of market place efficiency. [23] In focusing on economic efficiency or the ‘ market efficiency’ there is the issue that there is a failure to express people’s preference beyond their dollars.[24] So a preference for more expansive opportunities for a small business or preventing concentrations of economic power in private hands cannot be prevented.[25] It does not make sense to ignore these preferences as the politics would point out that the public places value on these objectives.[26] The disregard of the peoples voice means that democracy is being forgone and in the process people may lose faith in competition law policies.[27] So many people are affected by competition law policies, therefore it would make sense that the consideration of both economic and non-economic objectives are accounted for in order to promote fairness. Stucke comments that ‘ competition policy in democracy will never be captured by a single economic goal.’[28] The best way to overcome this once again to accommodate the self-interest of the people and lodge their hopes and fears I regards to competition.[29] By looking at what different jurisdiction have adapted we can have an idea of what has been working best. And by understanding what works best then we can determine whether we should focus on economic efficiencies. We can do this by using the merger control analysis.[30] The US courts have proven to focus their objectives on economic efficiency in their merger policies. The merger guidelines of 1992, demonstrate this as it has lowered the standard of proof <https://assignbuster.com/should-economic-efficiency-be-the-primary-consideration-for-competition-law/>

for efficiency arguments.[31] Canada also provides an efficiency defence in their competition Act under Section 96. In the Act they set out a test to check the effects of the merger and balance it against the efficiency gains. [32] The producer and consumer's losses and gains are reviewed.[33] The Canadians approach factor non-economic considerations and consider the protection of small and medium enterprises, and the balancing of such mergers against efficiency gains of the merger.[34] In the UK, the objective is on the ' increase rivalry in the market into account in assessing whether a merger gives rise to any risk of a substantial lessening of competition.'[35] The Office of fair trading which deals with the matter is allowed to use its discretion into these cases. The US holds the leading role of promoting the economic-efficiency objective whereas the European countries demonstrate a state of the mergers of both economic and non-economic efficiency objectives.[36] There has been a rise in the Chicago school of thought, which are fervent believer on the ' economic approach.' The Canadian competition law is like Europe in that it has managed to find a relative balance between the two objectives within a statutory framework. However, there is a penchant towards the economic efficient objective in practice.[37] The UK has shown to have preferred the economic efficient approach and has in consequence slowly give less weight to the importance attributed by statute to public interests concerns.[38] The task for a jurisdiction to accommodate non-economic efficiency is extremely difficult. Countries such as Israel are still in quest of a method to implement non-efficiency concerns in the Israeli competition law.[39] It has been found by Areeda and Hovenkamp that two approaches should be followed if economic-efficiency objectives should be applied. a) absence of collision with ambiguous statutory language.[40] b) <https://assignbuster.com/should-economic-efficiency-be-the-primary-consideration-for-competition-law/>

institutional capability of 'managing the information and decision-making process necessary' to implement such approach.[41] It has been pointed out however, that if too much attention is given to non-economic efficiency objectives when decisions are made then in the long run the economy will become less efficient, which will eventually affect the consumers negatively. [42] There seems to be a great need to combine both economic and non-economic efficient objective together. Blake and Jones have cited that the same rule of law may promote both objectives.[43] It is believed that non-efficiency objectives may be reached by ensuring market efficiency. In fact, what is believed is that economic efficiency is the 'direct goal' of competition, while the socio-political and other non-economic concerns are considered 'ultimate goals'. [44] The concern which many have with the Chicago school of thought is that the economic approach they eagerly defend brings about short term benefits. The merger guidelines that defend such thought [45] fails to take into account the social and political impact of mergers, which in the long run may lead to loss or transfer of jobs or an increasing political influence. [46]

[1] Organisation for economic co-operation & development COECD, competition policy & efficiency claims in horizontal agreements (Paris,) 1996), p. 5. [2] O. Green. (2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P2 [3] H. Schweitzer. "Competition law and public policy - reconsidering an uneasy relationship: the example of Art. 81" (2007), p. 13. Available at SSRN : <https://ssrn.com/abstract=1092883>. [4] A. Ezrachi, "The role of voluntary frameworks in multinational cooperation over merger control", 36 Geo.

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Wash. Int. L. Rev. 433, 438, n. 16 (2004). [5] O. Green.(2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. 3. [6] K. G Elzinga, “ The goals of antitrust: other than competition and efficiencies, what else counts?”, 125 U. Pa. L. Rev. 1182, 1203 (1977). [7] 6 ICN, Advocacy Working Group, Advocacy and Competition Policy (2002), p. 32; available at: https://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/advocacyfinal.pdf. [8] M. Trebilcock et al., The Law and Economics of Canadian Competition Policy (Toronto, ON: University of Toronto Press, 2nd ed., 2003), p. 39. [9] P. Slot & A. Johnson, An Introduction to Competition Law (Oxford, UK: Hart Publishing, 2006), p. 4. 35 Gal, “ Reality bites (or bits): the political economy of antitrust enforcement”, in: Hawk, ed., International Antitrust Law and Policy (Huntington, NY: Juris Publishing, 2001), p. 605, Part IV; available at SSRN: <https://ssrn.com/abstract=901756>. [10] Fox, “ The modernization of antitrust: a new equilibrium”, 66 Cornell L. R.. 1140, 1155 (1981). P. 1156 [11] E. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications (Newark, NJ: Bender & Co.: 4th ed., 2003), p. 2-3. [12] O. Green. (2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. 19. [13] C. Ehlermann & L. Laudati, eds., European Competition Law Annual: The Objectives of Competition Law (Oxford, UK: Hart Publishing, 1998), p. ix [14] UNCTAD, The Basic Objectives and Main Provisions of Competition Laws and Policies (1995), p. 2; available at: https://www.unctad.org/en/docs/poitd_15_en.pdf. [15] O. Green.(2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. 21. [16] 6 M. E. Porter, Competition and <https://assignbuster.com/should-economic-efficiency-be-the-primary-consideration-for-competition-law/>

Antitrust: A Productivity-Based Approach (2002), p. 2; available at: <https://www.isc.hbs.edu/053002antitrust.pdf>. [17] R. Pitofsky, “The political content of antitrust”, 127 U. Pa. L. R 1051, 1056ff (1979) [18] M. Stucke, Better Competition Advocacy (2007), p. 51; available at: https://works.bepress.com/maurice_stucke/1. [19] O. Green.(2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. 22. [20] Id., p. 23. [21] I Khemani, “Objectives of Competition Law”, in: World Bank-OECD, A Framework for the Design and Implementation of Competition Law and Policy (Paris, 1997), p. 5; available at: <https://www.oecd.org/dataoecd/10/9/27122227.pdf>. [22] J. Flynn, “Antitrust jurisprudence: a symposium on the economic, political and social goals of antitrust policy”, 125 U. Pa. L. R. 1182, 1186 (1977). p. 1186. [23] H. First, Book review of Posner, Antitrust Law: An Economic Perspective, 52 NYU L. Rev. 947, 947 (1977). p. 966. [24] O. Green.(2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. 25. [25] H. Hovenkamp, “Antitrust policy after Chicago”, 84 Mich. L. Rev. 213, 242 (1985). p. 241. [26] Ibid., p242. [27] J. Burns, “Vertical restraints, efficiency and the real world”, 62 Fordham L. Rev. 597, 628 (1993) [28] M. Stucke, Better Competition Advocacy (2007), p. 26. [29] D. Dewey, “Antitrust and economic theory: an uneasy friendship”, 87 Yale L. J. 1516, 1525 (1978) [30] Competition Bureau (Canada), Treatment of Efficiencies in the Competition Act: Consultation Paper (2004), Appendix C. [31] W. Kolasky & A. Dick, “The Merger Guidelines and the integration of efficiencies into antitrust review of horizontal mergers”, 71 Antitrust L. J. 207, 208 (2003), p. 209. [32] O. Green.(2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. <https://assignbuster.com/should-economic-efficiency-be-the-primary-consideration-for-competition-law/>

29. [33] J. Holsten, “ The Commissioner of Competition v. Superior Propane — the Tribunal strikes back”, 2002 Canadian Competition Record 26, 31 (2002). [34] 1 Economic Council of Canada, Interim Report on Competition Policy (Ottawa: Queen’s Printer, 1969), p. 22. See Competition Bureau (Canada), Merger Enforcement Guidelines (2004), 8. 19 [35] Office of Fair Trading, Mergers – substantive assessment guidance (OFT 561, 2003), par. 4. 30 [36] O. Green.(2008). Integration of non-efficiency objectives in competition Law. LL. M. Thesis. Faculty of Toronto: Canada. P. 43. [37] Ibid., p. 43. [38] Ibid., p. 43. [39] Ibid., p. 43. [40] P. Areeda & H. Hovenkamp, Antitrust Law (New York, NY: Aspen Law and Business, 2002), vol. I (rev. ed.), p. 127. [41] Id., p. 119. [42] B. Foer, “ The goals of antitrust: thoughts on consumer welfare in the U. S.” (American Antitrust Institute, Working Paper 05-09), p. 24 [43] H. Blake & W. Jones, “ Toward a three-dimensional antitrust policy”, 65 Colum. L. Rev. 422, 424 (1965). [44] C. Ehlermann & L. Laudati, eds., European Competition Law Annual: The Objectives of Competition Law (Oxford, UK: Hart Publishing, 1998), p. 30. [45] U. S. Department of Justice, Merger Guidelines (1984), reprinted in 4 Trade Reg. Rep. (CCH) ¶13, 103 [46] Sullivan, “ Post-Chicago economics: economists, lawyers, judges, and enforcement officials in a less determinate theoretical world”, 63 Antitrust L. J. 669 (1995)