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## OECD Global Forum on Competition

# THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY

**-- UNITED STATES --**

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**UNITED STATES**

Market competition enhances consumer welfare and promotes an efficient allocation of society's resources because those firms that best meet the needs of consumers with the lowest prices or best service will prosper. It is therefore a basic principle of U.S. antitrust law that antitrust laws should protect competition, not competitors. The mere fact that a particular competitor is injured by a practice does not mean that the practice is or should be prohibited. In fact, it is inherent in the process of competition that some firms prosper and others do not. It is the process of competition that U.S. law protects.

There is also general agreement that our antitrust laws should be construed to permit, and not to hamper, business arrangements that promote efficiency, and thereby enhance competition. Efficiency encompasses two elements. The first, termed "productive efficiency," involves minimising the cost of production and can be most simply understood as a ratio of a firm'

> mythical past when social, governmental and economic organisation was simpler, more comprehensible.[5]

For many years, the premise that antitrust protects the process of competition, but not competitors, coexisted uncomfortably alongside a significant tendency toward using the antitrust laws to protect small businesses, regardless of the consequences for the efficient functioning of competitive markets. In the famous *Brown Shoe* decision, for example, the Supreme Court observed that the Clayton Act, our chief merger statute, was concerned not only with addressing increased economic concentration of the sort that threatens to create market power,[6] but also with the promotion of competition through the "protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralisation."[7]

This inconsistency of view was not necessarily thought to be a bad thing; Congress and the courts sometimes endeavoured to give simultaneous effect to a wide range of antitrust goals. As Judge Bork has observed:

> In looking to the legislative history [of the antitrust laws], one discerns repeated concern for the welfare of consumers and also for the welfare of small business and for various other values — a potpourri of other values. ... Congress, in enacting these statues, never faced the problem of what to do when values come into conflict in specific cases. Legislators appear to have assumed, as it is most comfortable to assume, that all good things are always compatible. They did, however, make certain choices that suggest that in cases of conflict consumer welfare is to be preferred to small producer welfare, as well as to all other values.[8]

Professors Areeda and Hovenkamp analysed the validity of alleged antitrust objectives other than economic efficiency, such as "fairness," "dispersion of economic power," and "distribution of opportunities," and concluded that "neither the antitrust statutes nor the antitrust tribunal is in any sense a substitute for the legislative body addressing questions of maldistribution of wealth, or of economic dislocation caused by new innovation or consolidation. As a matter of *general* legislative policy, competition is hardly foundational, and government may often wish to intervene to mitigate its harsher effects. But antitrust's purpose is to see to it that competition is promoted whatever its collateral consequences, not to make legislative judgments about when relief from the excesses of competition is appropriate."[9] In addition, attempts to identify the specific "small businesses"