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Consumer Choice as the Best Way to Describe the Goals of Competition Law

Robert H. Lande
University of Baltimore School of Law, rlande@ubalt.edu

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Suppose that the 20 leading media companies in your country - including television networks, radio networks, and newspaper chains - all wanted to merge the entirety of their news operations. This surely would lead to tremendous savings in the costs of reporting the news. Tremendous efficiencies. But, would it lead to any price increases? Perhaps not. After all, these news operations are all competing for advertising dollars and personnel with many other television and radio shows and also with a vast number of Internet operations. Price effects would be very difficult to show.

However, you might be more creative than I am and able to ascertain some price effects that would be relatively certain to be caused by this merger. So let's also assume that these 20 media companies all agreed with the Competition Law enforcement authorities that if they were allowed to merge, they would not raise the price of anything.[1] Not of advertising rates, not of newspapers. Of nothing.

In sum, this merger would generate tremendous efficiencies, but would not lead to any price increases. Would you would permit this merger? Under a price or efficiency approach to competition law you should permit it.

But if you would not permit this merger, then welcome to the Consumer Choice approach to Competition Law! I'm wording this issue in this manner because I believe that the most serious harms from this news gathering merger can best be expressed in terms of a loss of the consumer choice that the free market otherwise would bring. Choice in terms of perspectives, editorial independence, and the quality and varieties of approaches to news coverage. A choice approach to Competition Law would reflect these concerns much better than Competition Law centered around price or efficiency.

Now I'd like to place the choice issues into a larger context.

I. The Approach In the United States To The Goals of Antitrust Law

Most of us from United States take great pride in our Antitrust Laws. Most of us believe they are the best and most sophisticated system of competition laws in the world. Despite our boasts, however, if we were being candid we would admit the U.S. Antitrust laws have a glaring weakness. A major, inexcusable weakness. They don't state their overall goal or goals. Moreover, our courts' interpretations of their purposes has changed over time and has never been

[1] Also assume that all 20 companies also agreed not to lower the wages they paid their employees. For this reason the merger would not lead to monopsony concerns.

truly clarified.[2] After more than a century, its distressing we can't decide on their overall concern.

Today there is an almost universal understanding in the United States that social/political concerns no longer matter, and that harm to competitors no longer matters. Today only economics counts in Antitrust decisionmaking.[3]

There currently is, however, tremendous uncertainty as to what should be included within the scope of the economics that Antitrust Law should be concerned with. There is especially great controversy as to whether U.S. Antitrust economics should include more than just "economic efficiency". Of course we all want a more efficient economy. But the Chicago School firmly believes that competition policy is nothing more than a quest for maximum economic efficiency.4

Another possible meaning for the economic approach to Antitrust Law goes by the name of the "wealth transfer," "purchaser protection," "price to consumers," or "distributive" approach. As you know, when cartels raise prices, they not only cause allocative inefficiency. They also transfer wealth from consumers to firms with market power.[5] (This approach also could be called the theft explanation for competition law. The belief that these laws are at their core about firms using market power to raise prices and thereby in effect steal from consumers.). A recent article shows that U.S. Supreme Court and lower court decisions are better explained by a concern with wealth transfers than they are by just a concern for efficiency.6 Efficiency is important, but so is the wealth acquired from purchasers by supracompetitive prices.[7]

So, United States Antitrust is concerned with efficiency, and also with protecting consumers from paying higher prices. But, what about non-price issues such as quality, variety, service, and privacy? As the U.S. Supreme court recently said in its Leegin decision, it is

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[2] For the history of the topic of the goals of the U.S. Antitrust laws see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67-71 (1982), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065413; and John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211-24 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113927.

[3] *See* Kirkwood & Lande, *supra* note 2, at 192-197.

[4] *See generally* Lande, *supra* note 2 and Kirkwood & Lande, *supra* note 2.

[5] *See* Lande, *supra* note 2, at 71-74.

[6] *See* Kirkwood & Lande, *supra* note 2, at 192-197.

[7] The U.S. Antitrust laws also have a concern with monopsony power leading to prices that are below the competitive level. *See* Kirkwood & Lande, *supra* note 2, at 233-36.

desirable when competition gives "consumers more options so that they can choose among low-price, low service brands; high-price, high service brands; and brands that fall in between."[8]

I wish I could provide a clear, unambiguous, explicit statement from the U.S. Supreme Court saying: "The best way to articulate the goals of the Antitrust Laws is that their purpose is to enhance consumer choice." Sadly, there is no clear statement that is on point. But there are a large number and variety of cases that cannot be explained just by a quest for efficiency or low prices. The best way to analyze and explain these cases is in terms of Consumer Choice.[9]

With this as background the remainder of this article will: First, define the Consumer Choice approach to Competition Law - what it means, including how it differs from the efficiency or price approaches, and how it often is embodied in current U.S. decisions. Second, the article will discuss specific types of situations where a Consumer Choice focus makes or would make a difference. In every case it would produce better results than the efficiency or price approaches.

II. What is the "Consumer Choice" approach to Competition Law?

If you examine every type of Competition Law violation, from price fixing to predation, and ask what they have in common, the answer is they all significantly restrict consumer choice. They all significantly and artificially distort or diminish the choices that otherwise would be offered by the free market. Three brief examples are: 1. Cartels certainly do this, by replacing the price and non-price options that should result from competition, by price and non-price terms set by collusion. 2. Mergers that lead to market power, and also 3. Monopolization by predation, both also leads to fewer price and non-price choices than the free market would offer. In fact, every Antitrust Law or Competition Law violation distorts consumer choices.[10]

You might now wonder how a Consumer Choice approach differs from either a price approach or an efficiency approach? It includes both. It includes price considerations because price is almost always an important choice variable for consumers. It also includes efficiency because efficiencies can affect choices, especially in the long run.

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[8] *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 127 S. Ct. 2705, 2715 (2007).

[9] In addition to the examples in this article that document the use of the Consumer Choice approach to Antitrust Law, see Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice Approach To Antitrust Law*, 74 ANTITRUST L.J. 175, 196-237 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459; and Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713-22 (1997), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134798.

[10] *See* Averitt & Lande, supra note 9, at 718-20.

But, crucially, the choice approach also includes a heightened concern with every significant non-price dimension of competition that consumers care about. In theory these factors are supposed to be considered under every approach. But as a practical matter, under a price or efficiency approach, factors such as service, innovation, quality, privacy and variety are as a practical matter sometimes relegated to the footnotes of the analysis, where they are too often forgotten. The Consumer Choice approach, by contrast, in effect moves non-price issues up into the text where they play a much more prominent role in the analysis and result. Near the end of this article the evolution of the United States' Merger Guidelines will illustrate the differing emphases that have been given to choice issues over time.

There are other crucial elements of a Consumer Choice approach that should be stressed. First, not every decrease in consumer choice counts as an injury to competition. Only significant decreases count. Not a reduction from 10 choices down to 9! Second, more choice is not necessarily good, because too much choice can cause confusion and can as a practical matter mean that costs increase unduly.[11] For his reason the goal of competition policy should not be to maximize consumer choice. Rather, it should be to eliminate practices that artificially restrict the choices that the free market would have provided. Third, as noted earlier, every competition law violation reduces consumer choice, but the converse is not true. It is not true that every reduction in consumer choice is a competition law violation. Some reductions in consumer choice - such as when a monopolist reduces its variety of offerings - don't violate any law. Other reductions in choice are Consumer Protection violations.[12]

III When Would the Consumer Choice Approach Make a Difference?

At this point you might well be thinking: of course Competition Law should be concerned about more than just price. Of course non-price issues should count, and should count heavily. But --- if a market is competitive in terms of price, won't it also be competitive in terms of non-price issues? For example, if a market has 4 firms, and if 4 firms are enough to have optimal price competition, won't these same 4 firms also insure optimal non-price competition? If so, is there a reason not to just using a price standard? Won't a price focus automatically give us optimal non-price competition as well?

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[11] *See* Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice Approach To Antitrust Law*, 74 ANTITRUST L.J. 175, 184 n. 23, 191-95 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

[12] *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 720-22 (1997), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134798.

Normally, it would indeed. Normally there is no difference between a choice approach and a price approach, and therefore little benefit to using a choice standard.[13]

But at other times the choice approach would make a significant difference in both the analysis and the result. The rest of this article will analyze specific cases and categories of cases where a choice analysis would make a significant difference. As you will see, each time the choice analysis and result would be superior.[14]

A. Cases in Markets With Little or No Price Competition

The first category of cases involves conduct in markets with little or no price competition. This could occur as a result of regulation, of industrywide joint ventures, or third party payers. In these situations there is no way properly to assess consumer welfare without focusing explicitly on non-price issues.

A United States example involves airlines back when their prices were regulated. During this period airlines still competed in terms of service.[15] Suppose that every U.S. airline had wanted to merge during this period. Why not allow these mergers? Prices were regulated and could not increase. Moreover, there might have been efficiencies from the mergers. The reason the airlines were not allowed to merge is that we wanted these airlines to engage in non-price competition. Specifically, in service competition.

In fact, similar mergers were allowed on these grounds involving a small market where I live - the market for taxicabs in Montgomery County, Maryland, an area very close to Washington, D.C. The local regulators allowed every major taxicab company to merge because their prices were regulated.[16] How could there possibly have been any harm from these mergers? As you could predict, the quality of taxicab service went down significantly as a result of the mergers to a near monopoly. Consumers suffered a harm that could not be picked up by a price or cost savings analysis.

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[13] Even for these situations, however, the Consumer Choice terminology is a better way of explaining the benefits of Competition Law to a lay audience or to judges than a price or efficiency approach.

[14] *See* Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice Approach To Antitrust Law*, 74 ANTITRUST L.J. 175, 196-237 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

[15] *Id*. at 196-97.

[16] *Id*. at 233-35.

Another important example is the FTC's recent Realcomp II case.[17] This involved a conspiracy among established full service, high priced real estate brokers to eliminate real estate brokers that provided only some specific brokerage services, but did so for a much lower price. The Federal Trade Commission and the reviewing Court held that consumers were entitled to have the low cost, low service option. It was not acceptable for the real estate broker cartel to only provide the full service, high cost option. Even though there was no evidence that the price of any real estate service increased, the court held that the conspiracy to eliminate choices from the marketplace violated the FTC Act.[18]

B. Conduct That Impairs Consumers' Decisionmaking Ability

A second category of cases when a consumer choice approach is superior involves conduct that increases consumers' search costs or otherwise impairs their decisionmaking ability. This conduct causes consumers to obtain products or services less suited to their needs, in addition to producing higher prices. There are a large number of U.S. case examples involving restrictions on advertising by lawyers, dentists, opticians, engineers, etc. You surely know of similar advertising restriction cases from your country.

In each of these cases the prices of the services in question - legal, dental, optician, etc. - increased as a result of the advertising restrictions. This was, of course, the purpose of the restraints. In addition, the prohibitions against advertising also made it hard for consumers to choose the service that best suited their needs. Consumers' also were harmed by their inability to select the engineer, lawyer, or optician that was optimal for them.

Efficiencies were claimed for all the practices. Naturally! Depending upon the case, the efficiencies were more believable, or less believable.

Most of these advertising restrictions were evaluated under the rule of reason. This means that the negative effects of the restrictions - both the higher prices and the diminished consumer choice - should be balanced against the practices' efficiencies. The balance easily could come out differently if only the price effects were included on the negative side of the tradeoff. However, a tradeoff that also included the negative effects on Consumer Choice (resulting from consumers' inability to find the best lawyer, engineer, etc. for their purposes) would more accurately reflect the effects of the restrictions on consumer welfare.

Another notable consumer search cost case, Detroit Auto Dealers Association, involved a conspiracy by every automobile dealer in a large metropolitan area to essentially stay open for

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[17] Realcomp II, Ltd., No. 9320, 2009 FTC LEXIS 250 (F.T.C. Oct. 30, 2009), *petition for review denied*, 635 F. 3d 815 (6th Cir.), *cert denied*, 132 S. Ct. 400 (2011).

[18] *Id*.

business only from 9 to 5 on weekdays.[19] This led to higher prices for automobiles. The decreased shopping time also caused consumers to purchase cars less suitable for their needs.

In the Detroit Auto Dealers' case - or in any of the vast majority of consumers' search cost cases that are decided under the rule of reason - the non-price harms to consumers should also be included, in addition to the price harms. Their combination should be weighed against any efficiencies from the practices. In practice, adding the non-price harms often could make a crucial difference in the outcome

C. Markets Where Firms Primarily Compete Through Choice Competition

The final category of cases involves markets in which firms compete primarily through independent product development, quality, variety, and creativity, rather than through price. Effective competition in these industries may sometimes require more independent centers of decisionmaking than are required to ensure price competition. Market concentration principles taken from a price context may not ensure robust competition in the ways that are most important to consumers. In these cases we care about artificially diminished consumer choice - even if prices are competitive. For this reason, in these markets a price standard is simply inadequate.

The media surely is an area where we care a lot about independent judgment, independent decisionmaking, and creativity. This is why my opening hypothetical was from the media sector.

Let me analyze media examples further by contrasting them to a more conventional example of a merger of cookie producing firms. Suppose there were only four firms that made cookies, that two of them wanted to merge, and that three firms would be enough to yield effective price competition. If consumers want 20 or 200 different types of cookies, the remaining three firms would supply them. For a hypothetical 4 to 3 cookie producer merger there would be no advantage to using a choice standard over a price standard or an efficiency standard. The reason is that the owners of the cookie companies don't care which cookies their customers eat, so they will produce whatever kinds of cookie consumers desire.

But this might not always apply in the media sector. The owners of the media might have distinct preferences concerning the editorial slant of the news. Within limits they may be able to slant their content or coverage. Moreover, the media owners might have unconscious biases and presuppositions, so even if they have the best intention they might not be able to supply the full range of views. While companies easily can make all different types of cookies, it is much more difficult to hold all sorts of different worldviews.

Another sector where we have special choice concerns involves high technology, where innovation is especially crucial. It is virtually meaningless to try to use a price standard to evaluate the effects of a merger or joint venture on future technology, since by definition that

[19] There were, however, exceptions to this prohibition. For an analysis of this case see *id.*at 200-01.

future technology does not yet exist. For cases in the defense, pharmaceutical, computer, or other high-tech sectors, to ensure the optimal level of future consumer choice we want divergent sources of current innovation. In other words, in some markets competition in terms of consumer choice (in terms of innovation, ideas, quality, privacy and/or variety) can be even more important than competition in terms of price or cost savings.

There certainly have been high tech cases where this concern with choices seems to have affected the analysis and the ultimate decision. For example, there have been mergers in the pharmaceutical industry where the U.S. Federal Trade Commission seemed to require one more firm to innovate than normally would have been required simply for price competition.[20] There have also been defense sector mergers where the U. S. Justice Department appears to have required, for the sake of optimal innovation, one more firm than it normally would require. [21]

IV. Implementation Issues

Competition Law cannot consider adopting a goal unless it can be implemented in a relatively objective, predictable manner. How does the Choice approach compare to the other possible goals by this criteria? What are the guiding principles for determining how much weight to give to significant decreases in Consumer Choice? How can we conduct the analysis relatively objectively?

Mergers might be the easiest place to discuss implementation issues.[22] As a practical matter, how would we implement these Consumer Choice concerns, especially in a sector like the media, high technology, entertainment, or fashion, where choice concerns might be especially important? In three possible ways:

1. As a tie-breaker or plus factor. If we were deciding the legality of a media merger, for example, and if we were just on the margin if we only considered price effects, choice considerations should cause us to challenge the merger.

2. As an implicit factor that would operate within the current structure of the Merger Guidelines and would, as an informal matter, give discretionary weight to non-price Choice

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[20] *See In re* Glaxo Wellcome plc, & SmithKline Beecham plc, Docket No. C-3990(F.T.C. Jan. 30, 2001), *available at* http://www.ftc.gov/os/caselist/c3990.shtm. This case appears to be such an example.

[21] See, for example the complaint filed in *United States v. Lockheed Martin Corp. & Northrop Grumman Corp.* (D.D.C. filed Mar. 23, 1998), *available at* http://www.justice.gov/atr/cases/f212600/212680.htm. This case appears to be such an example.

[22] For a fuller discussion of these issues see Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice Approach To Antitrust Law*, 74 ANTITRUST L.J. 175, 243-48 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

considerations in the enforcers' analysis. Suppose that for industries where price competition was most important, the enforcers would challenge 20% of above-Guideline mergers. But perhaps for those industries where Consumer Choice issues were especially crucial - for mergers involving sectors such as the media, entertainment, or fashion - the enforcers would block 40% of above-Guideline mergers. To implement Choice concerns this way, as an informal matter of the enforcers' discretion, the HHI levels in the Guidelines would not be changed. But the Guidelines would be enforced more vigorously whenever choice competition was especially important.

3. Change the Merger Guidelines and make Choice analysis a separate explicit factor in the merger review process. Under this approach, a merger should be challenged either if:

-- it was likely to lead to higher prices;

or if

-- it was likely to lead to significantly less Consumer Choice because the merger was likely to lead to less innovation (the most important factor that determines consumer choice in the long run).

The merger investigation would make a separate, high priority, inquiry into both the price and the innovation effects of the merger. This inquiry could lead to a different result from a price-based inquiry, especially because not every company within an industry competes substantially through innovation. Some firms instead largely compete by making existing products less expensively, by superior marketing, by superior service, etc. This would be somewhat different from attempting to predict whether a particular merger would lead to more or to less innovation. Rather, it would mean attempting to ascertain whether particular firms historically had been centers of independent innovation.

Here is how this inquiry could work. Suppose that a high tech industry consists of 5 firms, firms A, B, C, D, and E. Suppose we also believe that 3 firms is enough to have effective price competition, and also that 3 firms is enough for effective innovation competition. But suppose that only firms A, B and C compete significantly by innovating, that only these 3 firms have large R & D budgets, that only these 3 have a history of making significant innovations. Suppose that Firm D competes in other ways - perhaps it is an imitator that makes existing products less expensively, and suppose that firm E historically only competes through superior marketing.

Suppose that firms A and B (two of the firms that compete by innovating) want to merge. Under price analysis we should permit this merger. This is because after the merger there would still be 4 firms left, and we have stipulated that 3 is enough for effective price competition. But under choice analysis we should block this merger because it is likely to lead to less innovation, the long term source of optimal Consumer Choice.

Accordingly, regardless of the number of firms we believe is necessary for effective price competition, and even if we believe that the same number of firms will suffice for choice competition in every industry, choice analysis sometimes could lead to tougher merger enforcement.[23]

V. An Example of the Increasing Use of Choice Analysis: the Evolution of the United States Merger Guidelines

A striking and encouraging example of the increasing role of Consumer Choice analysis in United States Antitrust Law can be found by observing the increased importance of this subject in the United States Merger Guidelines. The 1992 edition barely mentions non-price competition. An introductory section titled "Purpose and Underlying Policy Assumptions of the Guidelines,"[24] contains a dozen references in the text to "price," the "transfer of wealth from buyers to sellers," and similar monetary concepts.[25] Only a single footnote suggests that merger policy includes non-price concerns.[26]

The 1992 United States Merger Guidelines thus technically permit consideration of non-price elements of competition, but the document is structured in such a way as not to particularly encourage this analysis. It is possible that non-price competition might have been intended to be captured in the Guidelines' use of the term "price" which could have been meant to be used in the

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[23] This is analogous to unilateral effects analysis, which in effect says that we should be especially tough on a merger between two firms that make products within the same niche of a relevant market, and more lenient towards mergers between producers of products that are not similar to each other. Choice analysis arguably could be said to create a “submarket” consisting of innovators, or an “innovation market”, within the overall market.

[24] U.S. DOJ & FTC Horizontal Merger Guidelines, § 0.1 (1992), reprinted in 4 Trade Reg.Rep. (CCH) ¶ 13,104, at 20,569-3.

[25] *Id*. at 20,569-3 to 20,571.

[26] Footnote 6 of the 1992 Merger Guidelines reads, "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." *Id*. at 20,571.

The 1987 National Association of State Attorneys General (NAAG) Horizontal Merger Guidelines reflected a similar emphasis. It states in a footnote that consumers can be harmed by oligopoly behavior "on terms of trade other than price...." The footnote then elaborates this consideration at somewhat more length than the federal guidelines. It reads in full as follows: "Tacit or active collusion on terms of trade other than price also produces wealth transfer effects. This would include, for example, an agreement to eliminate rivalry on service features or to limit the choices otherwise available to consumers." NAAG Horizontal Merger Guidelines, § 2.11 (1987), reprinted in 4 Trade Reg.Rep. (CCH) ¶ 13,405, at 21,186 n. 17. Then the NAAG merger Guidelines declare, more fundamentally, that the "central purpose" of merger law "is to prevent firms from attaining market or monopoly power, because firms possessing such power can raise prices to consumers above competitive levels...." *Id*. at 21,185 (footnotes omitted).

manner that economists often use this term: price that has been adjusted for quality, or "price" as a shorthand for both price and non-price attributes. The Guidelines did not, however, state this. Regardless, the 1992 Guidelines were not structured to encourage this approach, or to suggest that choice considerations were a high priority.

By contrast, the 2010 United States Merger Guidelines have warmly embraced a consumer choice approach: Section 1, the Overview, after noting that mergers can have price effects, states:

> Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition. [27]

Moreover, the Guidelines contain a new Section, 6.4, Innovation and Product Variety:

> Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.[28]
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> This section also makes the importance of non-price competition clear:

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[27] U.S. DOJ & FTC Horizontal Merger Guidelines § 1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[28] *Id*. at § 6.4. The Guidelines continue: "The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. *See id.* at § 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger.[29]

Even the 2010 Merger Guidelines' Efficiencies Section, which mostly is worded in cost terms, clearly makes non-price competition a high priority:

[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products....

Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price....

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing....[30]"

The decisions embodied in the 2010 Merger Guidelines to make choice competition a vastly higher priority are a most welcome advance over the 1992 approach. Perhaps for the reasons given earlier in this article, the new Merger Guidelines recognize that a concern with price and efficiency often are insufficient, and that the approach of the 1992 Merger Guidelines - mention non-price competition only in a footnote - is inadequate. Choice considerations are finally receiving the respect they are due.

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[29] *Id*. The Guidelines continue with an illustration: "*Example 21:* Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers." *Id*.

[30] *Id*. at §10, Efficiencies.

VI. Concluding Example: the United States Microsoft case

The final example is perhaps the United States Antitrust case most familiar to citizens of other nations. This enforcement action was analyzed and decided under a consumer choice approach, and could not have been analyzed well or decided correctly under a price or efficiency approach. This was the most highly publicized U.S. Antitrust Law case of the last generation - the Microsoft case.[31]

The primary products in question were personal computer operating system and browsers. The focus of the parties' briefs and the Court decisions was on innovation, new products, and short term and long term consumer choice. Little attention was paid to the price of anything. After all, the price of the operating systems was not an issue because Microsoft had a legal monopoly on it. The price of the browser was not an issue because Microsoft was giving it away for free (in fact, trying its best to give it to everyone for free). Nor were cost savings efficiencies a significant concern.[32]

Rather, short term consumer choices, and also innovation and the resulting long term choices innovation could bring, were the keys concerns. Naturally both sides disagreed strongly about how to maximize consumer choice. But the important point is that consumer choice was - and should have been - the focus of the case. By contrast, cost savings and price were - and should have been -much lower concerns.[33]

The United States Microsoft case illustrates two important points: First, Antitrust Law has long been in the process of moving from an efficiency or price approach towards a Choice approach, even if many cases don't explicitly use the Choice terminology. Second, a price or efficiency orientation often is inadequate to address many of our most important competition-related concerns.

Both Microsoft - and also the hypothetical involving the huge media merger presented at the beginning of this article - illustrate that the choice approach often will lead to a better analysis and a better outcome. The choice approach should be the normal way to analyze competition issues.

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[31] This analysis of Microsoft is based upon Robert H. Lande, *Consumer Choice As The Ultimate Goal of Antitrust*, 62 U. PITT L. REV. 503, 511-514 (2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478680. The relevant citations can be found here.

[32] *Id*.

[33] *Id*.