

● The primacy of economic efficiency

The 1978 *Engineers* case involved the first direct ousting of social factors for those of efficiency.⁵⁵ Engineers had agreed to forbid price bidding and contended that competitive bids would lower prices to the point where a socially desirable level of quality and safety was impossible. The U.S. Supreme Court rejected this defence as inappropriate to both corporate and judicial decision-making. The only objective relevant for a company was individualistic profit-maximization. The only factors relevant to an antitrust court were those relating to competitive impact, the prime factor of which was efficiency.⁵⁶

The equity based foundation of U.S. antitrust was removed and replaced with an efficiency foundation focusing on consumers.

Once it was seen that bigness and agreements on price were no longer bad *per se*, it did not take long to argue that bigness was also good.

Bigness enhances economic performance by allowing producers to attain economies of scale and the benefits of cheaper prices to consumers. The focus moved from an emphasis on **rivalry** that lowers prices to **efficiency** that lowers prices. Some of the implications drawn from this shift are:

⁵⁵*National Society of Professional Engineers v. United States* 435 U.S. 679, 1978.

⁵⁶See Korah, "From Legal Form toward Economic Efficiency: Article 85 (1) of the EEC Treaty in Contrast to U.S. Antitrust", 35 *Antitrust Bulletin*, 1990, 1010 (citing R. Bork, *The Antitrust Paradox*, pp. 7 ss.):

A consideration of the virtues appropriate to law *as* law demonstrates that the only legitimate goal of antitrust is the maximization of consumer welfare. Current law lacks these virtues precisely because the Supreme Court has introduced conflicting goals, the primary one being the survival or comfort of small business.

K.G. Elzinga, *op.cit.*, pp. 1194-5:

Antitrust policy, therefore, need not concern itself directly with increasing the purchasing power of the poor, because it accomplishes this indirectly when it prohibits cartels and monopolies in the single-minded pursuit of efficiency.