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GPN 1010203485 NT$:630

20 Years of the Fair Trade Act – Retrospect and Prospect

2012 Taiwan International Conference on Competition Policy and Law

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Edited and Published by the Fair Trade Commission

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Editor	Fair Trade Commission
Publisher	Fair Trade Commission
Address	12-14 F, No. 2-2, Jinan Rd., Sec. 1, Taipei City 100, Taiwan (R.O.C.)
Tel	886-2-23517588
Website	http://www.ftc.gov.tw
Publish Date	December, 2013
Edition	1st Edition
List Price	630 NTD
Retailer	Government Publications Bookstore Address: 1F, No. 209, Sungchiang Rd., Taipei, Taiwan, R.O.C. Telephone: 886-2-2518-0207 Wunan Book Co., Ltd. Address: No. 6, Chungshan Road, Taichung City, Taiwan, R.O.C. Telephone: 886-4-2226-0330
GPN	1010203485
ISBN	978-986-03-9807-6

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Welcome Remarks

Speech at Opening Ceremony

Chairman Shiow-Ming Wu *

Distinguished Guests, Ladies and Gentlemen, Good Morning. On behalf of the Taiwan Fair Trade Commission I would like to welcome everyone and to thank you all for taking the time to attend the "2012 Taiwan International Conference on Competition Policy and Law."

Taiwan's Fair Trade Act, enacted on February 4, 1992, has been aimed at maintaining trading order and consumers' interests, ensuring fair competition, and promoting a stable and prosperous economy. The TFTC, established in the same year, is tasked with the weighty responsibilities of formulating competition policy and enforcing the Fair Trade Act. Having recently marked the twentieth anniversary of our founding, we have accumulated over two decades of experience from a vulnerable infancy to an assured adulthood.

Since its founding, the TFTC has held fast to the guiding principles of administering the law, promoting economic development, upholding the public interest, and staying in touch with international trends. With the efforts of our colleagues and support from all sectors of society, we have fulfilled our mandate as stipulated in the Fair Trade Act. I would like to briefly describe the TFTC's accomplishments by means of the following four aspects:

1. Safeguarding free and fair competition through robust enforcement of the Fair Trade Act

The TFTC has processed over 36,406 cases over the past 20 years, including almost 27,042 complaints, 165 concerted action applications, 6,558 pre-merger applications and notifications, and 2,641 interpretations. Almost all cases have been resolved. In addition to investigations arising from complaints, the TFTC initiates ex officio investigations into cases that impact the public interest or those that are high profile in nature. At the end of 2011, this had yielded more than 1,851 ex officio investigations as well as imposed fines of up to NT$2.96 billion.

Last year, the TFTC's performance in terms of the case conclusion ratio, average days to case conclusion, the number of self-initiated cases and decision statements was the best since its establishment in 1992. Moreover, according to the World Economic Forum's (WEF) 2010 and 2011 Global Competitiveness Report, Taiwan ranked first out of 142 countries in the index of intensity of local competition for two consecutive years. This honor is the highest recognition for the TFTC's efforts against unlawful conduct and contributions to building a pro-competition environment in Taiwan.

* Seventh-term Chairman, Taiwan Fair Trade Commission.

2. Coordination and communication channels, and law-abiding advocacy

Considering the broad coverage of the Fair Trade Act, and statutory mandates involved with the duties and authorities of other government agencies, the TFTC has been working in collaboration with the Ministry of the Interior, Department of Health, the Financial Supervisory Commission and other agencies in order to preserve a sound competitive environment.

Furthermore, the TFTC has actively employed various tools to engage in competition advocacy for industries and the general public to assist them in understanding competition laws, and further safeguard their own rights. Up to now, the TFTC has organized more than 2,300 advocacy activities over the past 20 years. In recent years, Taiwan-based firms have often faced investigations conducted by foreign competition authorities. Since 2010, the TFTC has conducted a number of activities for select industries in different ways, including seminars, forums and discussions with high-level executives. The purpose of these events has been to help businesses better understand foreign countries' antitrust laws and regulations, by means of foreign experts' presentations and mutual communication.

3. Adjusting and revising organizational regulations, and firmly establishing capacity for upholding the law

The TFTC was restructured in accordance with the Organic Act of the TFTC passed by the Legislative Yuan last October. In addition to dropping "Executive Yuan" from its title, underscoring the TFTC 's status as an independent agency, the number of commissioners will be reduced from the current nine to seven from February 1, 2013, and commissioners will be appointed by the Premier for standard four-year terms, with appointments confirmed by the Legislative Yuan.

As we are well aware, the Fair Trade Act essentially regulates market transactions that occur among enterprises. Accordingly, it is vital to keep a close handle on the economic activities of enterprises in the market. In recent years the TFTC has not only conducted annual market structure surveys for various industries, and established databases for the convenience chain stores and multi-level sales enterprises, but it has also integrated secondary data of other government agencies and established an industry data system for maintaining a close grasp of the market to aid in law enforcement and management. Following other foreign competition agencies' experiences, the TFTC established the Information and Economics Analysis Office to strengthen economic analysis, improve case analysis quality, and remain abreast of changes in the state of market structure and competition to thwart illegal conduct.

The partial amendment of the Fair Trade Act came into force last year. The main changes include the introduction of a leniency policy, and the increase in the maximum fine for serious violators of regulations on monopolistic and concerted actions, from NT$25 million to 10% of an enterprise's sales during the previous fiscal year. Hopefully, this carrot and stick approach will dissuade enterprises from straying from the law and help reduce illegal conduct.

4. International exchange and cooperation, and community responsibility

In terms of participation in international bodies, in addition to joining meetings related to APEC – the first such organization we joined – and taking up the hefty responsibilities of planning and setting up the APEC Competition Policy and Law Database, in 2002 we became a regular observer of the OECD's Competition Committee and a member of the International Competition Network (ICN), thereby enabling the TFTC to be involved in the formulation of the ground rules of international competition law. As the TFTC's efforts to uphold the law have been widely recognized in the international community, our observership has been renewed four times by being biennially reviewed by the OECD's Competition Committee since 2005. I would therefore once again like to thank the OECD and many of the distinguished guests here today for your support and assistance.

In the meantime, the TFTC has also continuously gained international experience by sending personnel to participate in conferences held by international organizations to take the pulse of international developments on the one hand, while also hosting international conferences on the other, and inviting contributions from competition agencies and representatives of academia from across the globe. In so doing, we can enhance our law enforcement know-how, and as our law enforcement efforts mature we can hold regional technical assistance activities to make every effort to contribute to international society.

This conference will take place over two days. After the opening session, we will proceed with a 30-minute keynote speech by Dr. William Kovacic of George Washington University. The conference will then be divided into five sessions, each with papers to be presented and general discussions. The topics for the five panel discussions are as follows:

Panel One: Abuse of Dominance and Unilateral Conduct;

Panel Two: Coordination and Harmonization in Cross-border Merger Controls;

Panel Three: Building Effective Anti-cartel Enforcement;

Panel Four: Competition Advocacy and Business Compliance;

Panel Five: Creating the Best Competition Agency.

Our panel moderators and presenters are all leading figures in the competition law field and old friends to many of us. I look forward to lively discussions and exchanges of opinions over the next two days. I am confident that the interchange of viewpoints from theory and practice between domestic and international experts will yield outstanding results and will also greatly enhance international cooperation and exchanges.

Once again, thank you for your participation. May I wish this Conference the greatest possible success and I hope everyone finds it extremely beneficial. May I also wish you all the very best in terms of health and happiness. Thank you.

Chapter 1 The Challenges of Assessing Excessive Pricing Cases in Germany

The Challenges of Assessing Excessive Pricing Cases in Germany[1]

*Silke Hossenfelder**

1. Introduction

Competition Law is multifaceted and covers a wide range of competition issues. Some of these issues of competition law - such as anti-cartel enforcement - are more straight forward and easily explained to outsiders and non-competition law experts. Other competition law issues are very complex and the discussions on these topics are controversial. One of these more complex issues is the question of how to deal with exploitative abuse cases. Within the category of exploitative abuse cases, excessive pricing can be defined as the practice of selling goods or services at a price which is unreasonably high. On this subject little consensus has developed among competition authorities and between lawyers and economists.

Some jurisdictions allow lawful monopolists, and a fortiori other market participants, to set their prices as they choose, [2] and therefore do not regard high pricing as a potential competition law infringement. The arguments against intervention in excessive pricing cases include inter alia the risk of undermining investment incentives, both of firms already in the market and potential entrants, the legal uncertainty that is associated with the concept and also the risk of competition authorities overstepping their legitimacy in light of political pressure. Nevertheless, legal provisions prohibiting excessive pricing by dominant firms have been introduced in a large number of jurisdictions. [3] For competition authorities, enforcing these antitrust provisions is an onerous task.

One of the most prominent reasons to introduce such provisions and to engage in their enforcement is that excessive prices may have the most direct negative impact on consumers. Also, provisions against excessive pricing can fill enforcement gaps in those jurisdictions that cannot effectively intervene against the acquisition of dominance, as for example in the EU.[4] Other reasons to engage in this task include the limited potential for market self-correction due to permanently high entry barriers

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1. This paper provides an update of Germany`s contribution to the OECD Roundtable on Excessive Prices 2011. See OECD (2011), Excessive Prices, p. 239 ff. Available at: http://www.oecd.org/dataoecd/5/3/49604207.pdf.
2. US OECD Contribution, OECD (2011), Excessive Prices, p. 300. Available at: http://www.oecd.org/dataoecd/5/3/49604207.pdf.
3. Such jurisdictions include inter alia Germany and the European Union.
4. EU OECD contribution, OECD (2011), Excessive Prices, p. 310. Available at: http://www.oecd.org/dataoecd/5/3/49604207.pdf.

and the inexistence of a regulator or regulatory failure. The potential drawbacks on competition e.g. by diminishing incentives to enter the market can be avoided by using this tool with care and by focusing on the most obvious cases.

2. Legal framework in Germany

The German competition law, the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen;* hereinafter: ARC) [5] which entered into force in 1958 has contained a provision regarding the Bundeskartellamt's competence to combat the abuse of a dominant position right from the start. This provision has been further refined in the course of numerous amendments.

The current version of Section 19 ARC, which deals with abuse of dominance in general, also prohibits excessive pricing. To this end, it does not explicitly state excessive pricing as anticompetitive conduct. However, among other examples of abusive conduct listed in Section 19 (4) ARC, Section 19 (4) no. 2 defines abusive conduct by a dominant undertaking as the demand of "payment or other business terms which differ from those which would very likely arise if effective competition existed". Therefore, Section 19 (4) no. 2 ARC does not identify a specific conduct as abusive, but it prohibits dominant players' business practices which deviate (too far) from those expected to occur if there were "effective competition". This also applies to their pricing strategy.

There are different methodologies in order to establish if a price is considered to be excessive. [6] The aforementioned German provision, at first glance, may be read as a prohibition of any pricing above the hypothetical competitive level. However, the provision requires a substantial difference between the actual price in question and the hypothetical conduct in a market where effective competition prevails in order to establish an abuse. [7] Further, Section 19 (4) no. 2 ARC stipulates that "particularly the conduct of companies in comparable markets where effective competition prevails shall be taken into account". [8] The fact that the only method explicitly mentioned in Section 19 (4) no. 2 ARC is the comparative market concept has occasionally been interpreted as an indication that other possible methods of establishing excessive pricing such as a cost mark-up approach or a profit-limitation approach – are subsidiary concepts and only applicable under special circumstances. However, the courts and the legislator

5. An English translation of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.
6. To establish whether a price is excessive, the methodologies suggest using a wide range of comparators, including geographic, historic or relating to prices of other companies providing similar products or services. For a more detailed description see, *Motta and de Streel*, Exploitative and Exclusionary Excessive Prices in EU Law, presented in the 8th Annual European Union Competition Workshop, Florence (June 2003).
7. See *Bechtold* in:Kartellgesetz- Gesetz gegen Wettbewerbsbeschränkungen-Kommentar [Antitrust: Act Against Restraints of Competition - Commentary] (Rainer Bechtold ed. 6th ed. 2010) at § 19, para 74 and 80; Bundesgerichtshof (BGH) [Federal Court of Justice] WuW/E DE-R 375 ff., 379f. -*Flugpreisspaltung*.
8. Although it has been established by the Federal Court of Justice that, lacking alternatives, also monopolists may be taken as a benchmark, see BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*.

have clarified that there is no such ranking. [9]

Comparative markets can be other geographic markets, product markets with similar products or services, or the same market in the past – the latter typically alludes to former prices of the dominant company under investigation. The prices found on the comparative market which is deemed appropriate for the case are used as a benchmark for investigating the allegedly excessive prices.

However, not all markets are comparable one-to-one. So, deviating conditions on the dominated market, which a comparative competitor would also have to cope with if he entered that market, must be qualified, quantified and provided for in the benchmark via mark-ups on and deductions from the actual price used for comparison. [10] To incorporate the element of uncertainty inherent in the analysis, either the individual factors should be interpreted to the benefit of the companies under scrutiny, or a security mark-up should be added to the final amount, which then forms the benchmark. [11]

Finally, a substantiality mark-up is used to account for the requirement of a substantial deviation of the allegedly excessive price compared to the benchmark price, determining the threshold above which the higher price is considered an abusive practice. [12] The extent of such a mark-up has been subject of case law in Germany. [13] According to this, it has to be linked to the degree of competitive pressure remaining in the dominated market. This implies that the threshold for classifying prices as abusive is higher the more competition still remains in the market.

In order to make sure that suitable comparable markets or prices are chosen for the comparative market analysis, the sum of the adjustments may not account for the major part of the calculated benchmark price. [14]

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9. *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011) at § 19 GWB para 107. Stating that the comparative market concept is an important, but neither the only nor the primarily admissible methodology to establish excessive pricing (however requiring a justification of the specific concept used): Oberlandesgericht (OLG) [Higher Regional Court] Düsseldorf, decision of 22.4.2002, Kart 2/02 (V) – *Netznutzungsentgelt*. When introducing Section 29 (2) into the ACR, the German legislator declared that the concepts of profit limitation and cost control to establish excessive pricing practices already were accredited methods in the case law for Section 19 (4) 2 ACR and Art.
   82 EC Treaty (now Art. 102 TFEU) without any reference to subsidiarity, see Deutscher Bundestag [German Federal Parliament] – 16. Wahlperiode, Drucksache 16/5847, page 11.
10. BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*
11. *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1,(Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para124.
12. *Nothdurft* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1,(Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para 117 f.
13. BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz.*
14. BGH [Federal Court of Justice], WuW/E 1445 ff., 1454 - Valium II.

Any substantial deviation from the hypothetical competitive price established according to these principles must then be proven to be objectively unjustified in order to be classified as an abuse. [15] Particularly this last requirement occasionally made the establishment of excessive pricing a very complex task and difficult for the Bundeskartellamt to prove before the courts.

Apart from the general provision of Section 19 (4) no. 2 ARC, the German legislation includes a further, sector specific provision. Section 29 ARC was introduced in 2007 and facilitates the prosecution of excessive pricing in the energy sector. It is one of several measures by the German government to strengthen abuse control in the German gas and electricity markets. The necessity of such measures became visible in an investigation of the European gas and electricity sectors lead by the European Commission, which showed that the energy markets in Germany were highly concentrated and characterized by vertical integration as well as high prices. [16]

Section 29 ARC applies to companies with a dominant market position in the electricity and gas markets. The provision was introduced with a sunset clause and originally was supposed to expire in 2012 after a five-year-period. This period is seen as not to be sufficient, therefore, the prolongation of that provision has been proposed in the currently discussed 8th amendment of the ARC.

Section 29 ARC differs from the general anti-abuse-provision of Section 19 ARC in several aspects. Firstly, under Section 29 s. 1 no. 1 ARC the requirements for a company to be suitable for comparison are lower than under the general provision. This is because it is stated explicitly that prices of a dominant energy provider can be compared with those of other public utility companies, irrespective of whether these are active on a market in which competition prevails or not. [17] Choosing a suitable benchmark within the comparable market approach requires the identification of companies that are as similar as possible to those under investigation. Though in theory under this provision, these comparator companies could be from a different sector, in practice such companies are unlikely to be sufficiently similar for comparison. Differences such as structural differences in cost are taken into account via the above mentioned mark-ups or deductions from the benchmark. Especially in cases where there is a small basis for comparison (e.g. only one company), the benchmark price with the mark-ups and deductions has to be calculated as precisely as possible, with an additional security mark-up to be added to the benchmark price to account for general uncertainties.

Secondly, the provision contains a reversal of the burden of proof to a certain degree, as the dominant companies have to demonstrate either why the deviating behavior is

15. The range of possible objective justifications is very limited and subject to debate, see Nothdurft in Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 19 GWB para 119 ff. The case law accepts cost deficits as an objective justification, but only insofar as costs have been duly allocated and all rationalisation reserves have been exhausted (BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*).
16. See *Lücke* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol. 1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 29 GWB para 1.
17. Although case law had already established that this was also possible under Section 19 (4) ARC, see BGH [Federal Court of Justice], decision of 28. 6. 2005, KVR 17/04 - *Stadtwerke Mainz*.

not abusive or that the alleged deviation of their prices is objectively justified. [18]

Furthermore, Section 29 s. 1 no. 2 ARC establishes that an abuse of dominance can also be constituted by demanding prices that "unreasonably exceed the costs". This wording explicitly incorporates the concepts of cost mark-up (cost control) and, respectively, profit limitation. [19]

In the course of the amendment of the ARC introducing the sector specific abuse provision the legislator has eliminated the general suspensive effect of judicial recourse on decisions by the competition authorities in cases of abusive conduct. This new procedural alleviation also applies to orders based on the sector specific provision. [20] The application of Section 29 ARC has facilitated the investigation of a number of cases of allegedly excessive pricing in the energy sector for the Bundeskartellamt.

3. Case examples

The Bundeskartellamt is highly aware of the need to avoid potential negative effects on competition by intervention into prices and therefore enforces the provisions against excessive prices with great care. Recent cases focused on the electricity and gas sectors, where ten years after liberalization, these markets remain characterised by high concentration, vertical integration, and significant technical, structural and sometimes legal barriers to entry. In 2011 the Bundeskartellamt has also initiated a procedure against excessive prices for drinking water. In the following the most recent cases will be described briefly.

3.1 Gas suppliers

In 2008, the Bundeskartellamt analysed the prices of 35 suppliers of natural gas. The companies were suspected of having charged abusively excessive prices in the years 2007 and 2008 in the markets for the supply of household customers with heating gas. Despite increasing market opening in the energy sector, competition has not developed equally at all market levels.

The proceedings were conducted under both Section 19 and – regarding prices in 2008 - Section 29 ARC. In its investigation the Bundeskartellamt examined the differences between the gas prices of the suppliers under investigation and of comparable companies. Incorporating elements of the profit limitation concept into its comparative (geographic) markets approach, the Bundeskartellamt checked net revenues[21] in 2007 of the firms under investigation against those of other public utility companies. This approach enabled the Bundeskartellamt to analyse price changes

18. This shift in the burden of proof applies only to agency proceedings, not to private damages actions.
19. See *Lücke* in: Kommentar zum Deutschen und Europäischen Kartellrecht [Commentary on German and European Competition Law] Vol.1, (Eugen Langen & Hermann-Josef Bunte eds., 11th ed. 2011), at § 29 para 37 ff. See also footnote 8 and acc. text.
20. The general suspensive effect of an appeal against a decision of the competition authority on the basis of Sections 19, 20 and 29 ACR, regulated in Section 64 (1) ACR (old version), was abolished.
21. The revenues are calculated by price times quantity, adjusted for factors the company cannot influence.

over time, take into account the importance of specific tariffs in the portfolio of the individual companies, and compare prices irrespective of their specific form. Revenue diminishing factors that could not sufficiently be controlled by the companies, such as taxes or the (regulated) grid fee, were deducted. For 2008, quantity-adjusted net tariffs, which were considered the best proxy for revenues, were compared. [22]

As required, the Bundeskartellamt added a substantiality mark-up to the compared revenues and tariffs in order to account for the requirement of a substantial deviation. The amount of that mark-up was calculated depending on the degree of competition in the market. Moreover, this approach aimed at defusing the conflict between the objective of prosecuting excessive pricing and maintaining incentives for newcomers to enter the market. As a possible objective justification for price differences, cost deficits were accepted provided that costs had been duly allocated and rationalisation reserves had been fully exhausted. [23]

Especially relevant in this context were differing procurement costs, which the Bundeskartellamt accepted as justified up to the average procurement costs of companies in the same or comparative markets. [24] Long-term gass supply contracts with partly very unfavourable conditions and failing grid access models have still retarded lower supply costs for many retail gas suppliers.

The proceedings could be concluded quickly with commitment decisions. [25] The suppliers under investigation offered commitments in all cases that were investigated in-depth after the initial stage. This willingness to cooperate can at least partly be explained by the stricter instruments established in Section 29 ARC. Apart from direct and indirect financial compensation of consumers, the commitments made by the companies also included measures to stimulate competition, for example by making it easier for new suppliers to win customers by granting these suppliers access to a detailed map of the gas pipeline system.

In 2010 the Bundeskartellamt verified that the gas companies had abided by their commitments and estimated that consumers had received financial compensation amounting to a total of € 444 million. [26] Consumers were compensated by direct

22. Quantity-adjusted net tariffs were used to predict revenues for 2008 as the relevant data were not available for the year 2008 at the time of the decisions. Tariffs were compared on the basis of several archetype consumption patterns, adjusted for temperature-dependent differences in monthly gas consumption based on historical data. See for example Bundeskartellamt, decision 01.12.2008, WuW/E DE-V 1704 – *RheinEnergie*.
23. With this the Bundeskartellamt followed the case law, see BGH [Federal Court of Justice] WuW/E DE-R 375 ff. - Flugpreisspaltung, stipulating that a dominant firm may not be forced to sell its goods and services at prices below costs, provided that costs have been adequately allocated and all rationalization reserves have been exhausted.
24. See Bundeskartellamt, Activity Report (Tätigkeitsbericht) 2007/2008 = Deutscher Bundestag [German Federal Parliament] – 16. Wahlperiode, Drucksache 16/13500, page 30. Available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf.
25. On the basis of Section 32 b ACR, making the commitments binding on the undertaktings.
26. See Bundeskartellamt, Activity Report 2009/2010 = Deutscher Bundestag [German Federal Parliament] – 17. Wahlperiode, Drucksache 17/6640, page 120. Availabe

financial re-imbursement in the amount of around € 130 million; the rest consisted of financial easement when numerous companies refrained from passing on cost increases in the two years following the proceedings. Moreover, the evaluation showed that competition on the end-consumer level was not stifled but had consistently gained momentum after the proceedings. [27]

3.2 Heating current

In 2009, the Bundeskartellamt initiated proceedings under Sections 19 and 29 ARC against 18 suppliers of electricity for heating purposes (electrical heat pumps, night storage heating). The proceedings focused on end consumer prices charged by the suppliers in the years 2007, 2008 and 2009. In total, 25 companies were investigated. Despite liberalisation, customers of heating current are still de facto captive customers as the local network operator and retail supplier is practically monopolist in his service area due to the characteristics of this product.

The Bundeskartellamt applied a comparative market concept that was consistent with the one used in its proceedings against gas suppliers. The Bundeskartellamt established net revenues per year and compared these to those of other companies active on different geographic markets. Factors with an impact on the revenues that could not be influenced by the companies, e.g. taxes or licence and grid fees, were deducted from the comparative net-revenues and a substantiality mark-up was added.

The Bundeskartellamt regarded higher procurement and distribution costs as possible objective justifications, but only as far as they were justifiable under efficiency considerations.[28] In its calculation, the Bundeskartellamt accepted quantity-adjusted average procurement costs of all investigated companies, while with regard to distribution costs it accepted the average costs of the five most efficient companies - incorporating elements of a cost mark-up approach into its analysis. [29]

As in the gas price cases, most of the cases could be closed with committment decisions when the companies offered commitments that included lower prices, financial compensation of customers and measures to increase transparency in the market. Financial compensation amounted to a total of more than € 27 million and consumers received at least another € 20 million when companies, not least with regard to the then ongoing proceedings, refrained from raising prices in 2010 despite rising costs.[30] In addition, the electricity suppliers made further comprehensive commitments. The companies have commited to publish their multifaceted and rather intransparent electric heating tariffs on the Internet and to establish and subsequently

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only in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf.

27. *Ibidem.*
28. In line with the case law, BGH [Federal Court of Justice] WuW/E DE-R 375 ff., 377 - Flugpreisspaltung. See for example Bundeskartellamt, case B10-13/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/archiv/EntschMissbrauchaufsichtArchiv/2010/EntschMissbr auchsaufsicht.php.
29. See *Bundeskartellamt* 2010, Heizstrom – Marktüberblick und Verfahren, p. 6. Availabe only in German at http://www.bundeskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/Stellungnahmen.php.
30. Bundeskartellamt, Press release of 29 September 2010, available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2010/2010_09_29.php.

also to publish on the Internet temperature-dependent load profiles. It is expected that these commitments will decrease market entry barriers for new competitors and make it easier for consumers to switch providers, thereby stimulating competition in the market.

3.3 Drinking water

In March 2010 the Bundeskartellamt initiated proceedings against a German water provider for charging abusively excessive prices for drinking water. The Bundeskartellamt subsequently carried out extensive investigations into urban water supply and requested the relevant data from every town or city in Germany with a population of more than 200,000 (in all 38). Finally, the authority took the prices (the average of the three individual prices) of water providers in Hamburg, Munich and Cologne as a benchmark for the water prices in Berlin as the conditions of supply in these cities are comparable in structure with those in Berlin. It was established that the Berlin provider's sales returns were significantly higher than those of the water providers in the other three major cities.

In the course of its investigations the Bundeskartellamt examined in detail costs and conditions of supply in the different cities. In particular, it looked at the costs involved in the supply of the very good quality of drinking water in Germany. All the water providers undertake every effort to guarantee this high quality. In the authority's view, necessary expenditure in this area is no higher in Berlin than in Hamburg, Cologne or Munich. Berlin has ample resources of premium quality water which is easily accessible. Water distribution conditions are also very favourable in Berlin.

The water provider in question is Germany's largest water provider which is responsible for water supply and waste water management in Greater Berlin. It charges prices under private law, which means that competition law is applicable. Water providers have a monopoly position in Germany because customers cannot switch to other providers. In Berlin this natural monopoly is also legally protected by way of compulsive connection and use.

In its comments on the authority's first statement of objections of 5 December 2011, the Berlin water provider had pointed out that the water providers HamburgWasser and Stadtwerke München GmbH which the authority had used as comparable companies had in the meantime raised their water prices by more than 6%. Consequently, new investigations were conducted at all the companies and data collected for the year 2011. The investigations revealed that HamburgWasser and Stadtwerke München did not raise but in some cases even lowered their water prices last year.

Also, in its first statement of objections the Bundeskartellamt had considered in the water provider's favour the exceptional investment which had been necessary for redeveloping the East Berlin water supply network after reunification of the city. However, the latest investigations revealed that certain public subsidies for these investments had incorrectly not been indicated as a separate item from the company's own costs. This part of the costs had to be subsequently deducted in the calculation of the revenue.

In June 2012 the Bundeskartellamt issued a final decision in this case ordering the Berlin water provider to reduce its prices (based on the net returns per sale xcluding taxes and duties) on average by 18% for 2012 and by 17% in the years 2013 to 2015. This means that the water provider will be obliges to reduce its sales revenues for the next four years by approx. € 254 million which will directly benefit Berlin water

customers. The Berlin water provider can appeal against this order and apply for its suspension for the duration of the appeal proceedings.

4. Conclusion

The given examples give a good indication of some of the difficulties that complex excessive pricing cases entail. However, the experience in Germany shows that by pursuing such abusive practices, even when cautiously focusing only on the most exorbitant excessive pricing cases, benefits for consumers can be achieved reasonably quickly. Also other tools which are available to competition authorities can be deployed to foster the emergence of competition in such dominated markets.

Chapter 2 The Choices of Antitrust Reviewing Standards for Abuses of Monopoly Power: The Error-cost Model and its Policy Implications for the Taiwan Fair Trade Act

The Choices of Antitrust Reviewing Standards for Abuses of Monopoly Power: The Error-cost Model and its Policy Implications for the Taiwan Fair Trade Act

*Andy C. M. Chen**

1. Introduction

The Taiwan Fair Trade Act ("FTA") was implemented in 1992. Through the continuous efforts by members serving or used to serve in the Taiwan Fair Trade Commission, much progress has been made during this period. It includes not only the on-going revisions and amendments of the FTA to reflect the current trends in antitrust practices, but also the more solid reasoning employed and enlightened by the recent advancements of competition theories in the disposed cases. The addition of the "information and economic analysis office" in 2012 to the TFTC's existing organization structure marks the agency's another endeavor to improve its enforcement quality. With the potential contribution from the office, we are looking forwards to seeing a more objective and function-oriented reviewing process for the FTA.

Given that, however, the regulation of abusive conducts by monopolists is seemingly a less developed subset of the FTA. In comparison with the other types of anticompetitive arrangements covered by the law, the TFTC has very limited experience in handling monopolization cases. It further leads to a relatively unclear rule for the determination of relevant markets and market power as well as incoherent standards for reviewing abusive conducts in practice. The shortcoming might be attributable to the following three reasons. First, the human, technical, and financial resources necessary for conducting sophisticated analysis of market-structure issues by the TFTC may still be insufficient. The TFTC is frequently forced to make judgments on intuitive approximation. Facing this challenge, the TFTC may be prompted to rely on unfair-competition provisions in the FTA, which usually involve less data-intensive reviewing process, to prosecute monopolization cases. Secondly, pro and anticompetitive explanations frequently coexist in a specific unilateral conduct. Therefore, it may not be easy to distinguish abusive from legitimate business arrangements by a monopolist. It further implies that the determination of a default standard for reviewing monopolization cases is usually not a decision process seeking Pareto efficiency. Difficult and controversial tradeoffs among the different protected legal interests need to be made by the enforcement agency. Finally, a substantial portion of the conducts raising antitrust concern in Taiwan is implemented by deregulated

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firms with residual market power. Rationale justifying past regulations still play a role in the TFTC's case analysis, making the choices of reviewing standards more complicated and unpredictable.

We examine this issue in this paper. In Part II, we first conduct a survey on the current literature regarding the reviewing standards for unilateral abusive conducts. Although several models have been proposed, less effort has been made to provide guidelines on how to make choices among those standards. Taking into account that each of those current standards is theoretically limited and cannot be applied across the board to factually diversified cases, such guidelines are valuable for law enforcement. This paper introduces the error-cost model developed by Professor Keith Hylton in Part III, which is one of the few contribution in literature that undertake this project. We show next how Hylton's model could shed light on the enforcement of the FTA in individual case reviews and its implications for future policy making by the TFTC in Part IV. Part V concludes this paper.

2. A survey on the current reviewing standards for abuses of monopoly power: the economic perspectives

To establish a reviewing standard for unilateral abusive conducts in competition law, it seems to become a custom for antitrust commentators to start from the determination of the legislative purposes for competition legislation and what legal interests the competition law intends to protect. Although Article 1of the FTA has listed its legislative purposes,[1] the interrelationship and potential conflicts among those purposes, and how to set priorities for the realization of those purposes when conflicts occur are largely left unattended in Taiwan.[2] In theory, the issue could be approached from economic and non-economic perspectives. From non-economic perspectives, some commentator has suggested that the purpose of antitrust law is to balance political power through the dispersion of economic power.[3] The others emphasized the role antitrust law could play to redistribute social wealth.[4] In contrast, the economic perspectives focus generally on antitrust law's function to prevent anticompetitive conduct from reducing economic welfare. We follow the economic perspectives in this paper. Based upon the different "welfare" criteria employed, the various reviewing standards could be classified into the following two categories: the "specific-intent" and the "balancing" standards.[5]

1. They are "maintaining trading order, protecting consumers' interests, ensuring fair competition, and promoting economic stability and prosperity."
2. I have touched upon this issue in another paper. *See* Andy C. M. Chen, *The Value, Illustrations and Justifications of Applying Economic Analysis to the Fair Trade Law*, 27 Property and Economic Law Journal 47, 62-64 (2011)(in Chinese).
3. *See e.g.* David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219 (1988).
4. *See* Robert H. Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust*, 34 Hastings L. J. 67 (1982).
5. *See* Keith N. Hylton, *The Law and Economics of Monopolization Standards*, *in* Antitrust Law and Economics 82 (Hylton ed. 2010).

2.1 The specific-intent standard

Under the specific-intent standard, a monopolist's unilateral conduct is held illegal if the court can prove that the monopolist has a specific intent to exclude its competitors. And the existence of illicit intent is mainly inferred from the "irrationality" of the competitive strategies undertaken by the monopolist. In a nutshell, the specific intent standard examines first whether the conduct under review is economically beneficial for the monopolist when successfully implemented. Anticompetitive intent will be established if the previous question is answered negatively. Its underlying logic is derived from the self-interest and profit-maximizing assumptions underpinning most economic models and analysis. Within this context, profit-diminishing conducts are irrational for *Homo Economicus*. Hence, the appearance of those conducts in the market could at least be reasonably interpreted as being motivated by considerations unjustifiable by any legitimate business reasons. The current reviewing standards for predatory pricing illustrate well this thinking.[6] For example, the price-cost threshold might be treated as echoing the production theory of economics in which a rational firm is predicted to cease producing when market cost is below its "shut-down point", the average variable cost. Therefore, when the firm continues to sell and choose to tolerate the enlarging losses, anticompetitive purpose could be one, if not the only one, of the driving forces behind the implementation of such a pricing strategy. The plausibility of this inference is then further buttressed by the recoupment test. The more likely a monopolist is able to recoup its predatory losses in post-predation periods, the stronger the inference of its predatory intent will be.

Along this line, Professor Melamed proposed a "sacrifice" reviewing standard. He pointed out that the traditional "tradeoff" approach which evaluates the legality of a unilateral conduct by its net effect to market competition is usually hard to operate in practice. Moreover, such an approach will unduly enhance competitors' incentive to delay their responses to the monopolist's conduct to increase the probability that the conduct will be held illegal.[7] Under his proposed standard, the court or the enforcement agency should assess counterfactually whether the alleged unilateral conduct would still be profitable for the monopolist if the conduct cannot successfully exclude competition or maintain monopoly power.[8] In determining the costs and benefits, and therefore the "profitability," from a conduct, antitrust reviewer has to look into the monopolist's avoidable opportunity costs from withdrawing from the conduct and its increased sales and revenues from improved product or service quality.[9]

Similarly, the standard suggested by Professor Werden focuses on whether a monopolist's conduct makes economic sense. Under the "no economic sense" approach, a unilateral conduct would be held illegal when it would be profitable only when the existing competitors were excluded and a monopoly was created.[10] It differs from the "sacrifice" test in that the sacrifice of short-term profits *per se* will not be

6. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595-98 (1986); Brooke Group Ltd. V. Brown Williamson Tobacco Corp., 509 U.S. 209, 226, 240-42 (1993).
7. Douglas A. Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrificing, and Refusal to Deal*, 20 Berkeley Tech. L. J. 1247, 1253, 1254 (2005).
8. *Id*., at 1255.
9. *Id*., at 1256.
10. Gregory Werden, *Identifying Exclusionary Conduct Under Section 2: the "No Economic Sense" Test*, 73 Antitrust L. J. 413, 415 (2006).

viewed as either a sufficient or necessary conditions for inferring the existence of exclusionary effects. For example, we could still observe the sacrifices of short-run profits from R & D investments by firms in a competitive market. Alternatively, profits from exclusionary conducts might be captured by the monopolist without the lapse of time.[11] To determine whether a unilateral conduct is economically rational and justifiable or is simply a charade for anticompetitive intent require antitrust reviewers to evaluate further a conduct's market impacts other than the defendant monopolist's profit changes.

Both Melamed and Werden's standards approach the abusive issues from the perspective of the defendant monopolist. In contrast, some antitrust commentators have proposed standards founded upon the evaluation of how unilateral conducts would affect competitors. Judge Posner argued that plaintiffs in cases of unilateral exclusion have the burden of proving not only that the defendants possess market power, but also their conducts have the effect of excluding "equally efficient competitors." On the other hand, the defendants are entitled to proffer efficiency justifications for their conducts.[12] Professor Elhauge offers a similar but more stringent standard. Under his approach, unilateral conducts and their associated effect of expanding a monopolist's market power will be permissible if its sole effect is to improve the efficiency of the monopolist. In contrast, the conduct will be deemed illegal if it assists the monopolist to maintain or increase its market power by diminishing its competitors' efficiency, irrespective of its potential to enhance the monopolist's own efficiency.[13]

2.2 The balancing standard

Under this standard, antitrust reviewers would have to conduct a tradeoff between the pro and anticompetitive effects from a unilateral conduct to evaluate its net market impacts. Depending upon the criteria against which the impacts are judged, it could be further classified into the "total welfare" and "consumer welfare" standards.

2.2.1 The total welfare standard

The standard originated from the proposals by economists to replace the "intent" requirement in antitrust law with a firm's "market performance." Under this standard, an enforcement agency must review both the objective harms to consumers from a unilateral conduct and the efficiency gains to the monopolist before declaring the conduct exclusionary and illegal. Perhaps the most famous illustration of this standard is Professor Williamson's "welfare tradeoffs" model for merger review.[14] On the one hand, merger might enhance the market power of the merging party and enables the party to further raise its price. The deadweight loss caused by the lower post-merger output level represents the potential anticompetitive harm from merger. On the other, merger might reduce the merging party's production costs and create higher gains linked to more efficient production to the merging party. The Williamson' model

11. *Id*., at 424.
12. Richard A. Posner, Antitrust Law 194-95 (2nd ed. 2001).
13. Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 315 (2003).
14. *See* Oliver E. Williamson, *Economics as Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18, 22 (1968).

argued that merger should be allowed if the gains are larger than the loss because the society is better off in net from the merger.

2.2.2 The consumer welfare standard

In contrast to the total welfare standard, the consumer welfare standard focuses asymmetrically on unilateral conducts' impacts on consumer's interests. Professor Salop is the leading advocate of this approach. He argues first that the legislative purpose of the Sherman Act is to protect consumer's welfare.[15] The standard then suggests that a conduct could be held exclusionary and violating the antitrust laws "if it reduces competition without creating a sufficient improvement in performance to fully offset these potential adverse effect on prices and thereby prevent consumer harm."[16] Although the application of this standard would involve a variety of structural and behavioral evidence, but the evaluation process is not intended to be open-ended. It is not to search for the net market impacts as a whole as the total welfare standard has suggested. Rather, this standard is really about "whether consumers are harmed from higher prices, reduced quality, or (in some cases) reduced innovation" and could be more appropriately termed as a "consumer harm" standard.[17]

3. The standard for choosing reviewing standards: the error-cost model introduced

Although each of the reviewing standards is theoretically persuasive, none of them is analytically perfect for all types of exclusionary cases. A more pragmatic and realistic view might be to treat the selection of reviewing standards as a dynamic process and would vary with the conducts and market structures involved in individual cases.[18] Towards that end, we introduce Professor Hylton's error-cost model in this section.[19] Briefly put, the model asks first what the default rule for reviewing exclusionary conduct should be if antitrust court could enforce the law on monopolization without making any errors. The model then relaxes the error-free assumption and discusses how the introduction of error costs would affect our choices of the default reviewing standards.

3.1 The choices of reviewing standards when error costs are not considered

In cases where the court or enforcement agencies could obtain all the decisive information to flawlessly enforce the law, the model suggests that the "total welfare" standard should be the default rule for reviewing abusive conducts. Hylton argues that

15. Steven C. Salop, *Exclusionary Conduct*, *Effect on Consumers*, *and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L. J. 311, 329 (2006).
16. *Id*., at 330.
17. *Id*., at 331.
18. *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L. J. 435, (footnote 30)____ (2006)("[C]ourts do not implement Section 2 through a single legal test. Rather, Section 2 courts often apply different liability tests to different conduct.")
19. *See* Hylton, *supra* note 5.

it is the standard most likely to meet the goal of maximizing social welfare through law enforcements. To be sure, this proposition is debatable for those who hold the view that the purpose of antitrust law is to protect consumer's welfare. Literally, however, Article 1of the FTA seems to be more flexible on this issue than the Sherman Act. Incorporating such a proposition into the analysis of the FTA would also be less controversial. We might derive more specific policy implications from the error-cost model by the following illustration.[20]

Generally, we might categorize the potential market effects from a unilateral conduct into the following three types. The first type is the price-increasing potential occasioned by higher entry barriers and probabilities of market exclusion. Let ΔP denotes the degree of price change and assume the market output level will be decreased from Q_c to Q_m after the monopolist successfully implements the alleged conduct. The second type is the effect from the ways the alleged conduct has changed the quality of the product and hence the value to consumers. The extent of such a change is represented by ΔV. Lastly, the conduct could generate efficiency gains in the form of lower production costs for the monopolist and is symbolized as ΔC, with $\Delta C \leq 0$. Under the total welfare standard, a conduct will be deemed lawful when the following relation holds:

$$(\Delta P)(Q_c\text{-}Q_m) < \Delta V(Q_m) + (-\Delta C)(Q_m) \qquad (1)$$

Rearrange the equation, we have

$$\Delta P[(Q_c\text{-}Q_m)/\ Q_m] < (\Delta V - \Delta C) \qquad (2)$$

When the percentage of output reduction due to monopolization behavior is less than 50%, i.e. when $Q_c < 2Q_m$, $(Q_c\text{-}Q_m)/\ Q_m$ is less than 1. Under this scenario, we are still likely to encounter the situation where an alleged conduct should be treated as legal even when it does not improve the quality of the product ($\Delta V=0$) and the degree of price increase it caused is larger than that of the cost it saved ($\Delta P > \Delta C$). Verbally, this is because part of the loss of consumer's surplus from reduced output level is redistributed to the monopolist as higher profits. It is not a deadweight loss. The policy implication from this observation is that the ratio of output reduction is decisive for reviewing abusive conducts. It in turn is closely related to the degree of a monopolist's market power. Condemning an unilateral conduct simply because it causes the price to deviate "unreasonably" from its competitive level may not truthfully reflect the conduct's overall market impacts.

In contrast, Tullock and Posner have argued that the redistribution of consumer's surplus from monopolistic conducts provides the incentive for firms to compete for the status in the first place. This "competition-for-the-market" process may therefore involve inefficient rent-seeking activities engaged by potential monopolists to secure the dominant market positions.[21] Failing to notice this sort of wastes of future gains for present purpose underestimates welfare losses from exclusionary conducts. However, not all endeavors to become a monopolist are socially wasteful. Some rent-seeking activities could concomitantly lead to more innovation and fuller product

20. The discussion below is adapted from Hylton, *supra* note 5, 92-96.
21. *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Thefts*, 5 W. ECON. J. 224 (1967); Richard A. Posner, *The Social Cost of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

information.[22] The implication is that the seriousness of inefficient rent-seeking activities is sensitive to the type of monopoly that firms strive for. In markets where no subsequent and continuous innovative efforts are expected to be undertaken after a monopoly is granted, it is more likely that rent-seeking costs will not be offset by any benefits from status competition. Antitrust reviewers have more reasons to concern the creation of entry barriers and exclusion in such markets.

One additional issue derivable from Hylton's error-cost model is how the choices of standard could be affected when effects from a unilateral conduct impact monopolist and consumers asymmetrically. For example, price-increase profits could marginally bring more utility to monopolist than efficiency gains do to consumers. Alternatively, policy makers might choose to protect consumers from being exploited by abusive conducts more than maintaining the monopolist's incentive to innovate.[23] Under either scenario, policy makers or the courts might add a weighted parameter, α, with $0 \leq \alpha < 1$, to the equation. In other words, a unilateral conduct will be lawful when

$$(1-\alpha)(\Delta P)(Q_c-Q_m)-\Delta V(Q_m) < \alpha(-\Delta C)(Q_m) \qquad (3)$$

When the marginal utility from price increase to the monopolist is larger than that from efficiency gains to consumers, α should be set near one. In reverse, when α is set near 0, the total welfare standard converges with the consumer welfare standard.

With respect to the specific-intent test, the common theme of both Melamed and Werden's standards is to discover the relevance of the increased profits from a specific unilateral conduct to its likely exclusionary and procompetitive explanations. Suppose that Δπ is the increased profits and represented by the following equation.

$$\Delta\pi=(\Delta P- \Delta C)Q_m=[(\Delta P- \Delta V)+(\Delta V- \Delta C)]Q_m \qquad (4)$$[24]

Under equation (4), the increased profits are divided into two parts: those gained from reduced consumers' welfare due to the conduct's exclusionary effect (ΔP- ΔV) and those from efficient gains (ΔV- ΔC). With this simplified illustration, consider first the sacrifice and no-economic-sense standards. Both standards take the view that conducts will be unlawful when they are justifiable only by exclusionary purposes. Hence, the necessary condition for a unilateral conduct to be condemnable under antitrust law is $\Delta V- \Delta C \leq 0$. On the other hand, Elhauge's standard focuses predominantly on a conduct's effects of excluding competitors and reducing consumers' welfare through higher prices. The necessary condition for a lawful conduct would be $\Delta P- \Delta V \leq 0$. Finally, when$\Delta V- \Delta C \leq 0$, a larger portion of the increased profits will come from a conduct's exclusionary effects. Meanwhile, excluded competitors are more likely to be those with equal or higher efficiency. Such a conduct will be held illegal under Posner's standard. Alternatively, conducts are lawful when the increased profits are completely attributable to efficiency gains. For cases falling between these two extremes, Posner's standard offers courts the chance to review the extents the increased profits are attributable to these two counteracting effects.

22. Massimo Motta, Competition Policy: Theory and Practice 45 (2004)
23. Hylton, *supra* note 5, at 95.
24. *Id*., at 97.

3.2 The choices of reviewing standards when error costs are considered

There are two types of error costs under the total welfare standards. The first type is the "false conviction" costs in which courts mistakenly hold a welfare-enhancing conduct as illegal. The second type is the "false acquittal" cost where conducts with negative net market impacts are erroneously permitted by the courts. Putting the relevant reviewing standards in this context, the courts are more likely to commit false conviction under the consumer welfare standard. Alternatively, specific intent standard increases the possibility of false acquittal. As the total welfare standard involves the tradeoffs between a conduct's harms to consumer from price overcharges and its efficient gains, both types of error costs might arise under this standard. When their probabilities of occurrence are symmetrical, both types of costs cancel each other out and the total welfare standard should still be the default reviewing rule.[25] However, the hypothesis that errors occur symmetrically may be in defiance of market reality. The choices of ideal reviewing standard would then depend upon the following two factors. First, we must determine which type of error is more costly to market competition when it occurs. Secondly, we also need to verify which type of error is more likely to be observed in practice.

3.2.1 Cost comparison between false acquittal and false conviction

It is often difficult to measure precisely the costs of false acquittal and false conviction from law enforcements. But in antitrust at least, several commentators have argued that false acquittal imposes less serious a problem on market competition than false conviction. Judge Easterbrook is the leading advocate of this view. Using predatory pricing as an example, he contended that falsely condemning benign price competition as predatory creates irreversible costs consisting of lost consumer's gains from lower prices and hampered competition.[26] In contrast, the supra-competitive profits enjoyed by the mistakenly acquitted market predator invite market entry from potential competitors. It forced the predator to reduce its prices to meet competition. Therefore, costs from false acquittal in the form of higher monopoly profits are likely to be dissipated by subsequent potential competition. Professor Hylton further points out that false conviction signals the limits of courts' ability to properly enforce antitrust law against exclusionary conducts. It enhances potential monopolists' incentive to engage in rent-seeking activities such as bringing frivolous suits against competitors because their successful rates are expected to be higher.[27]

3.2.2 Probability comparison between false acquittal and false conviction

Although more scientific empirical studies are needed to determine which type of error cost is more likely to occur, several reasons might support the observation that false conviction is the type of error more likely to be committed by the courts. As we have mentioned earlier in this paper, it is usually difficult to distinguish exclusionary from procompetitive unilateral conducts. When courts venture to this challenging mission,

25. *Id*., at 102.
26. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981).
27. Hylton, *supra* note 5, at 104.

it is reasonable to infer that the probability for courts to misinterpret beneficial market effects of a conduct will increase.[28] Moreover, unlike collusive agreements, unilateral conducts implemented by a monopolist with abusive intent are more likely to be responded by potential competitors.[29] Therefore, the probability of false conviction increases in monopolization cases if courts abide by uniform enforcement intensity to review cartel and monopolization cases. The discussion so far assumes that courts are free from any bias towards specific errors. However, it is not unusual that antitrust courts could be influenced by non-competition policy considerations to unduly expand the reach of antitrust law to monopolization issues. False conviction is the type of error more likely to be committed than false acquittal when the potential bias towards more enthusiastic enforcement of antitrust law by the courts is taken into account.

4. A preliminary application of the error-cost model to the FTA

Some important policy implications might be drawn from the error-cost model introduced in the previous section. In a nutshell, the total welfare standard should be the ideal reviewing standard if the enforcement of antitrust law is flawless. When that presumption is not met, the standard then should be adjusted towards the specific intent standard. Some may argue against such an observation due to the difficulties of measuring error costs in litigations. However, a case-by-case approach fails to provide clear guidelines for business. It risks placing welfare-enhancing unilateral conduct in a legally unpredictable environment and could deter innovative investments from being undertaken. Although it may not be easy to assess precisely the error costs, the features underlying the market structure or alleged conduct in a monopolization case may assist courts to infer the types and probabilities of error. For example, for cases involving conducts by state enterprises or franchised monopolists, the probability and costs associated with rent-seeking activities are expected to be higher. In other words, costs from over-estimating deadweight loss could more likely be counteracted by the costs from resources inefficiently devoted to obtain the monopoly or franchises.

In addition, market power gained through state franchising usually lasts longer and are protected by law. Entry barriers are foreseeably high in those types of markets. Potential competition capable of challenging the franchised monopolist will be significantly restrained as a result. Franchised monopolist will have lower incentive to engage in subsequent innovation to increase the sum ofΔV- ΔC. And as a result, a larger portion of the increased monopoly profits will come from price prices and the transfer of consumer surplus to the monopolist, i.e. ΔP- ΔV. Under this scenario, false acquittals would be the type of error that should concern the antitrust reviewers. They would also have more confidence in giving a lower value to α in Equation (3) and using the consumer welfare standard for review. On the other hand, when the market where abusive conducts take place is dynamically competitive, the courts should focus more on avoiding over-deterring innovative investments through too stringent enforcement of antitrust law. A reviewing standard leaning towards the specific intent test would be justifiable to control the now more prevalent error of false conviction.

28. Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 109 (2005).
29. *Id*.

4.1 A more specific analytical framework for the FTA

Under the error-cost model, the operation and adjustments of the total welfare standard should at least consist of the following three specific factors.[30] Enforcement agencies or antitrust court should verify at the outset the *strategic considerations* underlying the alleged abusive conducts. It is worth bearing in mind that economic models are not in complete agreement regarding a specific type of conduct's market impacts. The courts or the enforcement agency would need to identify the model whose description of the conduct's potential anticompetitive effects is most pertinent to the case under review. The assumptions or empirical studies of the model would then serve as guideposts for discovering and gathering relevant evidences.

The second factor is the *business characteristics* of the defendant monopolist and its related competitors. The purpose of evaluating this factor is to assist the reviewers to judge the justifications for the defendant's proposed strategies. On the one hand, reviewers could calculate the price-cost differences and assess the need to realize scale economies by the defendant monopolist with the evidences relating to business characteristics. On the other hand, they also facilitate the inference of the possibilities for firms to engage in rent-seeking activities during the competitive process and the degree of extraction of consumer's welfare from the alleged abusive conducts.

After completing the first two steps of evaluation, the courts or enforcement agencies should proceed to estimate how *economic environment* of the investigated market could mitigate or aggravate the exclusionary effects of the alleged conducts. At this step, the main focus should be placed upon the factors relating to market structures. For example, the reviewers might examine whether there exists economic or legal constraints on market entry. The lower the entry barriers, the less likely a unilateral conduct is to succeed in excluding competitors. Additionally, the existence of potential competition implicates that error costs from false acquittal are more likely to be counteracted by the benefits brought about by entering rivals. Under this scenario, it is more reasonable for antitrust enforcers to favor a reviewing standard orientated towards the specific intent test.

4.2 Extensions to more general issues in the FTA

In addition to the typical monopolization cases, the analytical framework developed in this paper could shed light on some more general issues in the FTA. We discuss three of them in the rest of the paper.

4.2.1 The measurement of market power for state or franchised enterprises

In measuring the market power of state or franchised enterprises, the traditional approach has sometimes been criticized for failing to reflect the real economic dominance enjoyed by those enterprises. In particular, the conventional market-share threshold is frequently questioned for falling short of echoing the power gained through brand preference and networking leverage across industries. The principle

30. *See* Michele Polo, *Using Economics for Identifying Anticompetitive Unilateral Practices, in* Competition Policy and the Economic Approach: Foundations and Limitations 94, 96-97 (Josef Drexl, Wolfgang Kerber, & Rupprecht Podszun ed., 2011)

of asymmetrical regulation is one of the commonly seen mechanisms to counter this problem. Under this principle, policy enforcers could enlarge the market power of state or franchised enterprises represented by market share by incorporating non-economic or non-market factors into the evaluation process. However, such a regulatory technique frequently arouses controversies and renders the enforcement of antitrust law even more capricious. In contrast, the error-cost model maintains the traditional approach for measuring market power. Meanwhile, it also allows antitrust assessment of the market impacts unable to be reflected by market share to be adjusted according to specified endogenous indicators such as defendant monopolist's rent-seeking or innovation potentials. It could thereby lead to a more coherent antitrust enforcement.

4.2.2 The problem from condemning exclusionary conducts under both the restrictive-competition and unfair-competition provisions in the FTA

Exclusionary unilateral conducts are governed by two types of provisions in the FTA. Article 10 is the typical "antitrust" or, "restrictive-competition" as is termed in the FTA, legislation on abuses of market power. The application of Article 10 requires first the TFTC to prove that the defendant's market power has exceeded the investigation thresholds. The TFTC then has to establish the alleged conducts would create anticompetitive effect in the relevant market. Alternatively, price discrimination, discriminatory treatments of transacting counterparts, or refusal to deal are also likely to be reviewed under unfair-competition provisions. For example, Article 19 prohibits firms from imposing upon its transacting counterparts the obligations having the actual or potential effects of restricting competition. Article 24 also condemns actions that are patently unfair. The market power requirements are lower or even non-existent in the unfair-competition provisions. Understandably, the difference in legal requirement has tempted the TFTC to rely more on the unfair-competition part of the FTA to avoid the investigation of relevant market. As a result, the TFTC has tended to follow the consumer welfare standard in most exclusionary cases. And false conviction is the type of error more likely to be committed in the enforcement of the FTA. Under the error-cost model, this tendency will be appropriate only when the defendant's rent-seeking incentive is high and the possibility of overkilling innovation is low. The main implication from this observation is that unfair-competition legislation should not mislead the TFTC to think that "unfairness" of the investigated conduct alone is decisive for antitrust assessments. In the short run, the TFTC should adjust its current enforcement techniques regarding unfair-competition provisions to accommodate more market and industry information in its investigation process. The error-cost model is also insightful for policy reform in the longer run. At present, the majority of antitrust commentators in Taiwan appear to accept the view that unfair-competition differs from restrictive-competition law as a whole in the sense that market-structure reviews are not necessary for the former. But as we have shown, this view comes at a cost of falsely convicting welfare-enhancing activities. It is therefore desirable for policy makers to reconsider and revise the current prerequisites for initiating the application of unfair-competition law to market-exclusion conducts.

4.2.3 The implications for exclusionary arrangements by joint actions

In addition to exclusionary conducts by a single monopolist, anticompetitive unilateral conducts could also be jointly implemented by cartel members. In this respect, one of

the recurring issues in Taiwan is how to examine the behavioral or product requirements established and imposed by industry associations. To simplify the analysis, those requirements are viewed here as attempts to "standardize" the products or services in relevant markets. And in essence, those established standards could be further categorized into *de jure* and *de facto* standards. Professional associations (lawyer, accountant, architect etc.) are the exemplary cases of the de jure standards. They are so termed because those standards are frequently set up under the association's self-regulating power authorized by law. For example, the Taiwan Bar Association has recently prohibited its member lawyers from offering online legal services. The reason for the Bar Association's decision is that allowing lawyers to become partners of website operators and to share profits is equivalent to soliciting clients through paid agents. It has violated the Ethical Codes promulgated by the Association, which is authorized by the Attorney Act. On the other hand, de facto standards are usually formed through practices. They could be a product of a top-down, command-and-control process. The decision by trade associations to fix product prices, quality, or types of marketing methods to stabilize a cartel is this type of standard. In addition, de facto standard could consist of those formed via the force of competition. For example, product standards mandated by trade or professional associations in hi-tech industry could be the ones that have survived the fierce "standard war" in the industry.

The current TFTC standard for reviewing exclusionary conducts by trade or professional associations focuses mainly on the comparison of ΔP and ΔC. Namely, the TFTC will usually examine first how the conducts implemented by associations will impact the prices for consumers. The results would then be counterweighted by the conducts' cost-saving effects to the defendant associations. On the other hand, the effects of how the conducts might change the consumers' reservation prices for the standardized products or services (ΔV) are reviewed only occasionally. The implication from the error-cost model for this issue is straightforward. The rent-seeking incentive would be higher and more prevalent in the acquisition of de jure standards. Consequently, it increases the chances that the cost of over-estimating price overcharges will be neutralized. Moreover, the legally protected monopoly power also shields the de jure monopolist associations from standard competition frequently observed in the markets for de facto standard. Innovative and value-increasing activities are less likely to be undertaken in this type of market. The application of the consumer welfare standard under this scenario is more justifiable because false conviction is less worrisome a problem for the enforcement agencies.

5. Concluding remarks

The enforcement of competition law is sometimes criticized as being assigning too broad a discretionary power to the enforcement agencies. It makes the law unpredictable and increases business' compliance costs. In the case of monopoly, the costs could be higher. When a unilateral conduct entails both pro and anti-competitive explanations and could not be easily distinguished in practices, erroneous applications of the law seem inevitable. Despite that antitrust commentators have proposed several reviewing standards to assist increasing its transparency and predictability, none of them is capable of perfectly integrating all types of exclusionary cases. It is also evident that a one-standard-fit-all model is inadequate in responding to competition issues resulting from abuses of monopoly power in an increasingly globalized and

dynamic market. Perhaps it is time for us to consider the possibility of shifting the enforcement paradigm from finding what is right to what could be done to reduce the probability of committing wrong. Instead of abiding by a specific reviewing standard developed from a preordained legal (legislative intent of antitrust law) or economic (self-correction function of market) criteria, an approach allowing the choices of various standards to be made according to the propensity of enforcement error in individual cases could be preferable. The error-cost model introduced and analyzed in this paper is an endeavor aiming at that end. Nevertheless, we duly acknowledge that the error-cost model still needs more theoretical and empirical studies to validate its workability. It is presented here not so much a panacea as a food for thought. However, taking a less traveled but enlightening path for policy making could be as important as fllowing one that has been regularly trampled. As a young competition agency whose long-term policy goal is still in the shaping, it is an adventure worth exploring by the TFTC.

Chapter 3 Regulations against Dominance and Unilateral Conduct in Japan

Regulation against Abuse of Dominance and Unilateral Conduct in Japan*

*Toshiyuki Nambu***

1. Introduction

It is a great honor for me to be invited to the 2012 Taiwan International Conference on Competition Policy and Law. I was asked to make a presentation during Session I on "Abuse of Dominance and Unilateral Conduct". In Japan, we have two types of regulations against unilateral conduct: regulation against private monopolization and regulation against unfair trade practice. In this paper, I would like to explain why Japan has introduced two types of regulations against unilateral conduct, the history of enforcement of those two types of regulations, difficulties in double standard rule for unilateral conducts and efforts to apply the international standard in regulation of dominance and unilateral conducts. Also, I would like to speak about the type of unfair trade practices referred to as "abuse of a superior bargaining position", which is unique regulation in Japan.

2. Introduction of double rules to regulate unilateral conducts; private monopolization and unfair trade practice

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade or Japanese Anti-Monopoly Act (AMA) was introduced in 1947 as an occupation policy after the World War Ⅱ modeled on the U.S.Antitrust Law and the Japan Fair Trade Commission (JFTC) was established modeled on the US Federal Trade Commission as a single competition authority in Japan.

Article 3 of the AMA stipulates the prohibition and criminal penalty for unreasonable restraint of trade modeled on Sec.1 of the Sharman Act and the prohibition and criminal penalty for private monopolization modeled on Sec.2 of the Sharman Act. In addition to that, Article 19 of the AMA stipulates the provision that was modeled on Sec.5 of the Federal Trade Commission Act as well as Sec.2 and Sec.3 of the Clayton Act and named it "the prohibition of unfair method of competition", which was later renamed as "prohibition of unfair trade practices."

In the US, two competition authorities, namely DOJ and FTC coexist and each of them enforces the Sharman Act and the FTC Act respectively. The coverage of Sec.1 and Sec.2 of the Sharman Act and Sec. 5 of the FTC Act is deemed to be the same. On the other hand, in Japan, with regards to unilateral conduct, the JFTC may enforce

* The views expressed in this paper are my own and not necessarily reflect the views of the Japan Fair Trade Commission.

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both Article 3 to prohibit private monopolization and Article 19 to prohibit unfair trade practices.

Unlike the US and the EU in which every single competition authority enforces a single substantial prohibition clause for unilateral conduct, the single competition authority in Japan, the JFTC, enforces double substantial prohibition clauses for unilateral conduct. Some scholars say that this is the fundamental mistake in introducing the US antitrust regulation to Japan, which has employed a double standard for prohibition of unilateral conduct and raised some business concerns with regards to the ambiguity of the rule.

3. Prohibition of private monopolization and unfair trade practices

As I mentioned above, we have two types of regulation against unilateral conduct in Japan, namely prohibition of private monopolization and prohibition of unfair trade practices. First, we will look at these two types of prohibition.

3.1 What is private monopolization?

Private monopolization is prohibited under Article 3 of the AMA. Private monopolization is strictly defined in Article 2, Paragraph 5 of the AMA. The detailed definition of the term can be summarized as activities by which an enterprise causes a "substantial restraint of competition in the market" through the "exclusion"or "control" of other enterprises' business activities. There are three crucial points in here:

The first point is the meaning of "exclusion."

The second is the meaning of "control."

And the third is how we determine whether the relevant situation is a "substantial restraint of competition."

The first point is the meaning of "exclusion." Exclusion is construed as "making competitors' business difficult to maintain, or making new entry into the market difficult." There are no legal limitations on the methods of exclusion. However, examples of typical exclusionary conduct which are described in the "Guidelines for Exclusionary Private Monopolization under the AMA" issued in 2009 include: 1) below-cost pricing, 2) exclusive dealing, 3) tying and 4) refusal to supply and discriminatory treatment. Of course, exclusion as a result of competition on the merits is not regarded as exclusion. Furthermore, to establish exclusion, there is no requirement to prove that the competitors have been actually excluded.

The second point is the meaning of "control." This is generally referred to as "controlling other enterprise's decision-making in business and forcing them to submit to one's will." There are also no legal limitations on the methods of control. Examples of such control include: 1) the acquisition of competitor's stock; 2) the dispatch of directors; and 3) the abuse of a dominant bargaining position.

The third point is how we determine the presence of a "substantial restraint of competition." With regards to the definition of "substantially to restrain competition in any particular field of trade", the Court held in 2007 that this is interpreted to mean "establishing, maintaining or strengthening the state in which a certain enterprise or a certain group of enterprises can control the market at will by being, to some extent, free to influence price, quality, quantity and other various conditions after competition itself has lessened" (Tokyo High Court Judgment May29, 2007) [1]. If the

1. This court decision is based on the Tokyo High Court Judgment in 1953, in which the

state of market control by such means is established, maintained, or strengthened, it is deemed that competition is substantially restrained, even in the case where the prices are not increased in reality.

Determining the conclusion will be made after comprehensively taking various factors into account. The factors to be considered include: 1) the position of the alleged enterprise, e.g., the market share and its ranking in the relevant market and the situation of its competitors; 2) potential competitive pressure; 3) its user's countervailing bargaining power; 4) efficiency improvement incidental to the enterprises' conduct; and 5) extraordinary circumstances to assure consumer interests.

3.2 What is unfair trade practices?

Article 19 of the AMA stipulates, "No enterprises shall employ unfair trade practices." The term "unfair trade practices" means "any acts that are likely to impede fair competition" which are either provided by the AMA itself or designated by the JFTC by means of a public notice.

The types of unfair trade practices provided by the AMA are:1) concerted refusal to trade(Art.2⑨ **i**), 2) discriminatory pricing(Art.2⑨ **ii**),3) unjust low price sales(Art.2⑨ **iii**), 4) resale price restriction(Art.2⑨ **iv**) and 5) abuse of a superior bargaining position(Art.2⑨ **v**).

The types of unfair trade practices designated by the JFTC by means of a public notice include: 1) discriminatory treatment on transaction terms, 2) tie-in sales, 3) dealing on exclusive or restrictive terms and 4) interference with a competitor's transactions.

With regards to the definition of "likely to impede fair competition", the decision of the JFTC in 1953 concluded that the level of anti-competitiveness of unfair trade practices is lower than that of private monopolization. The word of "likeliness" may imply that the impediment of competition can be satisfied by abstract danger or abstract effect of restraint of competition.

4. History of application of the AMA towards unilateral conducts in Japan

As mentioned above, private monopolization is a conduct that causes a substantial restraint of competition in the market through the exclusion or control of other enterprises'business activities and there are no legal limitations on the methods of exclusion or control. On the other hand, the types of conduct that fall under the unfair trade practices are clearly provided either by the AMA itself or designation by the JFTC.

However, the types of unfair trade practices are rather broad, including refusal to trade, discriminatory dealing, unjust low price sales, resale price restriction, tie-in sales, dealing on exclusive or restrictive terms and so on and can cover almost all of the conceivable conducts of exclusion or control that may lead to private monopolization.

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definition of "substantially to restrain competition in any particular field of trade" is described as "bring about the state in which a certain enterprise or a certain group of enterprises can control the market at will by being, to some extent, free to influence price, quality, quantity and other various conditions after competition itself has lessened."

Therefore, the distinction of application may be only based on whether the unilateral conduct concerned is recognized as substantial restraint of competition in the market or likely to impede fair competition.

The definition of "substantial restraint of competition in the market" held by the Tokyo High Court in 2007 as mentioned earlier may imply that the existence of rather large amount of economic power in the relevant market is required to apply private monopolization clause to unilateral conducts. As a result, historically, it has been recognized that the private monopolization clause can only be applied to an enterprise whose share in the relevant market is large enough to dominate the market, namely more than 80%.

On the other hand, historically, Article 19 has been recognized as a clause to prevent private monopolization. This idea was said to come from the generalization of a so called "incipiency doctrine" of Sec.5 of the FTC Act, in which unfair trade practices should be regulated in advance in order to prevent that those practices are aggravated to private monopolization.

Actually, the level of anti-competitiveness of "likely to impede fair competition" to be satisfied is deemed lower than that of "substantial restraint of competition in the market" and the JFTC's Guidelines on unfair trade practices in 1991 states that "a firm that is influential in a market can be a target of prohibition of unfair trade practices and whether a firm is influential in a market or not is in the first instance judged by a market share of the firm, that is, whether it has no less than 10% or its position is within the top three in the market." In this way, prohibition of private monopolization clause has been cautiously applied only to the abuse of economic power which dominates a relevant market. Actual cases of private monopolization have been very scarce. On the other hand, prohibition of unfair trade practices clause has been actively applied to the various types of unilateral conduct or vertical constraint and there have been many actual cases.

In short, to address unilateral conducts, the original AMA from the US introduced both Sec.2 of the Sharman Act and Sec.5 of the FTC Act, which are deemed to be the same as a rule in the US. But the experiences of application of the AMA have modified the function of both clauses and succeeded in letting them coexist in the competition law enforcement in Japan. On the side of the defendant, any enterprise in violation of the provisions prohibiting private monopolization or unfair trade practices will be subject to an administrative measure known as a "cease and desist order" issued by the JFTC.

As for sanctions against violation, the original AMA introduced a criminal penalty against private monopolization but so far no cases have been criminalized, just like the enforcement of Sec.2 of the Sharman Act in the US. The original AMA did not introduce any sanctions against violation of unfair trade practices following Sec.5 of the FTC Act. Therefore, from the defendants' point of view, practically speaking, whether a specific unilateral conduct is regulated as private monopolization or unfair trade practice, it may not have been a matter of concern because so far the only measure to be taken was a cease and desist order, the contents of which were not so different.

5. Difficulties in double standard rule for unilateral conducts

However, it has been said that looking at the respective types of unilateral conducts, the decision of applying private monopolization clause or unfair trade practice clause has not necessarily been conducted based on the level of anti-competitiveness and

the effects of restricting competition in the relevant market. It has also been said that it is practically impossible to draw a clear line between "substantial restraint of competition in the market" and "likely to impede fair competition" with regards to respective type of unilateral conducts.

This has become very much a critical issue since the introduction of the surcharge payment order for private monopolization and certain types of unilateral conducts because the surcharge calculation rate and the conditions under which it is applied are different between private monopolization and unfair trade practice.

Actually, in the amendments of the AMA by 2010, surcharge payment orders by the JFTC were introduced to the private monopolization and certain types of unfair trade practices and the surcharge calculation rates differ between them. As for private monopolization, the basic surcharge calculation rate for the control type is 10% (3% for the retail and 2% for the wholesale) and that for the exclusionary type is 6% (2% for the retail and 1% for the wholesale). As for unfair trade practices, the basic surcharge calculation rate for concerted refusal to trade, discriminatory pricing, unjust low price sales and resale price restrictions that are the second offence within ten years for the same type of violation is 3% (2% for the retail and 1% for the wholesale). And the surcharge calculation rate for abuse of a superior bargaining position is 1%.

It is for that reason that a specific unilateral conduct being recognized as private monopolization or unfair trade practice has become a concern for the defendant. Furthermore, in the globalized economy, it may be considered inappropriate that only Japan has the different type of double track rule to regulate unilateral conducts when both the US and the EU have a single rule to apply for unilateral conducts, and that unilateral conducts which only have an abstract effect of restraint of competition may not be illegal in other countries but may be regulated in Japan as a violating conduct of unfair trade practice.

6. Efforts to apply the international standard to regulate unilateral conducts

Recently, several developments have been observed on this issue. According to the recent cases on unilateral conducts, the level of impediment of competition in unfair trade practices cases has been approaching the level of substantial restraint of competition in the market in private monopolization cases. For example, recent court decisions of cases on unfair trade practices have not considered the meaning of"likeliness" in the same way as in previous years. Some of the decisions state that the conduct in question did not fall under unfair trade practices because the effect of restraint of competition in the relevant market was not proved. Other decisions state that the conduct in question fell under unfair trade practices because the conduct was recognized for having unduly made the continuation of business for competitors in the market more difficult.

Also, with regards to the recognition of "likely to impede fair competition", the decision of the JFTC in 2008 mentioned that "it should not be recognized as the only probability of causing a decrease of competition but should be decided after taking into account the qualitative and quantitative effects on competition respectively by the conduct in question."

Furthermore, in 2009, the JFTC made the "Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act" public and described the JFTC's investigation policies for cases concerning exclusionary private monopolization. According to the Guidelines, the JFTC, when deciding whether to investigate a case

as exclusionary private monopolization, will prioritize cases where the share of the product supplied by the enterprises concerned exceeds approximately 50% after the commencement of such conduct, and where the conduct is deemed to have a serious impact on the lives of the citizenry, comprehensively considering the relevant factors such as market size, scope of business activities of the enterprises concerned, and characteristics of the product.

It is said that in the US, the courts have found that monopoly power should be found only for market shares significantly above 55% and in the EU, a dominant position is usually assumed if the market share of the firm is larger than 40%-50%. The Guidelines were aimed at harmonizing the market share for regulating unilateral conducts in Japan with other countries by adopting the share of exceeding approximately 50%[2]as a first indicator.

The Guidelines also mentioned four typical exclusionary conducts; "below-cost pricing", "exclusive dealing", "tying" and "refusal to supply and discriminatory treatment" and described for each type of conduct, consideration factors for assessing whether the alleged conduct falls under exclusionary conduct. By way of introducing market share of exceeding approximately 50% as a first indicator to consider investigation and describing consideration factors for assessing typical type of unilateral conducts, the Guidelines is aimed at realizing the conformity of regulation of private monopolization by the AMA with the international standard of regulation of unilateral conducts.

7. The way forward and further challenges

It can be said that the JFTC has committed to an active enforcement of provision of private monopolization against unilateral conducts as long as it is applicable and it is expected that actual cases will be accumulated and the case law concerning regulation of private monopolization will be developed.

On the other hand, provision of unfair trade practices still exists and the Guidelines itself mentioned that even where the alleged conduct is found not to fall under exclusionary private monopolization after the JFTC's investigation, it is still likely to be regulated as unfair trade practices, as provided for in Article 2 (9) of the AMA.

Therefore, the double track competition rules against unilateral conducts still exist and a great challenge is how to realize a single rule for unilateral conduct to harmonize with the international standard.

Some scholars propose to abolish the types of unfair trade practices that can be covered by the private monopolization clause and integrate the regulation of unilateral conducts to a single private monopolization clause. However, this is too bold a step at this time because unfair trade practices have a long history in the Japanese competition law enforcement and some types of unfair trade practices still play an important role in addressing anticompetitive conducts. The way forward may be to conduct an active enforcement against private monopolization under the rule conforming to the international standard.

2. The Guidelines also state that "even if a case does not meet these criteria, it may be subject to investigation of the case as exclusionary private monopolization depending on the type of conduct, market conditions, positions of the competitors, and other factors". Therefore, the market share of approximately 40% can also be regulated as private monopolization.

8. Abuse of superior bargaining position

Unfair trade practices are divided in to two types, namely the practices that may be coincidental with the conducts to be covered by the provisions of private monopolization and the practices that may be categorized as acts of unfair competition.

The latter includes a conduct referred to as "abuse of a superior bargaining position." It is sometimes described as a unique regulation in Japan. It refers to the abuse of buyers' bargaining power and it is a typical practice that gives small and medium-sized enterprises an unfair disadvantage. There have actually been a number of cases where a large-scale supermarket has abused its bargaining power against suppliers.

The regulation of abuse of superior bargaining position does not presuppose the existence of a market power but focuses on abusive behaviors exercised against transaction parties with inferior positions. The JFTC is strictly conducting enforcement against the abuse of superior bargaining position.

For instance, in November 2009, the JFTC set up a "Task Force for the Abuse of Superior Bargaining Position" in the Investigation Bureau. When the task force gains suspicions or information on this practice through the JFTC's survey and so on, it dedicates itself to conducting the necessary investigations and deterring and rectifying the abuse of superior bargaining position. Also because the JFTC has become liable for ordering a surcharge payment for the abuse of superior bargaining position since 2010, the JFTC formulated the "Guidelines Concerning Abuses of Superior Bargaining Position under the Antimonopoly Act," in November 2010 to improve the transparency and the predictability of the enforcement.

Abuse behaviors by the enterprises with a superior bargaining position against their transaction parties with inferior positions are under frequent observation in Japan, and private litigation to address this kind of abuse is hard to access and not so active. Therefore, administrative measures taken by the JFTC have very much been relied on and strongly supported by the stakeholders.

Chapter 4 Reflexions on European Union Merger Control and International Cooperation

Reflexions on European Union Merger Control and International Cooperation*

*Adrian Lübbert***

1. Introduction

During the last decade, globalisation has further continued and deepened. In parallel, competition policy also has continued to evolve. The number of merger control authorities has grown from roughly a dozen in 1990 to more than 100 globally today. The growth of merger control regimes is a positive development, as this area of competition policy can contribute to open and competitive markets around the world. However, the increase in the number of reviewing authorities has also increased complexity, not least for merging companies. In the absence of a worldwide competition policy, those competition authorities that would like to coordinate their reviews of a merger to some extent with other competent competition authorities find themselves in an increasingly multi-polar world that entails some challenges.

This paper briefly discusses international cooperation in merger control from the perspective of the European Commission. The remainder of the paper is organised as follows: after a brief overview of global M&A trends from 2001 to 2011, it takes a snapshot at merger control enforcement at the European Union level. Section 3 discusses why and under which circumstances international cooperation is beneficial. Section 4 explores the European Union's current institutional framework for international cooperation in merger control and section 5 looks at recent practical experience. Section 6 concludes.

2. Snapshot at EU merger control

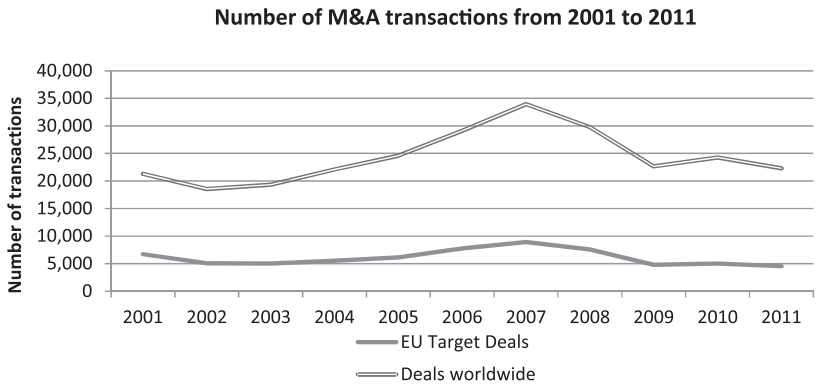
2.1 Global M&A activity

The below charts[1] provide an overview of the global and European M&A activity during the last 10 years. The first chart illustrates the number of M&A transaction, whereas the second chart depicts those transactions in deal value.

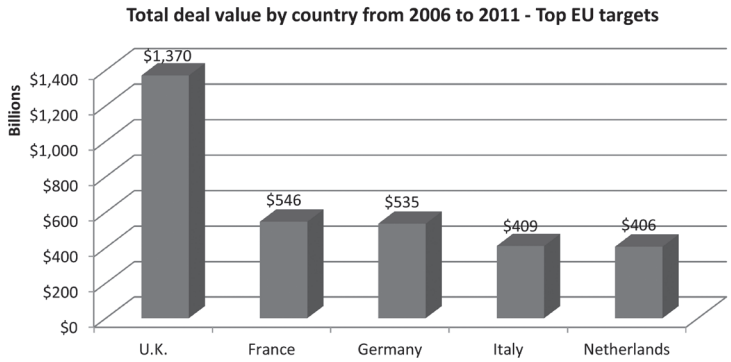
* The content of this presentation does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

** Case handler, Directorate General for Competition, European Commission.

1. Source: Bloomberg.



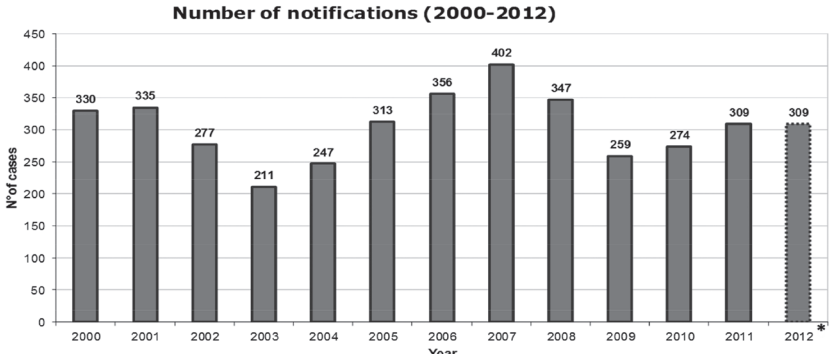
The charts show that the global and European M&A activity follows the economic cycle and they seem to follow the economic cycle relatively closely. Overall, M&A activity in Europe is currently still at a significant level, despite the decrease since 2007 and in particular during the economic and financial crisis. Furthermore, the current level seems in line with the longer-term range.



The above chart shows[2] the geographic distribution of the top M&A targets within the European Union. Most of the European M&A targets were headquartered in the United Kingdom. A number larger than in proportion to the size of its economy were located in the Netherlands.

2.2 The European Commission's merger control enforcement

Against this background, the below graph depicts the number of transactions that have been notified to the European Commission under EU merger control rules.



What can be seen is that also the number of merger notifications follows the economic cycle to some extent. But of course, the sheer number of cases does not properly reflect the complexity of cases and the ensuing procedural and analytical challenges of the ca ses for the European Commission.

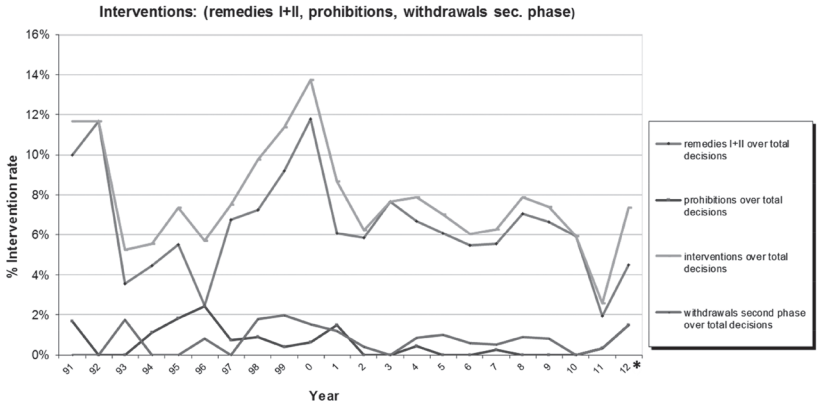
As regards the European Commission's enforcement record, the below analysis[3]

2. Source: Bloomberg

* Extrapolated and estimated figure for 2012 based on assumptions.

3. Source: author's own calculations based on DG Competition data, up to 30 April 2012. The data are based on approximations and subject to shortcomings. The author cannot guarantee for the accuracy of the analysis.

depicts the share of yearly interventions over total number of mergers notified to the European Commission. The intervention rate measures the share of mergers that were notified but that were modified compared to the notification due to either remedies, prohibitions or withdrawals.



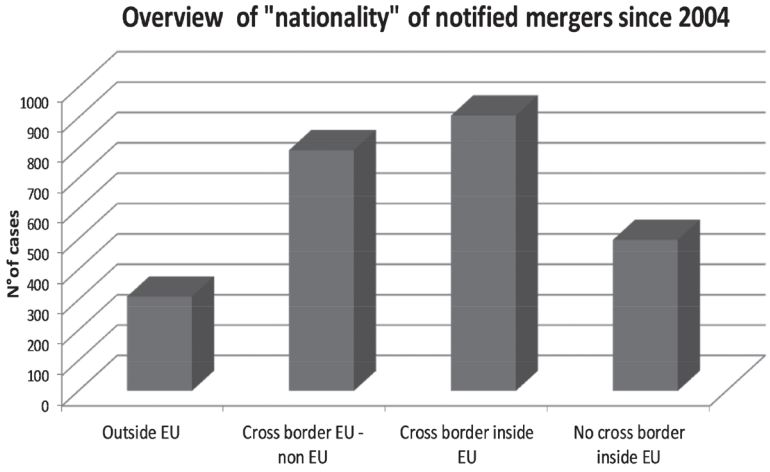
As the chart illustrates, the intervention rate shows different degrees of volatility over time. The explanation for this is that the European Commission does not have a target intervention rate for merger control enforcement, but analyses cases on a case -by-case basis on the merits. The following table provides an overview of the most significant merger cases between 2010 and April 2012.

Overview of Merger Activities Significant cases in 2010 – 2012	
Prohibition (Article 8(3)) *M.6166 DEUTSCHE BÖRSE / NYSE EURONEXT* *M.5830 OLYMPIC / AEGEAN AIRLINES*	**Phase I clearance subject to remedies (Article 6(2))** *M. 6459 SONY / MUBADALA / EMI MUSIC* *M.6447 IAG / BMI* *M.6258 TEVA / CEPHALON* *M.6093 BASF / INEOS / STYRENE JV* *M.5984 INTEL / MCAFEE* *M.5978 GDF / INTERNATIONAL POWER* *M.5927 BASF / COGNIS* *M.5953 RECKITT BENCKISER / SSL* *M.5855 DB / ARRIVA* *M.5778 NOVARTIS / ALCON* *M.5865 TEVA / RATIOPHARM* *M.5756 DFDS / NORFOLK* *M.5655 SNCF / LCR / EUROSTAR* *M.5669 CISCO / TANDBERG* *M.5650 T-MOBILE / ORANGE* *M.5721 OTTO / PRIMONDO* *M.5661 ABBOTT / SOLVAY PHARMA*
Phase II clearance subject to remedies (Article 8(2)) *M.6266 Johnson&Johnson / SYNTHES* *M.6203 WESTERN DIGITAL IRELAND / VIVITI TECHNOLOGIES* *M.5658 UNILEVER / SARA LEE BODY CARE* *M.5675 SYNGENTA / MONSANTO SUNFLOWER SEED BUSINESS*	
Phase II clearance without remedies (Article 8(1)) *M. 6214 SEAGATE TECHNOLOGY / HDD BUSINESS OF SAMSUNG ELECTRONICS* *M.6106 CATERPILLAR / MWM* *M.6101 UPM / MYLLYKOSKI AND RHEIN PAPIER* *M.5907 VOTORANTIM / FISCHER / JV*	
Abandonment (in Phase II) *M.6362 CIN / TIRRENIA BUNISESS BRANCH* *M.5969 SCJ / SARA LEE*	

Finally, the below analysis[4] shows the "nationality" of those mergers that were

4. Source: author's own calculations based on DG Competition data. The data are based on approximations and subject to shortcomings. The author cannot guarantee for the accuracy of the analysis.

notified to DG Competition since 2004. Nationality of a company in this context is primarily based on the location of its headquarters.



Column one essentially illustrates the fact that a lot of mergers that occur outside the European Union, for instance in the United States or in Asia, are also notified to the European Commission. The second column represents cases of internationalisation where one of the two companies is European. Column three stands for cross-border consolidation within the European Union's internal market. Finally, the fourth column includes large mergers within a European Union Member State, of such magnitude that they have an impact on the European Union's internal market. In the context of a discussion on international cooperation, it is therefore interesting to see that a substantial share of the merger cases notified to the European Commission involves companies that are headquartered outside the European Union. The following section will discuss why cooperation between competition authorities is beneficial and in which circumstances and at what stage it should ideally take place.

3. Why international cooperation in merger control is beneficial and at what stage

As a result of the continued globalisation and the growth in the number of merger control regimes worldwide, a significant number of mergers have to be filed in various jurisdictions, the so called multijurisdictional filings. In these cases, multiple competition authorities around the world review the same merger.

For the purposes of this paper, international cooperation is understood to be any form of formal or informal contact between two competition authorities that are competent to review a transaction in two different nations. International cooperation could therefore range from official, high level contacts between the competition authorities during the case to a simple informal phone call or email at working level. Whereas international cooperation could therefore be any contact between two international competition authorities to discuss a specific merger case, the depth, frequency and method of communication can of course vary greatly.

3.1 Why is cooperation useful and what are the objectives?

From a competition authority's perspective, international cooperation during the review of a merger case can allow to increase efficiency and transparency of the investigation. While cooperation is evidently without prejudice to the competition authority's independence in reviewing a merger and making decisions, it can serve as a tool for coordination. Successful coordination can allow to reach consistent or at least non-conflicting outcomes in the review of a merger. This is particularly important in cases involving remedies, where coordination can allow for coherent or, at least, non-conflicting remedies.

From the merging companies' point of view, cooperation between competition authorities can reduce the burden on them and on third party market participants. Merging companies should normally see international cooperation as beneficial in most multijurisdictional mergers, but certainly in remedies cases: it can avoid inconsistent or even irreconcilable outcomes. Coordination can ultimately also contribute to increasing the level of certainty with which merging companies can anticipate the outcome of the international review of their merger.

As to the objectives of international cooperation, the authorities involved should be aware that cooperation does not require or imply that in all cases and at all moments the same results are obtained. An authority's assessment entirely depends on the competitive situation in the respective jurisdiction, which can vary internationally. Nonetheless, international cooperation can help efficiency, transparency and ultimately decision-making.

3.2 For which cases is international cooperation beneficial?

As usual in merger control, the question whether international cooperation in an individual case would be beneficial depends on the case at hand.

A first and obvious criterion is the scope of the geographic relevant market or the geographic impact on competition. The wider the relevant geographic market, the higher the likelihood of cross-border effects. If a merger concerns international or worldwide relevant markets, a competition authority's decision is more likely to entail externalities on other jurisdictions. Such cases are therefore usually a good candidate for international cooperation.

In addition to the obvious candidates due to wide geographic markets, international cooperation can also be beneficial in other mergers. For example despite finding relatively narrow geographic markets, a remedy in one jurisdiction may have externalities on the assessment in other jurisdictions.

Finally, even those cases that eventually only raise competition issues in one jurisdiction and do not entail any externalities can still benefit from cooperation, for instance in terms of timing and procedural issues.

3.3 At which stage of a merger case is cooperation useful?

As a general rule, cooperation can start very early in the review of a merger case. Cooperation is certainly always helpful at the stage of assessing the competitive effects – not least to simply compare notes. But it can already be helpful in the framing and preparing an investigation. From the European Commission's perspective, also in light of the different procedural timetables throughout the world, this would imply that international cooperation can already start during the pre-notification phase.

If a merger case possibly involves remedies, cooperation should not only start at the stage of structuring the remedies. Cooperation should on the contrary start quite early, in particular to allow for a discussion on the competitive assessment. If already at the earlier stage of the competitive assessment the findings of the various competition authorities differ, it would appear more likely that the respective remedies would eventually also differ.

Finally, while cooperation is of course essential at the stage of designing remedies, it is often also helpful during their implementation.

3.4 Other necessary "ingredients" for successful international cooperation in merger control

In addition to the characteristics of a case mentioned in the previous sections and the reflexions on timing, the depth and ease of cooperation in an individual case of course depends heavily on the merging companies.

Merger reviews almost always concern a substantial amount of business secrets, primarily from the merging companies. They are in a position to determine to the largest extent how competition authorities can use the business secrets they have submitted. This implies that merging companies have an important influence on the level of depth of international cooperation that a competition authority can engage in.

Generally, merging companies also see the benefits of international cooperation for them and they should have an interest in facilitating authority cooperation for a smooth dealing with their case. This incentive should be even stronger, the more "multijurisdictional" a case is and the higher the likelihood that remedies are needed. Authorities' decisions in such cases can have even more important repercussions on companies' ability to merge.

To conclude this section, two caveats should be added: remedies of course always have to satisfy all the requirements in each jurisdiction involved to constitute a solution and international cooperation does not imply that solutions in one jurisdiction are simply "exported" to another jurisdiction. Second, as to timing, the procedural differences between jurisdictions simply need to be accepted. This means that "parallel" proceedings does not necessarily require that the review be started at exactly the same moment. The realistic goal should rather be that authorities are enabled to meaningfully cooperate at their decision making moments.

4. The European Union's current institutional framework for international cooperation in merger control

4.1 Bilateral agreements

In order to engage in international cooperation in merger cases, the European Union has multiple cooperation agreements with other jurisdictions.[5] There are for example agreements to cooperate in competition policy with the United States of America, Brazil, Canada, China, Japan or Korea.

5. Overview on the following website: http://ec.europa.eu/competition/international/bilateral/index.html

4.1.1 EU-US cooperation

A particular example of extraordinarily far-reaching cooperation after many years and cases of working together is the cooperation between the U.S. competition authorities and the European Commission in merger control.

An original cooperation agreement was adopted in 1991 and in 2002 best practices for the cooperation in merger investigations were issued. After 20 years of cooperation, the best practices for merger control were revised and a new document was adopted in October 2011: the revised EU-US best practices on cooperation in merger investigations.

The main reason for reviewing the best practices was to incorporate the significant experience gained since 2002 as well as to further intensify cooperation.

The main content of the revised document are best practices concerning the communication between reviewing agencies and the coordination on timing of merger reviews in the U.S. and the European Union, in particular during the assessment of a case and the design of remedies. The best practices in that context also stress the role of merging parties in enabling effective cooperation throughout the review.

4.2. The International Competition Network

The International Competition Network ("ICN") seeks inter alia to facilitate effective international cooperation. It has developed significant soft law instruments relating to procedural and substantive aspects of merger control.

For instance the ICN "Guiding Principles for Merger Notification and Review" lay down basic principles such as procedural fairness, coordination, or protection of confidential information. The "Recommended Practices for Merger Notification and Review Procedures" build upon the guiding principles and establish rules aiming at a coherent handling of mergers across jurisdictions. Finally, the "Recommended Practices for Merger Analysis" essentially compile common criteria for the assessment of mergers.

The ICN lends itself to worldwide multilateral cooperation in merger control and the possibilities for dialogue within the ICN would benefit from the widest possible membership. Other relevant international fora include the OECD and to some extent the WTO and UN.

4.3 Cooperation within the European Union

As a particularity of the European Union, there is also "international" cooperation between the European Commission and the authorities of Member States, e.g. France, Germany, United Kingdom, etc.

The European Commission and the Member States meet regularly in a “merger working group”. It is a forum to foster cooperation & convergence within the EU and to exchange best practices. Furthermore, in 2011 the Member States and the European Commission adopted best practices on cooperation between EU national competition authorities in merger review. These best practices aim for effective and consistent enforcement through increased coordination between Member States’ competition authorities for those mergers that are notified to more than one national competition authority (but not the European Commission). Whereas the cooperation amongst national competition authorities within the European Union is of course a particularity

of the institutional structure of the European Union, many aspects are similar to those for cooperation between competition authorities at the global stage.

5. International cooperation in EU merger control in practice

5.1 General overview and some statistics

In practice, competition authorities do not have to cooperate and sometimes are not in a position to closely and meaningfully cooperate in a merger case. But international cooperation holds the potential for large benefits, and of course in the ideal world competition authorities should strive for full convergence – the best outcome for everybody involved.

As mentioned earlier, the recent years have seen a significant number of multijurisdictional merger filings as a result of globalisation and the growth of merger control regimes. From the European Union's perspective, this is mirrored in the following findings:

During 2010 and 2011, international cooperation while the European Commission was reviewing a merger mostly took place in complex cases. Only few cases that were authorised in the first phase without remedies involved international cooperation. By contrast, cooperation was much more frequent in those phase I cases that involved remedies. As for phase II, cooperation rates were significant for all cases regardless of the outcome (with or without remedies at the end of phase II). Finally, out of all cases that were cleared subject to remedies, more than 40% involved international cooperation.

Phase I cases represented the bulk of cooperation cases, simply because the number of phase II cases was more limited. However, the qualitative aspects of international cooperation such as frequency and depth varied of course between phase I and II, as there is significantly more time and the possibility to cooperate more intensely during a phase II investigation.

As to the partner authorities, cooperation was most frequent with U.S. competition authorities. The second most frequent was Canada, followed by a group of Australia, China and Japan who were approximately on par.

5.2 Selected case examples

From the European Commission's perspective, there are many examples of successful international cooperation in merger cases in the recent past.

For instance in the case Thomson/Reuters, the U.S. Department of Justice the Canadian Competition Bureau and the European Commission cooperated. As a result of parallel investigations the authorities jointly designed the remedies and ensured their implementation.

In the merger review of Pfizer/Wyeth the European Commission cooperated with the U.S., Canada and Australia. In the case Panasonic/Sanyo there was cooperation with the U.S. and Japan that resulted in a joint remedy package. Cisco/Tandberg is an example of very close cooperation between the U.S. Department of Justice and the European Commission: the decisions to authorise the merger in light of remedies submitted to the European Commission were taken and announced the same day. In the review of Intel/McAfee the cooperation between the U.S. FTC and the European

Commission was very close and despite the fact that the clearance was subject to remedies in the European Union but not in the U.S., the case could be authorised at the end of Phase I in both jurisdictions. Finally, the two mergers in the hard disk drive industry under review in 2011 involved not only very close cooperation between the U.S. FTC and the European Commission, but also very helpful contacts with six other competition authorities worldwide.

6. Any further room for improvement in international cooperation in merger control? Outlook and conclusion

Globalisation, M&A activity and the growth of competition policy have continued at fast pace. As a result, it can be expected that going forward a significant number of merger cases will be reviewed by multiple competition authorities in parallel. Many of these cases are good candidates for international cooperation.

International cooperation is already part of everyday practice in European Union merger control. The reality is, however, that for the time being competition policy regimes differ throughout the world and in particular procedures vary significantly. But this challenge does not mean that competition authorities have to forgo the benefits of international cooperation. Once experience from a significant number of cases has been gained, international cooperation can to some extent accommodate these challenges. This will in particular be possible where the merging companies cooperate in relation to timing and confidentiality of business secrets – two areas where further facilitation will always be welcome.

Bilateral cooperation will remain of great importance and it can be significantly more intense than multilateral cooperation. A good example of this is the depth and frequency of cooperation between the U.S. competition authorities and the European Commission. At the same time, international cooperation is also at the heart of multilateral organisations, such as the ICN.

Chapter 5 Building Effective Anti-cartel Enforcement - the Practice and Lessons of Hungary

Building Effective Anti-cartel Enforcement – the Practice and Lessons of Hungary

*Miklós Juhász**

1. Introduction, historical overview

After the existence of a planned economy for several long decades, Hungary enacted its first real market-economy orientated Competition Act in November in 1990 to effectively enforce competition law in the country. It was modelled on the rules of the German and the EEC competition laws.

The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) began its activity on 1 January 1991, when the Competition Act entered into force. As regards cartels, the Act contained a specific provision which made it possible for the GVH to take retrospective-type actions against the so-called "old cartels" which were the consequences of the inherited centrally planned economy, in which there were several central trusts and associations that were operating in various sectors of the economy. Applying this special provision of the Competition Act, in 1991 the GVH had 13 cases of this kind. Even if condemnations were rare in these cases, as a result of the exercise of this power, undertakings soon learnt that there was a new rule in Hungary, namely the Competition Act.

Irrespective of these initial cases, the first half of the 90's was characterised by serious economic problems in the country. Many old companies went bankrupt due to the collapse of markets they previously belonged to; moreover, the economic relations of the companies were dissolved. As a consequence, it can be stated that this period – the period of the mid 90's – was not a favourable time for undertakings to engage in collusive behaviour.

Towards the end of the 90's, when the crisis period was over, an increase in cartel activity was experienced. However, the Competition Authority did not have sufficient investigative tools to explore and prove these violations. Among other things, the GVH did not have the power to organise dawn raids. Consequently, enforcement in this area remained weak; there were only a few cases and the GVH either could not prove the violations or closed some of the cases with the imposition of very low fines.

The participation of GVH officials at a conference[1] provided them with impetus to step forward and define the direction that the GVH needed to take in order to

* President of the Hungarian Competition Authority. This article has been prepared on the basis of a speech presented on the 2012 Taiwan International Conference on Competition Policy and Law (June 26-27, 2012 Taipei, Taiwan).

1. 3rd Nordic Competition Policy Conference on Fighting Cartels – why and how, held in Stockholm on 11–12 September 2000, organised by the Swedish Competition Authority.

strengthen its enforcement activity. So, at the end of 2000 the GVH proposed a number of legislative changes.

1.1 Legislative steps

The ability to hold unannounced inspections formed the basis of the first legislative change that was proposed as part of a larger legislative project aimed at creating an appropriate regulatory framework that contained the necessary investigative tools. It became possible to hold dawn raids for the inspection of not only business premises but also the private premises of CEOs (chief executive officials).

In the same regulatory package the rules on '*de minimis'* agreements (on agreements of minor importance) were modified, by stipulating that hard-core cartels may not enjoy the exception guaranteed by the *de minimis* rule. This meant that the fixing of purchase or selling prices between competitors, directly or indirectly, and the sharing of markets between competitors, could not be deemed as *de minimis* agreements, even if in the given case any of these fulfilled the criteria of the *de minimis* rule.

In 2003 the Act on Public Procurement provided for the possibility of excluding cartel members from subsequent tender projects. However, this provision was recently abolished as it created a certain level of counter-interest concerning leniency applications.

The beginning of 2004 saw the introduction of two notices of the President of the GVH and the Chairman of the Competition Council. One of these notices concerned the calculation of fines, while the other introduced a leniency policy for the first time into the Hungarian legal system.

The next step was the establishment of the possibility of amicus curiae, first concerning the application of European legal norms – in the case of cartels this basically means the application of Article 101 of the Treaty on the Functioning of the European Union – and later the same possibility was created for cases dealt with under national competition rules. According to these provisions judges proceeding in private law suits, applying either European or national competition norms, may pose questions to the GVH in order to ask our opinion on a particular case.

The prohibition of cartel agreements concluded in public procurement and concession procedures was introduced into the Criminal Code in the summer of 2005. The Code foresees a term of imprisonment of up to five years for the infringement of the provision. This development was highly controversial and the GVH was not involved in the preparatory work of this solution.

In June 2008 the GVH attempted to create a provision on individual responsibility by establishing new rules on the disqualification of chief executive officials (CEOs) who were found liable for cartel activity. Unfortunately, the Constitutional Court found the planned provisions anti-Constitutional and the provision had to be withdrawn.

In September 2008 an interesting new element was built into Hungarian competition law, the rebuttable presumption on the level of the damage caused by the cartel activity. This provision will be dealt with in more detail at a later point in this paper.

Since the GVH experienced a lower number of leniency applications in comparison to what it had previously anticipated, in 2009 the GVH tried to provide some incentive for the submission of such applications by mitigating the liability of leniency applicants concerning the payment for damages caused by the cartel. Since in the case of cartels the cartel members are jointly and severally liable for the payment of the damages, a new provision of the Competition Act now makes it possible for a leniency applicant,

who has already received a leniency commitment from the GVH, to refuse to pay damages for the harm caused by its conduct until the claim can be recovered from any other person responsible for causing harm by the same infringement.

In June 2009 the GVH fine-tuned the rules of the Hungarian leniency regime, since it had to be harmonised with the Leniency Model Programme elaborated by the European Competition Network. A few minor amendments had to be made (e.g. to introduce the possibility of markers). Another, more substantial change was that the regulation of leniency was raised from the level of notices to the level of the Competition Act. Since June 2009 the Competition Act itself regulates leniency.

The last step that is worth mentioning here is the elaboration of a reward scheme for informants. According to this new instrument the GVH pays a reward to a natural person if he/she provides written evidence to the GVH which qualifies as indispensable for founding hardcore restrictions such as price-fixing, market sharing – including collusive tendering – allocation of production or sales quotas. The amount of the reward is one percent of the fine imposed by the decision of the GVH to a maximum amount of fifty million HUF (approx. 170 thousand EUR).

1.2 Institutional developments

In addition to the legislative framework, the institutional background obviously also had to be created. Recognising the importance of the special knowledge and investigatory skills that are indispensable here, in August of 2001 a specialised unit was set up which became responsible for dealing with hard-core cartel cases, irrespective of the sector the case derived from. Of course, if it is necessary, e.g. in the case of dawn raids, this small group of staff may be assisted by colleagues from other units and departments of the GVH. If the investigation of the cartel case makes it necessary, colleagues having more sectoral knowledge may contribute to the proceeding.

The GVH invested seriously in Forensic IT. On the one hand, the necessary hardware and software was bought, and on the other hand, one member of staff from the GVH was sent to the US to learn how to use this technology properly. The colleagues of the Cartel Unit carefully follow international developments, the work going on in the Cartel Working Group of the International Competition Network and also at European level, in the European Competition Network.

1.3 Enforcement records

Some statistics about the number of hard-core cartel cases closed by the GVH may be found in the table below.

Year	Number of hard-core cartel cases	Number of hard-core cartel cases condemned	Fine imposed (Million Euro)
2004	13	7	27,92
2005	12	6	9,25
2006	12	9	6,12
2007	10	4	3,16
2008	3	2	0,01
2009	4	3	9,95
2010	3	3	31,92
2011	2	2	0,28

Based on the figures a few conclusions may be made.

First, the number of cases that the GVH has managed to close has decreased in the last few years, with 2008 seeming to be the turning point in this respect. At the same time, and beginning also from the same year, the rate of the condemnations – compared to the number of the closed cases – has increased. This can be deemed as a positive development and shows that the resources of the competition authority are being used more effectively in this case category.

One more comment: the amounts of the fines imposed fluctuate, but this is an understandable, normal phenomenon. Much depends on the importance of the particular case and on the volume of the turnover affected by the violation, and also on when a particular case where a high fine has been imposed is concluded. This means that it cannot be a justified endeavour for a competition authority to maintain the same, equally high level of fines throughout the years.

2. Some critical elements of the Hungarian cartel enforcement

Despite the fact that the necessary legal and institutional backgrounds were elaborated upon between 2001and 2008, there are a few questions that need to be solved in order to make Hungarian anti-cartel activity more efficient. This part of the paper mentions two issues of this kind and in a third point a relatively new regulatory solution of Hungarian competition law will be described which aims to facilitate private enforcement.

2.1 Reconciliation of leniency with criminal consequences of bid rigging cases

One of the current issues that is being faced in the enforcement of Hungarian competition law in the field of hard-core cartels is the requirement that the leniency policy is harmonised in some way with the criminal consequences attached to hard

core cartel cases committed in public procurement actions.

As I have already mentioned, the Hungarian Criminal Code has been punishing cartel members that are engaged in bid rigging since 2005. At first sight it seemed to be a good solution. A research report prepared by Deloitte and published by the Office of Fair Trading in 2007 clearly shows that criminal sanctions have a higher deterrent effect than administrative sanctions. In this report a number of questions were addressed to businesses and their legal advisors about the deterrent effect of enforcement agencies. Both undertakings and lawyers ranked criminal penalties as having the most deterrent sanctions in competition law enforcement. From the viewpoint of businesses, the disqualification of directors was feared more than the imposition of fines.

As regards leniency, in Hungary – as I have also already mentioned – we initiated our leniency policy in January 2004. Later, in 2006, the ECN – i.e. the European Competition Network, the cooperation of the 27 competition authorities of the EU Member States and the European Commission – elaborated a so-called ECN Leniency Model Programme[2], to which all the ECN members aligned their leniency policies. This work was completed by 2009, almost all the ECN members – including the European Commission – approximated their leniency regime to this commonly agreed model programme. In Hungary, in 2009 a new leniency system entered into force and as a result of this, the Hungarian leniency programme is now fully harmonised with that of the ECN.

However, this does not mean that we can be satisfied, as we are not receiving as many leniency applications as we expected. There are several explanations with regard to the low number of leniency applications. Some say that plea bargaining does not have a legal tradition in the Hungarian legal system as it was only adopted in 2003, and not with the same content as in common law jurisdictions.

Others say – and I totally agree – that perhaps the most serious reason for the low number of leniency applications is that with the amendment to the Criminal Code in 2005 the legislators introduced criminal consequences for bid rigging cases.

I think that this fear creates a strong counter interest for potential leniency applicants in all cartel cases where public procurement is involved (that is, in bid rigging cases).

This reasoning can be supported by the fact that most of the leniency applications are dated before 2004, preceding the year when criminal sanctions were introduced attached to hard-core cartels in public procurement and concession procedures. After the amendment to the Hungarian Criminal Code took place, an average number of only 1 or 2 leniency applications per year were filed at the GVH in bid rigging cases.

As a result of this, it has become apparent to us that it is essential that the leniency policy is harmonised with the instrument of plea bargaining in order to eliminate the possible threat of criminal consequences for potential leniency applicants. One of the major problems was that leniency applicants did not have any clear information about whether they are pursued by criminal law or not. This situation was caused by inconsistencies between the criminal code and the Competition Act. To eradicate these inconsistencies the GVH has recommended that legislative measures be taken by the Parliament. As a result, we expect the Criminal Code to be amended soon and we hope that this will solve the problem in a reassuring way. Namely, we may have certain legal tools to facilitate the applicant's conduct to cooperate with the prosecutor, e.g. by adopting a conditional decision on the immunity/reduction of fines. Thereby leniency applicants may gain certainty on whether they will be exempted

2. See under: http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

from criminal penalties.

We are confident that this new solution will stimulate the interest of potential leniency applicants also in the field of bid rigging cases and that from next year we will receive a lot more leniency applications in this case category.

2.2 The role of public procurement bodies

Good cooperation between the Competition Authority and the public procurement officials is a must. The public procurement officials play a key role in recognising the signs of possible bid rigging – and as we all know, bid riggings are among the most egregious violations of competition law. This is why it is extremely important for the Competition Authority to have good cooperation with public procurement bodies and their officials and that these public procurement officials are aware of the indicators which may suggest that bid rigging is taking place. Tenderees have an important role in promoting and ensuring competitive practices.

The support of competition is guaranteed best by the existence of legal provisions which protect competition and which provide equal treatment for undertakings. Both the Hungarian Public Procurement Act and the Competition Act state the importance of competition, which is the guarantee of a fair and effective market. Bid-rigging practices infringe the general rules of public procurement, as well as competition rules.

In my opinion, it is essential that between the two regimes of public procurement and competition law, it is the latter that has the appropriate enforcement tools to fight bid-rigging cartels. Therefore, it is vital that a competition authority is able to obtain information from procurement stakeholders. This information flow between tenderees and the competition authority is regulated in Hungary by a paragraph in the Public Procurement Act. According to this rule, the tenderee shall notify the Hungarian Competition Authority when the contracting entity considers that there is a clear and manifest infringement of the anti-cartel rule of the Hungarian Competition Act (or TFEU[3]), or that there is a reasonable suspicion of such an infringement. Sometimes the GVH finds the application of this rule troublesome, because even if the Authority receives a tip-off from a tenderee, the information therein is not enough to launch an investigation. Besides, public procurers have difficulties detecting cartels, as cartel behaviour is a very complex form of infringement and very few procurement officials recognise such illegal conduct.

Perhaps a bigger problem is that there is great uncertainty among tendering authorities as to whether a procurement procedure should be deemed unsuccessful if the fairness of the procedure is reasonably questioned, for example in the case of a reasonable suspicion of bid rigging. The legislator has not fully clarified this issue. Not to mention the fact that procurement officials have an obligation to meet the strict deadlines in public procurement procedures that serve the efficient spending of taxpayers' money. Keeping deadlines and notifying the competition authority by delaying procurement procedures seem to result in a conflict situation, which causes difficulties for many tendering authorities.

There is also a lot of work to be done to raise awareness about the risks of bid-rigging in procurement procedures. The GVH – together with the Procurement Agency – certainly plays a great role in promoting competition by informing the public and

3. Treaty on the Functioning of the European Union, see under: http://ec.europa.eu/competition/antitrust/legislation/articles.html

procurement staff on bid rigging schemes and on the warning signs of these very harmful infringements.

2.3 Facilitation of private enforcement

In Hungary – just like in Europe in general but also like in some other parts of the world – it would be desirable if private enforcement had more importance and played a bigger role. There are well established opinions that among many other things one of the obstacles of the wider penetration of this means is the problem attached to the calculation of the damage and more importantly, to the problem attached to proving the amount of the damage by the claimant.

In Hungary there was an attempt to find a practical method which was suitable to facilitate private enforcement – at least from this point of view. In September of 2008, a new provision of the Competition Act entered into force which provided the possibility for victims of hard-core cartel activity to obtain compensation for damages without having to prove the sum of the loss suffered by the violation.

According to the new rule, there is a rebuttable presumption of 10 per cent as the level of the damage caused by the cartel. This 10 per cent was determined by studying the literature carefully. It was found that it seems almost entirely sure that any cartel activity influences the price to an extent of 10 per cent. Of course, if the plaintiff intends to obtain compensation that amounts to more than 10 per cent, it is also possible, but in such cases he/she will have to prove the actual amount of the damage.

The presumption is rebuttable, meaning that the cartel member from which the compensation is requested may prove that the amount of the damage is less than 10 per cent, or that there is no damage at all. This provision aims to release those who suffered losses caused by the cartel from proving the amount of the damage. But it is perhaps even more important that this provision switches the burden of proof, that is, the plaintiff of the damage claim does not have to prove the occurrence of the damage, only that he was directly affected by the cartel activity.

Unfortunately, at the GVH there is not a lot of information about the application of this provision. Obviously, this provision plays a role in private enforcement, both in stand alone and follow-on cases. The GVH only has very limited information about these situations as there is no direct feedback from civil courts to the GVH. This means that there may have been a few cases in the civil courts in which this provision of the Competition Act has been referred to that the GVH is currently unaware of. From another point of view, considering that this provision only entered into force in September of 2008 and that court proceedings last for several years, it may well be that no case has been closed with the application of this provision.

3. Conclusions

First, it is fair to state that in Hungary the appropriate legal background for the fight against cartels has been created and that this is also true in the case of the established institutional background.

Secondly, this does not mean that there are no problems, and can be evidenced by the relatively low number of cases. Making the Hungarian leniency policy more efficient can remedy this problem. As it has been described above, on the one hand, the problem emanating from the conflict between our leniency policy and the criminal plea bargaining system has to be solved. On the other hand, it is also very important

that the public is given more information about the harm caused by hard-core cartels. Such information should stress the importance of fighting cartels and also how the leniency policy works, for example, how leniency applications may be filed to the GVH.

A third conclusion is that the GVH ought to concentrate also on prevention. Competition Commissioner Almunia said at a conference in Berlin in 2011: "*Prevention when possible, repression when necessary*". I completely endorse this statement. The more a competition authority invests in prevention the more it may save in enforcement. Consequently, the GVH will have to focus much more on prevention in the near future. Actually, there is currently ongoing work in this respect: at the GVH there is a project running with which the compliance activities of undertakings will be facilitated. The compliance efforts of other national competition authorities such as Canada, the United Kingdom, Sweden and some more European Union Member States have been studied This work is in progress and perhaps by the end of 2012 the Hungarian compliance policy will be elaborated. To make it known for the target audience, the means of the competition culture policy will be actively used.

Chapter 6 Highlighting Key Elements Contributing to a Successful Anti-cartel Program

Highlighting Key Elements Contributing to a Successful Anti-cartel Program*

*Mark L. Krotoski***

1. Introduction

In the increasingly global economy, criminal antitrust enforcement remains essential to promote competition and protect consumers both domestically and internationally. From a law enforcement perspective, over time some elements have proven essential as part of an effective anti-cartel program. Some of these elements include the role of (1) transparency about applicable enforcement policies, (2) predictability and certainty in sentencing, (3) an effective leniency program to encourage early self-reporting at the risk of severe sanctions, and (4) international coordination and cooperation enforcement efforts. In tandem, these elements help reinforce the primary objectives of antitrust laws. After a brief review of the Sherman Act and summary of some of the unique challenges in criminal antitrust enforcement, each of these elements is considered below in the context of how they promote anti-cartel efforts.

1.1 Overview: criminal enforcement under the Sherman Act

In the United States, the Sherman Act continues to serve as a primary means to promote competition, protect consumers, and punish and deter *per se* criminal anticompetitive conduct.[1] As the U.S. Supreme Court observed long ago:

> The Sherman Act … rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[2]

Criminal antitrust enforcement focuses on *per se* (or so-called "hard core") violations which are reserved for conduct without any societal benefit.[3] *Per se* unlawful conduct

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* The views expressed do not necessarily reflect those of the United States Department of Justice.

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1. 15 U.S.C. § 1.
2. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).
3. As the Supreme Court has noted, "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render

includes price fixing, market allocation, and bid rigging. For example, price- fixing is well-recognized as *per se* unlawful because of its "pernicious effect on competition and lack of any redeeming virtue."[4] Because of the adverse impact of price- fixing on competition and consumers, justification evidence is inadmissible and irrelevant both at trial,[5] and at sentencing.[6]

The criminal penalties are reinforced with civil provisions which promote deterrence and compliance with the law. For example, a criminal conviction may be used as *prima facie* evidence of the anticompetitive conduct in a subsequent civil action.[7]

Civil parties may seek treble damages.[8] These statutory policies reflect a balanced approach to discourage and deter *per se* anticompetitive conduct with substantial criminal and civil consequences.

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unjustified further examination of the challenged conduct." *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U. S. 85, 103-04 (1984); *see also National Society of Professional Engineers v. United States*, 435 U. S. 679, 692 (1978) (agreements are *per se* illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

4. *Northern Pacific Railway*, 356 U.S. at 5 ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" including "price fixing, division of markets," and bid rigging.).
5. *See, e.g.*, *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.") (footnote omitted); *Northern Pacific Railway*, 356 U.S. at 5 (noting the "principle of *per se* unreasonableness … avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.").
6. *See, e.g.,* U.S.S.G. § 2R1.1 cmt. Background (noting price-fixing agreements are "so plainly anticompetitive that they have been recognized as illegal *per se*, i.e., *without any inquiry in individual cases as to their actual competitive effect*") (emphasis added).
7. *See* 15 U.S.C. § 16(a) (noting that a conviction in a "criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto").
8. 15 U.S.C. § 15 (permitting recovery of "threefold the damages … and the cost of suit, including a reasonable attorney's fee"); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.
   614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.").

1.2 Policy objectives confronting unique challenges

Against the statutory framework, the prosecution of Sherman Act violations presents unique challenges. Cartels are normally difficult to detect. By nature, the collusive conduct is secretive. The information about the price fixing, bid rigging or market allocation is typically restricted to a few individuals among competitors. Many cases involve sophisticated actors and executives. Participants may take affirmative steps to evade detection by law enforcement. For example, in a number of cases, co-conspirators have planned their meetings outside the United States to evade detection by law enforcement.

Given these challenges, policies can focus on both prevention and detection. First, anti-cartel enforcement efforts can seek to prevent *per se* unlawful conduct at the inception. Steps can be taken to promote a better awareness of the laws and an understanding of the risks and consequences for violating it.

Second, policies can be implemented to facilitate the detection of *per se* anticompetitive conduct. For example, as noted below, the Antitrust Leniency Program has been designed to impose a "threat of severe sanctions," heightened fear of detection, and transparency and predictability in enforcement.[9] This approach provides incentives for an executive or decision maker engaged in anti-competitive to disclose unlawful conduct. Some significant international cartels have been exposed and busted based on these policies.

2. Transparency role

Transparency about governing policies serves a key role as part of any anti-cartel program. Transparency promotes an understanding about the law, enforcement of the law, and the consequences for violating it. With this greater awareness about the process, predictable and certainty in enforcement encourages compliance with the law and cooperation with law enforcement officials.

Transparency promotes the criminal justice objectives of deterrence, retribution, rehabilitation, and incapacitation.[10] Information about the enforcement program may avert unlawful conduct at its inception or may contribute to the termination of ongoing anticompetitive conduct by cooperating with law enforcement (such as by participating in the Leniency Program).[11]

The Antitrust Division public website contains a wealth of information about recent cases, policies, and speeches. Transparency is provided about each phase of the criminal justice process.[12]

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9. *See* note 73, *infra*.
10. *See* note 23, *infra*.
11. The Leniency Program is described in Section IV, *infra*.
12. This policy of transparency has been in place for many years. Deputy Assistant Attorney General for Criminal Enforcement Scott D. Hammond has stated:
    The Division has sought to provide transparency in the following enforcement areas: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Leniency Program.

Much of the information about the criminal program is publicly available online,[13] including applicable statutes and guidelines,[14] model plea agreements,[15] and criminal policy speeches.[16] Specific policies about the conditional requirements to qualify for the Leniency Program are provided.[17] The model letters used as part of the conditional leniency process are available online[18] Press releases share information about case outcomes.[19] Public filings, including the case charges and plea agreements are available for many cases online.[20]

The public website also contains information about lodging a formal complaint about potential criminal conduct.[21] Transparency also includes outreach and education efforts which help promote awareness of the policies and consequences.

These transparency steps help promote both prevention and detection objectives. Information about enforcement policies and specific court and program documents is readily available. Consequently, an understanding about the risks and consequences is enhanced for criminal antitrust conduct.

3. Sentencing policies

The sentencing process serves a central role in promoting predictability and certainty in criminal antitrust enforcement. Individuals and companies should have a fair understanding about what punishment they are likely to face for criminal violations of the Sherman Act. This understanding provides context to the risk-reward calculus of decision makers who may contemplate price fixing, market allocation or bid rigging conduct. Sentencing predictability also advances the established criminal justice goals

13. Criminal enforcement information is available at: http://www.justice.gov/atr/public/criminal/index.html.
14. Statutory provisions and guidelines of the Antitrust Division are available at: http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf.
15. For the model corporate plea agreement, *see* http://www.justice.gov/atr/public/guidelines/corp_plea_agree.pdf; for the model individual plea agreement, see http://www.justice.gov/atr/public/guidelines/indl_plea_agree.pdf.
16. Criminal policy speeches are regularly updated online at: http://www.justice.gov/atr/public/speeches/speech-criminal.html.
17. Leniency Program policy documents are publicly available at: http://www.justice.gov/atr/public/criminal/leniency.html.
18. The model leniency letters include: (1) Model Corporate Conditional Leniency Letter; (2) Model Individual Conditional Leniency Letter; (3) Model Dual Investigations Leniency Letter used when the corporate leniency applicant is a subject, target, or defendant in another Antitrust Division investigation; and (4) Model Dual Investigations Acknowledgement Letter for Employees, which are available on the Leniency Program Page at http://www.justice.gov/atr/public/criminal/leniency.html.
19. Press releases for twenty years are available online at: http://www.justice.gov/atr/public/press_releases/2012/index.html.
20. Case filings for many cases since December 1994 are available at: http://www.justice.gov/atr/cases/index.html#page=page-1.
21. Information to lodge a complaint and how the report is handled is available at http://www.justice.gov/atr/contact/newcase.html.

of deterrence, retribution, rehabilitation and incapacitation.[22]

Four primary questions are raised about sentencing in criminal antitrust enforcement: (1) What are the maximum criminal penalties and related trends toward higher sentences? (2) What is the position of the U.S. Department of Justice for Sherman Act violations in the sentencing process? (3) What policies guide the Court's discretion and decision in imposing the sentence? (4) What are the trends concerning the sentences imposed in criminal antitrust cases over the past few decades?

3.1 Ongoing trend to increase the maximum penalties

On the first question, since the early 1970s, there has been a consistent effort in the United States to increase the criminal penalties for Sherman Act violations. One primary objective has been to promote greater deterrence in light of the serious nature of antitrust violations. These statutory increases have enabled significantly higher maximum prison terms and criminal fines.

In 1890, the original Sherman Act provided for maximum criminal penalties of one year as a misdemeanor and a $5,000 fine.[23] Sixty-five years later, in 1955, Congress increased the original fine of $5,000 to $50,000.[24] Congress and others later realized that a misdemeanor conviction and modest fine were inadequate to deter *per se* anticompetitive conduct.

As summarized below, during the thirty years between 1974 and 2004, the criminal fines under the Sherman Act were increased through a series of amendments from a maximum of $50,000 to $100 million for corporations, and from $50,000 to $1 million for individuals. The Alternative Fines Act further allowed for fines in excess of $100 million based on twice the gross pecuniary gain or gross pecuniary loss from the offense.[25] The maximum period of incarceration increased from one year, as a misdemeanor, to ten years, as a felony. These higher criminal penalties have allowed the Antitrust Division to prosecute and seek and courts to impose significantly stronger punishment for *per se* unlawful conspiracies.

22. *See, e.g.*, *Tapia v. United States*, 564 U.S. _, 131 S.Ct. 2382, 2387–88, 180 L.Ed.2d 357 (2011) (listing "retribution, deterrence, incapacitation, and rehabilitation" as "the four purposes of sentencing generally"); *see also United States v. Dyer*, 216 F.3d 568, 570 (7th Cir.2000) ("The principal objectives of criminal punishment that guide the design and application of the federal sentencing guidelines are retribution, deterrence, and incapacitation.") (citing, *inter alia*, 18 U.S.C. §§ 3553(a), (b)).
23. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal" and subject to a misdemeanor conviction punishable 'by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both…") (codified at 15 U.S.C. § 1).
24. *See* Act of July 7, 1955, ch. 281, 69 Stat. 282. *See also* H. Rep. No. 84-70, 84th Cong., 2nd Sess. 5 (1955) ("Under existing laws the deterrent effect of a $5,000 fine against a large corporation is almost negligible except for the stigma of conviction.").
25. *See* Section III(A)(2), *infra*.

3.1.1 Summary Of amendments resulting in higher criminal penalties during 1974 to 2004

In the Antitrust Procedures and Penalties Act of 1974, Congress elevated Sherman Act convictions from a misdemeanor to felony.[26] The amendment tripled the maximum period of incarceration for individuals from one to three years. The maximum fine was increased twenty fold to $1 million for corporations and doubled to $100,000 for individuals.

Sixteen years later, in the Antitrust Amendments Act of 1990, Congress increased the maximum fine for antitrust convictions for individuals to $350,000.[27] The maximum criminal fine for corporations was increased to $10 million.[28]

Fourteen years later, in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Congress increased the maximum corporate fine for Sherman Act criminal violations by ten fold, from $10 million to $100 million.[29] At the same time, fines for individuals were nearly tripled, from $350,000 to a maximum of $1 million. The maximum prison term for individuals was also increased from three years to ten years.

In response to the higher statutory penalties in 2004, the Sentencing Guideline Commission increased the recommended penalties for antitrust offenses under the Sentencing Guidelines in 2005.[30] The sentencing amendment was adopted in direct response to "congressional concern about the seriousness of antitrust offenses and provide[d] for antitrust penalties that are more proportionate to those for sophisticated frauds…."[31]

3.1.2 Alternative Fines Act: 18 U.S.C. § 3571(d)

Supplementing the higher penalties specified in the Sherman Act, the Alternative Fines

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26. *See* Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (establishing violations of the Sherman Act as felonies) (codified at 15 U.S.C. § 1); *see also* H. Rep. No. 93-1463, 93rd Cong., 2d Sess. 10 (1974) (noting purpose to "increase[] the maximum fine levels for all federal criminal offenses except petty offenses"), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6535, 6540; S. Rep. No. 93-298, 93rd Cong., 1st Sess. 4 (1973).
27. In 1984, Congress increased the maximum fine for individuals for most felony offenses to $250,000. *See* Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134, 3137 (Oct. 30, 1984) (codified at 18 U.S.C. § 3623) (repealed in 1987); *see also* H. Rep. No. 98–906, 98th Cong., 2d Sess. 15 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5433, 5448.
28. Pub. L. No. 101–588, § 4, 104 Stat. 2879, 2880 (Nov. 16, 1990) (codified at 15 U.S.C. § 1); *see also* H. Rep. 101-287, 101st Cong., 1st Sess. 1 (1989).
29. Pub. L. No. 108-237, § 215, 118 Stat. 665, 665-66, 668 (2004) (codified at 15 U.S.C. § 1).
30. The penalties included a higher base offense level and adjustments to the volume of commerce table. *See* 2005 Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, 5-7 (April 29, 2005) (concerning U.S.S.G. app. C., amend. 678), *available at* http://www.ussc.gov/Legal/Amendments/Official_Text/20050429_Amendments.pdf.
31. *Id.* at 7.

Act, 18 U.S.C. § 3571(d),[32] permits criminal fines in excess of $1 million dollars for individuals or $100 million for companies. Under this section, an alternative maximum fine of twice the gross gain or gross loss from the offense may be imposed.[33]

This federal provision, which was based on the Model Penal Code and other statutes,[34] was originally enacted in 1984 as part of a congressional effort to "make criminal fines a tougher punishment."[35] As noted in the House Report, "The most effective way to ensure that the wrongdoer does not profit is to base the fine upon the pecuniary gain of the defendant."[36] Larger fines against organization were recognized as necessary "since organizations generally have greater resources than individuals," and since organizations cannot be incarcerated significant fines could deter criminal conduct by corporations.[37]

3.1.2.1 Southern Union decision

The Supreme Court recently considered Section 3571(d) and other criminal fine provisions which increase the fine above the statutory maximum.[38] The Court

32. Section 3571(d) provides:
ALTERNATIVE FINE BASED ON GAIN OR LOSS. - If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.
33. Section 3571(d) was enacted in the Criminal Fine Improvements Act of 1987, § 6, P.L. 100-185, 101
Stat. 1280 (Dec. 11, 1987). According to the House Report, the provision retained the standard under 18 U.S.C. § 3623(c)(1) (1984), and expanded the application to situations in which "the defendant knows or intends that his conduct will benefit another person financially." H. Rep. No. 100–390, 100th Cong., 1st Sess. 6 (1987). The earlier version of the statute, under 18 U.S.C. § 3623(c)(1) (1984), provided:
If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. (repealed Nov. 1, 1987).
34. Model Penal Code (First), § 6.03(5) (fines above specified ceiling amounts may be in "any higher amount equal to double the pecuniary gain derived from the offense by the offender"); H. Rep. No. 98–906, 98th Cong., 2d Sess. 17 (1984) (citing other statutes that increase the criminal fine based on a multiple of the loss to the victim or gain to the offender), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5433; *see also Southern Union Company v. United States*, 567 U.S. _, n.4, 132 S.Ct. 2344, 2351 n.4 (2012) (citing 18 U. S. C. § 645 (embezzlement fine by officers of United States courts up to twice the value of the money embezzled);§ 201(b) (fine for bribery of public officials of up to three times the value of the bribe).
35. H. Rep. No. 98–906, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5433.
36. *Id*. at 17.
37. *Id*.
38. *See Southern Union Company v. United States,* 567 U.S. _, 132 S.Ct. 2344, 183

specifically noted that Section 3571(d) had "been used to obtain substantial judgments against organizational defendants," including a $400 million fine in a criminal antitrust case, along with other criminal fines.[39] The recent decision clarifies that a jury must make a finding that the facts support a higher fine imposed under Section 3571(d).

3.1.2.2 Case examples applying section 3571(d)

To date, the Antitrust Division has used the Alternative Fines Act provision to obtain twenty corporate fines exceeding $100 million dollars.[40] These fines have been imposed since 1996 through the present.

A couple of case examples are noted. The highest fine to date resulted in the 1999 prosecution of the Swiss pharmaceutical company F. Hoffmann-La Roche, Ltd. which agreed to pay a $500 million criminal fine for conspiring to raise and fix prices and allocate market shares for certain vitamins.[41] The same case resulted in a criminal fine of $225 by German firm BASF Aktiengesellschaft for participating in the same vitamin conspiracy.[42]

More recently, this year, the Antitrust Division obtained a $470 million criminal penalty against the Yazaki Corporation, a Japanese supplier of automotive electrical components.[43] Additional convictions and fines have been obtained as part of this ongoing investigation. These cases demonstrate that the Antitrust Division can and will use the Alternative Fine Provision where it can establish the twice the gain or loss resulting from the pecuniary gain of the offense.

3.1.3 Summary

The congressional trend to increase the maximum penalties over the past few decades reflects the need to send a strong message that criminal anti-competitive conduct will be subject to strict punishment. As the maximum criminal penalties have increased under law, the criminal penalties have risen in criminal prosecutions. It is generally

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L.Ed.2d 318 (June 21, 2012) (No. 11-94).

39. *See Southern Union Company*, 567 U.S. at _, 132 S.Ct. at 2351-52 (2012) (citing $400 million corporate fine in the Amended Judgment in *United States v. LG Display Co., Ltd.*, No. 08–CR–803–SI (ND Cal.) (involving a Korean corporation)).
40. *See* Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (June 21, 2012), *available at* http://www.justice.gov/atr/public/criminal/sherman10.pdf.
41. *See United States v. F. Hoffmann-La Roche, Ltd.*, Criminal Case No. 99-CR-184-R (ND Texas May 20, 1999). For the information alleging the charge, *see* http://www.justice.gov/atr/cases/f2400/2452.pdf; for the plea agreement *see* http://www.justice.gov/atr/cases/f2400/hoffman.pdf.
42. *See United States v. BASF Aktiengesellschaft*, Criminal Case No. 3:99-CR-200-R (ND Texas May 20, 1999). For the information alleging the charge, *see* http://www.justice.gov/atr/cases/f2400/2453.pdf; for the plea agreement *see* http://www.justice.gov/atr/cases/f2400/basf.pdf.
43. *See United States v. Yazaki Corp.*, Criminal Case No. 2:12-cr-20064-DML-MKM (ED Michigan March 1, 2012). For the information alleging the three charges, *see* http://www.justice.gov/atr/cases/f280000/280050.pdf; for the plea agreement *see* http://www.justice.gov/atr/cases/f280600/280689.pdf; and for the case press release, *see* http://www.justice.gov/atr/public/press_releases/2012/279734.pdf.

recognized around the world that higher penalties promote deterrence and the objectives of criminal antitrust enforcement. Increased penalties in other countries have been identified as a key factor in antitrust enforcement efforts.[44] These responses from other countries are consistent with the experience in the United States.

3.2 Position of the antitrust division during the sentencing process

A second important element advancing predictability and certainty in sentencing concerns how the Department of Justice will respond with respect to sentencing during a criminal prosecution. The Antitrust Division is committed to clear and consistent enforcement. The position of the Division is reinforced in a variety of public statements and in cases.

At sentencing, the government will be asked for its position on the recommended sentence. The policy of the Antitrust Division is to request prison terms "for *all defendants domestic and foreign*."[45] While the final sentence imposed will ultimately be up to the court, the prosecutors will consistently urge the court to impose prison terms. As Congress has recognized, strong criminal penalties are necessary to promote deterrence given the pernicious nature of the criminal *per se* unlawful violations. The Division also pursues policies which expose a larger number of culpable decision makers, typically executives, to criminal prosecution.[46]

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44. *See, e.g.*, Trends and Developments in Cartel Enforcement Presented at the NinthAnnual ICN Conference in Istanbul, Turkey, at 5, 6 (April 29, 2010) (surveying 46 jurisdictions on enforcement issues) (43 of 46 countries listing "increased penalties" as one of the "changes/developments" in "competition law [that] have impacted" the country's "cartel enforcement program over the last 10 years"), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf.

    The 46 surveyed countries included: (1) Argentina; (2) Australia; (3) Austria; (4) Brazil; (5) Bulgaria; (6) Canada; (7) Chile; (8) Croatia; (9) Cyprus; (10) Czech Republic; (11) Denmark; (12) Egypt; (13) El Salvador; (14) Estonia; (15) European Union; (16) Finland; (17) France; (18) Germany; (19) Greece; (20) Hungary; (21) Ireland; (22) Israel; (23) Japan; (24) Jersey; (25) Korea; (26) Mexico; (27) Mongolia; (28) Netherlands; (29) New Zealand; (30) Norway; (31) Pakistan; (32) Panama; (33) Peru; (34) Poland; (35) Portugal; (36) Romania; (37) Russia; (38) South Africa; (39) Spain; (40) Sweden; (41) Switzerland; (42) Taiwan; (43) Turkey; (44) United States; (45) United Kingdom; and (46) Vietnam.

45. Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," at 7 (Feb. 25, 2010) (hereinafter "Evolution of Criminal Antitrust Enforcement") (emphasis in original); *id*. ("The Division will not agree to a 'no-jail' sentence for any defendant, and our practice is not to remain silent at sentencing if a defendant argues for a no-jail sentence."); *see also* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, "Charting New Waters in International Cartel Prosecutions," at 16 (March 2, 2006) (noting Division policy of "insist[ing] on jail sentences for *all defendants* – domestic and foreign") (hereinafter "Charting New Waters"), *available at* http://www.justice.gov/atr/public/speeches/214861.pdf.

46. Charting New Waters, *supra* note 46, at 17 ("Individuals excluded from the non-prosecution coverage can include culpable employees, employees who refuse

As already noted, with regard to corporations, the Antitrust Division has a track record of seeking and obtaining large criminal fines. In terms of predictability and certainty, potential violators of the Sherman Act can understand that the Antitrust Division will seek strong and appropriate punishment at sentencing.

3.3 Judicial sentencing policies

On the third issue, what policies guide the courts in deciding a fair and appropriate sentence for criminal Sherman Act violations? For antitrust cases, the relevant sentencing policies provide a presumption for incarceration and significant fines given the serious nature of the offense.

3.3.1 sentencing process overview

As a threshold matter, to understand the sentencing policies, it is useful to consider the process under which sentences are imposed. In 2005, in a landmark ruling, the Supreme Court gave more discretion to district courts to determine a final criminal sentence.[47] Certain sentencing policies or guidelines have been established to guide the court's discretion in imposing a sentence following an antitrust conviction.

Under current law, there are two primary parts to the sentencing process. Under the first part, the district court applies the U.S. Sentencing Guidelines to determine an initial sentence.[48] "As a matter of administration and to secure nationwide consistency," the Supreme Court has held, "the [Sentencing] Guidelines should be the starting point and the initial benchmark."[49]

After this threshold determination under the advisory Sentencing Guidelines, as part of the second sentencing phase, the court considers a number of specific sentencing

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to cooperate with the Division's investigation, and employees against whom the Division is still developing evidence.").

47. *See United States v. Booker*, 543 U.S. 220 (2005). Prior to 2005, criminal sentences were imposed within a sentencing range unless aggravating or mitigating circumstances were not adequately taken into account. Congress enacted the Sentencing Guideline system to address the problem of sentencing disparity. As noted in the Senate Report, federal judges were imposing "an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of Probation, while another-- convicted of the very same crime and possessing a comparable criminal history -- may be sentenced to a lengthy term of imprisonment." S. Rep. No. 98-225, 98th Cong., 1st Sess. 38 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.
48. The Sentencing Guidelines were promulgated pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 1995 (Oct. 12, 1984); *see also* 28 U.S.C. § 994(a). Amendments to the Sentencing Guidelines are submitted to the Congress not later than the first day of May each year under 28 U.S.C. § 994(p). Current and past proposed amendments are available at http://www.ussc.gov/Guidelines/Proposed_Amendments.cfm.
49. *Gall v. United States*, 552 U.S. 38, 41 (2007); *see also Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (noting that "district courts must treat the Guidelines as 'starting point and the initial benchmark'" in imposing sentence).

factors.[50] During this phase, the sentencing court may exercise its discretion in whether to depart from the initial guidelines sentence. The sentencing factors include the nature and circumstances of the offense, history and characteristics of the defendant, the need to reflect the seriousness of the offense, deterrence, the need to protect the public, the need to avoid unwarranted disparity in sentences, and the need for restitution.[51]

3.3.2 Sentencing guideline policies for courts

In the sentencing process, certain sentencing policies guide the court's discretion in determining the sentence. First, the sentencing policies recognize the serious nature of criminal antitrust violations. As the Guidelines note on this point:

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, i.e., without any inquiry in individual cases as to their actual competitive effect.[52]

Second, given the pernicious and anti-competitive nature of the antitrust offense, there is a presumption in favor of at least some period of incarceration for individuals. As noted by the Sentencing Commission, "terms of imprisonment are ordinarily necessary for antitrust violations because they 'reflect the serious nature of and the difficulty of detecting such violations.'"[53] On this point, the commentary notes to the applicable sentencing provision for bid-rigging, price-fixing and market-allocation agreements, recognize: "Absent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases."[54] Other options to incarceration are disfavored, recommending that

50. 18 U.S.C. § 3553(a).
51. *Id*.
52. U.S.S.G. § 2R1.1 cmt. Background.
53. Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762, 22,775 (May 16, 1991) (quoted in *United States v. Vandebrake*, 771 F.Supp.2d 961, 1009 (N.D. Iowa 2011) (noting the applicable guideline "policy statements" support that the defendant be "sentenced to a period of incarceration"), *aff'd*, 679 F.3d 1030 (8th Cir. 2012).
54. The commentary provides:
    Under the guidelines, *prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice*. Absent adjustments, the guidelines require some *period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases*. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, *in very few cases will the guidelines not require that some confinement be imposed*. Adjustments will not affect the level of fines.
    U.S.S.G. §2R1.1, note 7 (emphasis added); *see also* U.S.S.G. Ch.1, Pt. A (Introduction and Authority), introductory cmt. 4(d) (Probation and Split Sentences) ("Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, *antitrust offenses*, insider trading, fraud, and embezzlement, that

"alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders."[55]

As a practical matter, in criminal antitrust cases the sentence is largely driven by the volume of commerce[56] The higher the volume of commerce, the greater the likelihood that a prison term may be imposed.[57]

Consistent with these sentencing policies, a number of courts have recognized that the Sentencing Commission policies warrant stronger punishment in criminal antitrust cases.[58] As further reflection of these sentencing policies, in many cases, the parties

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in the Commission's view are '*serious*.'") (emphasis added).

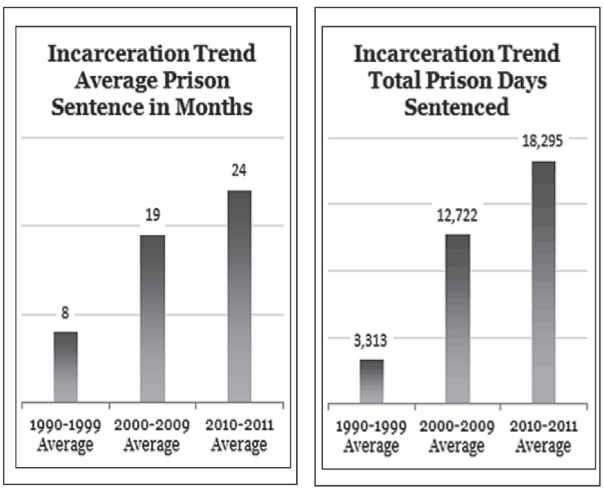
55. U.S.S.G. §2R1.1, note 5.
56. Under U.S.S.G. § 2R1.1(b)(2), the volume of commerce used is "the volume of commerce done by him or his principal in goods or services that were affected by the violation." The volume of commerce affected is that which the conspiracy "acts upon or influences negotiations, sale prices, the volume of goods sold, or other transactional terms" even when the conspirators fall short of their specific goals or targets. *United States v. SKW Metals & Alloys, Inc.*, 195 F. 3d 83, 90 (2d Cir. 1999); *see also United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001) (applying a rebuttable presumption that all sales during the conspiracy were affected by the conspiracy); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 89-90 (2d Cir. 1999) (holding that a "price-fixing conspiracy can affect prices even when it falls short of achieving the conspirators' target price"); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995) (concluding that all sales made within the conspiracy period affected commerce "without regard to whether individual sales were made at the target price"). Congress has indicated its continued support for the volume of commerce determination. 150 CONG. REC. H3658 (June 2, 2004) ("Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy.") (Reps. Sensenbrenner and Conyers).
57. *See* U.S.S.G. § 2R1.1(b)(2) (listing higher adjustments for different levels of volume of commerce).
58. *See, e.g.*, *United States v. Rattoballi*, 452 F.3d 127, 135 (2d Cir. 2006) ("The Guidelines reflect a considered determination by the Commission that jail terms are the most effective deterrent for antitrust violations.") (citing U.S.S.G. § 2R1.1 cmt. background) (reversing non-incarceration sentence for Sherman Act conviction); *United States v. Haversat*, 22 F.3d 790, 797 (8th Cir. 1994) ("The Sentencing Commission has emphasized that the sentencing court should impose some confinement in all but the rarest criminal antitrust cases.") (citing U.S.S.G. § 2R1.1 cmt. background); *Vandebrake*, 771 F.Supp.2d at 1009 ("[T]he court takes into account the Sentencing Commission's view 'that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.' U.S.S.G. § 2R1.1, cmt. n. 5. The Guidelines reflect a considered determination by the Sentencing Commission that terms of incarceration are viewed as the most effective deterrent for antitrust violations. *See id.* § 2R1.1 cmt. background (stating that 'in very few cases will the guidelines not require that some confinement be imposed')); *United States v. Vandebrake*, 771 F.Supp.2d 961, 1009 (N.D. Iowa 2011) ("The Guidelines reflect a considered determination by the Sentencing Commission that terms of incarceration are viewed as the most effective deterrent for antitrust violations."), *aff'd*, 679 F.3d 1030 (8th Cir. 2012).

have recommended strong fines and prison terms to resolve the prosecution and which have been accepted by the court.

3.4 Sentencing trends in antitrust cases

Given the congressional and Sentencing Commission policies in support of higher punishment for antitrust criminal violations, what do the actual sentencing trends show since the 1990s?

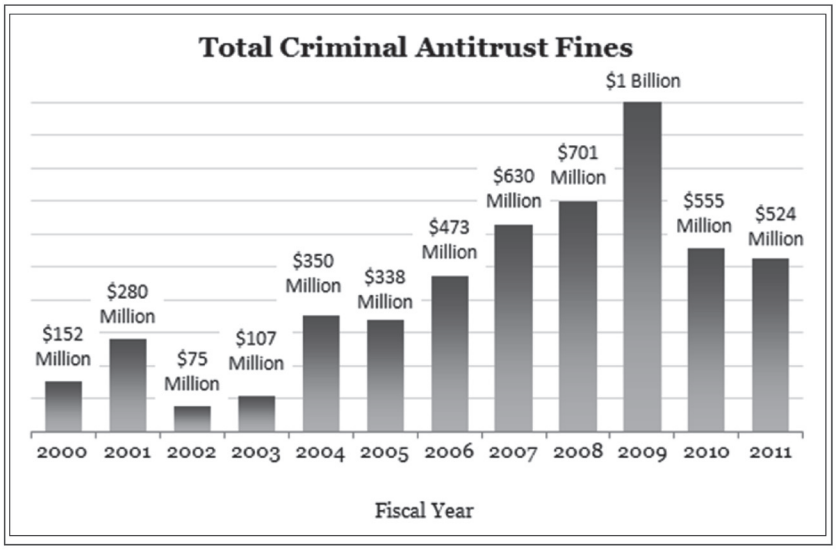
For individuals, there is a clear trend for longer periods of incarceration. About half of the U.S. citizens convicted of antitrust violations have received a prison term of at least one year. Recent information shows that longer periods of incarceration have been imposed since the 1990s in terms of average prison sentenced by month or total prison days:[59]



source: http://www.justice.gov/atr/public/criminal/264101.html

Since 2000, criminal antitrust fines have increased over the past eleven years. In the beginning of the decade, the total fines were around $100 million per year. In recent years, the total fines have exceeded $500 million each year since 2007, including about $1 billion in 2009:

59. The charts are publicly available and updated at: http://www.justice.gov/atr/public/criminal/264101.html.



Source: http://www.justice.gov/atr/public/criminal/264101.html

In sum, these trends in practice are consistent with congressional and sentencing policies for higher penalties to be imposed on individuals and corporations in criminal antitrust cases.

4. Leniency program

4.1 Antitrust Division leniency program: overview

The Corporate Leniency Program has been described as the Antitrust Division's "most effective investigative tool,"[60] and for good reason. In recent years, under the Leniency Program, "the Antitrust Division has seen a nearly twenty-fold increase in the leniency application rate." For example, during the period from fiscal year 1996 through early 2010, "[i]n the United States, companies have been fined more than $5 billion for antitrust crimes … with over 90 percent of this total tied to investigations assisted by leniency applicants," and more than half of the international cartel investigation "initiated" or "advanced" based on "information received from a leniency applicant."[61] In comparing the last four decades, the following criminal antitrust fines were collected:[62]

60. Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 3.
61. Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 3.
62. *Id*. at 5.

Decade	Total Criminal Fines Collected
1970-1979	$48 Million
1980-1989	$188 Million
1990-1999	$1.6 Billion
2000-2009	$4.2 Billion

The current Corporate Leniency Program was adopted in August 1993,[63] after the terms of the 1978 program were modified.[64] An Individual Leniency Policy was issued in August 1994.[65]

4.2 Conditional requirements

While the details of the Leniency Program are publicly available and fully described on the Antitrust Division website,[66] generally there are two conditional corporate leniency options. "Type A" Leniency applies where there is no pre-existing investigation,[67] and is automatic upon satisfaction of six conditions.[68] The program imposes an obligation

63. *See* Corporate Leniency Policy (issued August 10, 1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf.
64. *See generally* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, and Belinda A. Barnett, Senior Counsel "Frequently Asked Questions Regarding The Antitrust Division's Leniency Program And Model Leniency Letters," (November 19, 2008) (hereinafter "Leniency Program FAQ"), *available at* http://www.justice.gov/atr/public/criminal/239583.pdf.
65. *See* Leniency Policy For Individuals (Aug. 10, 1994), *available at* http://www.justice.gov/atr/public/guidelines/0092.pdf. Three conditions apply for individual applicants:
    (1) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
    (2) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
    (3) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.
    Id.; *see also* Leniency Program FAQ, *supra* note 65, at 21 (Question 24) (noting leniency criteria for individuals).
66. *See generally* Leniency Program FAQ, *supra* note 65.
67. *See generally id*. at 4 (Question 3) (describing Type A and Type B Leniency).
68. The six conditions include:
    (1) At the time the corporation comes forward, the Division has not received information about the activity from any other source.
    (2) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.
    (3) The corporation reports the wrongdoing with candor and completeness and

of candor and continuing and complete cooperation.

"Type B" Leniency covers those circumstances where (a) the requirements of Type A Leniency are not met, or (b) the Division may already be aware of the antitrust activity. Seven conditions must be satisfied to qualify for Type B Leniency.[69]

Under either type of leniency, only the first company to satisfy the conditions may be granted leniency.[70] Under both leniency options, the applicant must admit to core cartel conduct, among other requirements.[71]

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provides full, continuing, and complete cooperation to the Division throughout the investigation.

(4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(5) Where possible, the corporation makes restitution to injured parties.

(6) The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

See Corporate Leniency Policy, at 1-2 (August 10, 1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf; Leniency Program FAQ, *supra* note 65, at 4 (Q3) (conditions for Type A leniency).

69. The seven conditions include:

(1) The corporation is the first to come forward and qualify for leniency with respect to the activity.

(2) At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.

(3) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.

(4) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.

(5) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(6) Where possible, the corporation makes restitution to injured parties.

(7) The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward.

See Corporate Leniency Policy, at 2-3 (August 10, 1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf; Leniency Program FAQ, *supra* note 65, at 4 (Q3) (conditions for Type B leniency).

70. *Id*. at 5-6 (Question 4) ("Under both Type A and Type B, only the first qualifying corporation may be granted leniency for a particular antitrust conspiracy.").

71. Antitrust Corporate Leniency Policy, ¶¶ 3-4 (1993) ("The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;"), *available at* http://www.justice.gov/atr/public/guidelines/0091.htm; *see also* Leniency Program FAQ, *supra* note 65, at 6 (Q5) (noting "the applicant must admit its participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes before it will receive a conditional leniency letter"); *id* at 21 (Q24) ("As with a corporate applicant, an individual

4.3 Core attributes promoting enforcement objectives

The Antitrust Division Leniency Program is carefully designed to impose a "threat of severe sanctions," heightened fear of detection, and transparency and predictability in enforcement.[72] These three core attributes foster a variety of races in criminal enforcement.

First there is the race among competitors to be the first to cooperate with prosecutors. The first company to report will be assured of its position through the "marker" system.[73] The marker system prevents "leapfrogging" and provides time for the applicant to obtain sufficient information to show that the conditions have been met.

Second, there is a race that may result by the individual employee in advance of the company. The consequences of this race are significant to the leniency applicant. None of the cartelists will know if one of their competitors have raced to cooperate with prosecutors under the Leniency Program

4.4 Benefits and efficiencies

The Leniency Program promotes a number of benefits and efficiencies in criminal enforcement. Anticompetitive conduct may be detected that may otherwise have not been uncovered. This detection applies not only to the reported conduct, but also related and further criminal activity. For example, cooperation under the Leniency Program has resulted in the identification of other unknown cartel investigations in a number of instances.

If the unlawful conduct is reported during an ongoing cartel, proactive investigative steps can be taken to gather further evidence. Recorded conversations may be possible to obtain current communications about the cartel activity. Broader access to documents and witnesses may result. This information may supplement historical evidence concerning the cartel activities.

Enforcement resources can be conserved and directed on the suspected hard core conduct. The investigation can determine who are the decision-makers in the anti-competitive conduct and learn how the cartel operates and implements the conspiracy agreements.

Significantly, detection of the cartel's activities clearly terminates the harm to consumers and promotes the objectives of the Sherman Act. The criminal justice process can be used to redress the harm through appropriate penalties and possible

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leniency applicant is required to admit to his or her participation in a criminal antitrust violation.") (citation omitted).

72. Three cornerstones have been identified as part of a successful leniency program:
First, the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hard core cartel activity and fail to self-report. Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency, and what the consequences will be if they do not.
Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 3-4.
73. Leniency Program FAQ, *supra* note 65, at 3-4 (describing marker process).

follow-on civil actions which may allow victims to seek civil recovery.[74]

4.5 Summary

The Leniency Program has proven to be an indispensible part of antitrust criminal enforcement. As noted, the Leniency Program has successfully led to the detection of some very large international cartels. Not surprisingly, leniency programs in other countries have also been seen to have a favorable impact on enforcement efforts.[75]

5. International issues

Another important aspect involving the enforcement of antitrust laws is the ability to reach across borders. This feature is essential given the increasing global markets. Cartelists should not feel that they have safe harbors to protect them.

Foreign nationals are not beyond the reach of the U.S. antitrust laws. Since May 1999, 57 foreign defendants have served, or are serving, prison sentences in the United States for participating in an international cartel or for obstructing an investigation of an international cartel.

The Antitrust Division remains committed to using a variety of tools to hold violators of the Sherman Act accountable even if they reside outside the United States. Some of the tools include (a) the use of red notices and border watches; (b) the extradition process; and (c) cooperation with our international partners.

5.1 Use of red notices and border watches

After an investigation, charges may be brought based on violations of the Sherman Act. Some individuals may already be outside the United States or may try to evade arrest by leaving the country.

The Antitrust Division uses international law enforcement channels to apprehend fugitives. For example, since 2001, the Division adopted a policy of placing indicted

74. Under Section 5 of the Clayton Act, 15 U.S.C. § 16, a final criminal antitrust judgment provides "*prima facie* evidence against" the defendant "in any action or proceeding brought by any other party" and provides "an estoppel as between the parties thereto." This is a unique public policy balance struck by the Congress. *See United States v. David E. Thompson, Inc*., 621 F.2d 1147, 1150 n.4 (1st Cir. 1980) (Section 5 of the Clayton Act "makes a criminal judgment in an antitrust case *prima facie* evidence in a subsequent civil action."); *see generally Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc,* 473 U.S. 614, 652 (1985) ("The unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress. Since its enactment in 1890, the Sherman Act has provided for public enforcement through criminal as well as civil sanctions.").

75. *See, e.g.*, Trends and Developments in Cartel Enforcement Presented at the NinthAnnual ICN Conference in Istanbul, Turkey, at 5, 6 (April 29, 2010) (surveying 46 jurisdictions on enforcement issues) (35 of 46 countries listing leniency provisions as one of the "changes/developments" in "competition law [that] have impacted" the country's "cartel enforcement program over the last 10 years"), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf.

fugitives on a 'Red Notice' list maintained by INTERPOL,"[76] which is comparable to an "international arrest warrant."[77] The International Criminal Police Organization (INTERPOL) now consists of 190 countries which assist one another on law enforcement issues.[78]

As another tool, the Antitrust Division places foreign witnesses and defendants on border watches.[79] The border watch alerts the government about their entry into the United States.

These tools allow the Antitrust Division to be alerted to the travel of criminal defendants abroad or at the border. Once the individuals are detected, they may be subject to arrest and brought to the United States to face the charges.

5.2 Extradition process

Supplementing red notices or border watches, the extradition process provides an established avenue to bring defendants abroad to the criminal justice system in the United States. Extradition is permitted under the specific terms of a treaty entered by the United States and country where the individual is found.

The Antitrust Division has successfully used the extradition process to extradite individuals abroad on charges filed in the United States. These extraditions have been accomplished based on Extradition Treaties between the United States and Israel and the United Kingdom.[80]

In February 2012, an owner of an insulation service company based in New York City was extradited from Israel based on charges of conspiring to rig bids on contracts for re-insulation services to New York Presbyterian Hospital (NYPH), conspiring to defraud the Internal Revenue Service (IRS) and filing a false tax return. In July 2012, he pled guilty to these charges.[81]

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76. Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 14 ("A red notice watch is essentially an international 'wanted' notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have been apprehended through a Division INTERPOL red notice."); *see also* Charting New Waters, *supra* note 46, at 9 (describing policy of using Interpol Red Notices).
77. U.S. Department of Justice, Criminal Resource Manual 611 ("An Interpol Red Notice is the closest instrument to an international arrest warrant in use today."), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00611.htm.
78. Connecting Police For A Safer World, INTERPOL Annual Report, at 5 (2011) (noting "in 2011, INTERPOL also grew in size and strength, reaching 190 members with the addition of three new countries - Curaçao, Sint Maarten and South Sudan"); *see also* INTERPOL Website, available at http://www.interpol.int/About-INTERPOL/Overview.
79. Charting New Waters, *supra* note 46, at 7.
80. *See generally* Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011, United States Department of State, *available at* http://www.state.gov/documents/organization/169274.pdf.
81. *See* Indictment filed in *United States v. David Porath and Andrzej Gosek*, No. 10-CR-120 (SDNY Feb. 18, 2010), available at http://www.justice.gov/atr/cases/f257600/257638.pdf; Plea Agreement in *United States v. David Porath*, No. 10-CR-120 (SDNY Feb. 18, 2010); *see also* Press Release: Owner Of Insulation Service

In March 2010, a former chief executive officer of a publicly-held corporation based in the United Kingdom was extradited to the United States based on obstruction of justice charges related to a federal grand jury investigation into the price fixing of carbon brushes and other carbon products. The defendant was convicted at a jury trial and sentenced to serve 18 months in prison.[82] His conviction was affirmed on appeal.[83]

These cases demonstrate the ability and commitment of the Antitrust Division to use the extradition process to hold individuals to account in the criminal justice process in the United States on charges.

5.3 International coordination

The United States will continue to cooperate with our international partners to the extent possible in criminal antitrust enforcement. A number of avenues will be pursued.

Many countries have recognized the importance of bilateral agreements. In 1994, Congress enacted the International Antitrust Assistance Act of 1994 ("IAEAA"),[84] which authorizes the Antitrust Division and the Federal Trade Commission to enter into bilateral antitrust mutual assistance agreements with foreign governments. Under these agreements, the countries will commit to use their investigative powers (such as subpoenas) to obtain evidence for use by foreign antitrust authorities.

Where possible, the Antitrust Division will continue to pursue joint enforcement opportunities with our foreign partners. For example, this has included the execution of simultaneous search warrants in multiple jurisdictions to obtain a substantial amount of evidence. These coordinated efforts have proven effective in seizing cartel evidence that may have otherwise been difficult to obtain.

While there are more than 50 countries with Leniency Programs, most have confidentiality provisions which are honored. We have seen a number of instances in which the leniency applicant has elected to waive the confidentiality provisions which has permitted enforcement agencies to discuss common issues.

In sum, international cooperation has proven effective in past cases to address international cartels. The Antitrust Division remains committed to pursuing cooperative efforts where possible to maximize enforcement efforts.

Company Pleads Guilty To Million Dollar Bid-Rigging And Fraud Conspiracies At New York City Hospital (July 11, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/285024.docx; *see generally* Charting New Waters, *supra* note 46, at 10-12 (discussing extradition steps taken in the United Kingdom in the *Norris* case).

82. *See* Second Superseding Indictment filed in *United States v. Ian P. Norris*, No. 03-632 (EDPA Sept. 28, 2004), *available at* http://www.justice.gov/atr/cases/f206000/206064.pdf; *see also* Press Release: Former CEO Of The Morgan Crucible Co. Sentenced To Serve 18 Months In Prison For Role In Conspiracy To Obstruct Justice (Dec. 10, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/265028.pdf; Press Release: Former CEO Of The Morgan Crucible Co. Found Guilty Of Conspiracy To Obstruct Justice (July 27, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/260826.pdf.
83. *See United States v. Norris*, No. 10-4658 (3d Cir. March 23, 2012), available at http://www.justice.gov/atr/cases/f268800/268813.pdf.
84. Pub. L. No. 103-438, 108 Stat. 4597 (Nov. 2, 1994) (codified at 15 U.S.C. §§ 6201-6212).

6. Conclusion

There are a variety of components that contribute to successful antitrust enforcement. Certainly, these elements can be tailored appropriately to any enforcement program to take into account other policy consideration. The goal is to advance the public policy objectives of preventing and detecting cartel activity.

Transparency about the program and relevant policies promotes awareness about the risks and consequences of anticompetitive conduct. This information may help prevent cartel conduct before it starts or lead to detection of cartel activity. Awareness about sentencing policies provides greater predictability and certainty. Leniency programs have proven to be the most effective tool to detect cartels. The cartelists are encouraged to self-report promptly or risk severe sanctions after the cartel is uncovered. Finally, international coordination and cooperation, where possible, is necessary to reach conduct and defendants outside the country. Collectively, these elements reinforce one another and facilitate successful investigations and prosecutions of *per se* anticompetitive conduct.

Chapter 7 Institutional Design: One Size does not Fit All, but Good Principle Might

Institutional Design: One Size does not Fit All, but Good Principle Might

*Bruno Lasserre**

1. Introduction

(1) "Creating the best competition agency" is a bold and, I suspect, slightly provocative title. Of course there are many success stories throughout the jurisdictions represented here today, and they take as many different forms as there are different economic, legal, institutional, even historical backgrounds. In the European Union alone, while a vast majority of countries operate an administrative type of competition enforcement, a few others choose to rely on the judicial system, be it by referring the adjudication of cases to an administrative, civil or criminal Court.

In France, it was in view of contingent circumstances, namely the poor deterrence brought by a low level of enforcement of competition rules by criminal courts, that the need was felt to resort to specialist administrative enforcement. In several other jurisdictions around the world, judicial enforcement has proved to be vigorous, and has so flourished that the competition system remains to this day split between an independent agency and a prosecutorial body – and with much success.

Every time it is a matter of having a competition agency that is tailored to its national environment. Therefore, no-one would venture to claim that a "template" can be drawn for the design of the "best competition agency".
Still, one may attempt to identify a few sound principles that would be the basis for the institutional design of a "good" competition agency –features and processes that would be likely to allow for the robustness and credibility of the regulation of competition.

(2) As this is an Olympic year, and despite the sad fact that Paris was defeated by London in the final step of the designation process as the host city for the summer Olympic Games starting in a few weeks, I cannot resist quoting the famous motto: *Citius, Altius, Fortius* , which is Latin for "Swifter, Higher, Stronger". Not a bad way to set what "the best" or "a good" competition agency should seek to achieve!

The motto was proposed by Frenchman Pierre de Coubertin, who was the one who revived the Olympic games in modern times, and it was introduced as the official Olympic motto at the Games of 1924 that took place in…Paris.
Somehow this motto, if one is ready to stretch its wording a bit, may quite aptly

* Président, Autorité de la Concurrence, France.

define the main principles that may be the basis for the institutional design of a good competition agency.

I- "Swifter" can be taken to mean not only "faster" but also "nimbler": I shall examine how the "one-stop-shop" approach, with all aspects of competition enforcement under one roof, allows the agency to aptly respond to all competition issues – and in a skillful manner;

II- "Higher": we'll see that aiming high in terms of procedural fairness may be a good way to ensure respect and credibility for your agency;

III- "Stronger": a strong competition agency is also one that can rely internally on sound expertise, and one that does not lose sight of its focus.

2. "Swifter": How juggling with a set of powers makes one more skillful at the use of each

2.1 Most competition agencies of the administrative type have moved toward a "one-tier system":

(1) As you may know, the institutional framework of the French competition agency was overhauled a couple of years ago. The dual system whereby powers and resources were scattered between an independent enforcement agency and the ministry of Economy was replaced with a single, fully independent authority, vested with the full spectrum of competition enforcement powers: taking care of detection and investigation measures, enforcing antitrust rules, overseeing mergers, and conducting market studies and issuing opinions, including on its own motion.

That is not to say that there was anything exceptional in moving from a two-tier to a single-tier system: Spain (before France), Luxembourg, Brazil have acted along a similar line, and the UK is now doing so. I will simply try to show how, in the context of administrative regulation of competition, bringing all aspects of competition under one banner brings about many advantages – needless to say, this is of little relevance to jurisdictions with prosecutorial antitrust enforcement, that have demonstrated how a two-tier system can indeed be run most effectively.

(2) What good is there in this unification?

I- Investigation / decision:

Combining the investigation and decision-making functions within the same agency prevents duplication and reduces the risk of information getting lost on the way. Being capable of conducting any enquiry to enforce competition rules means that a comprehensive investigation strategy can be developed, and that the enforcer is equipped to effectively combat cartels.

II- Merger control/antitrust:

Consensus: This combination of powers has gathered a consensus across Europe: all 27 national competition agencies in the EU now have a unified system to take care of mergers and anticompetitive practices.

III- Visibility: The "one stop shop" approach is good for the visibility of the agency, as it gets unambiguously identified by all stakeholders as the one competition enforcer. Similarly, it allows the agency to speak with one voice in the international arena.

Consistency: Making merger control and antitrust enforcement the responsibility of a single agency allows for a coherent approach in the implementation of competition law – hence making the agency more trustworthy, especially in the eyes of the undertakings concerned.

IV- Advocacy/antitrust:

The ability to conduct market studies is a decisive tool for an agency; they provide a detailed diagnosis of markets, whereby increasing the awareness of consumers and competitors regarding possible competition concerns.

They allow the agency to build up its own body of knowledge on markets, enhancing its expertise and its capacity to make informed prioritization decisions.

More specifically, the power of a competition agency to launch a market enquiry, to issue an opinion and make recommendations to government and businesses upon its own initiative is a remarkably powerful tool, that helps strengthen the position of the agency as it signals that it may make its own strategic choices, shape competition regulation and, namely, may target any sector where it suspects the state of play to be dysfunctional.

2.2 Combining a manifold toolkit allows for overall greater proficiency:

(1) A continuum of powers:

Highly potent cross fertilization can be expected to arise out of making parallel/simultaneous use of these powers. The skills and knowledge gained in practicing one, both at agency and individual levels, enriches the use of the other. The growing use of settlements is a case in point, as the expertise gained in devising them in the framework of merger review would be equally beneficial to designing them in a unilateral conduct case, and vice versa.

Once the agency is endowed with the powers to carry out merger review, antitrust enforcement and market studies, a pattern emerges that competition enforcement works as a continuum. It has been the case for instance for the Autorité that the competition analysis carried out in the course of a sector inquiry in the management of railway stations has later nurtured the theory of harm and the design of remedies in two merger reviews in the rail sector.

(2) Devising a policy mix:

Acting "swiftly" or "nimbly" is not only a matter of what types of powers the agency is entrusted with, but also has to do with the variety of available tools.

To maximize effectiveness, enforcers endowed with both hard and soft powers should try and devise a combination of these diversified tools – a "policy mix".

An effective toolkit ought to offer serious, credible deterrence: to that effect, having in place a sound, predictable set of rules pertaining to the amount of fines likely to be imposed on infringers, supported by a track record of actual antitrust enforcement, is a must. I would also mention here leniency, which greatly increases the efficiency of antitrust enforcement, as it is the best chance to unveil hardcore cartels – hence it serves as another strong disincentive.

Procedural tools such as settlements, whereby companies can apply for a reduction

of their fine if they waive their right to challenge the statement of objections, also hugely benefits the agency, as cases can be processed more quickly, thus freeing up resources.

Similarly, fostering the set up of corporate compliance programmes, by way of advocacy, is another occasion to hand over competition concerns back into the hands of those primarily responsible for ensuring competition in the market place.

In the end, the agency and its staff get nimbler at carrying out their mission when they have a full view of the competition concerns on the markets at stake, and can act upon them. Stakeholders will also soon realize that this one-stop-shop is well-stocked with in-depth skills and a capacity to take swift action – by whichever means is most suitable.

3. "Higher": aiming high in terms of procedural fairness to ensure respect and credibility for your agency

3.1 Balancing greater powers and adequate safeguards: the notion of procedural fairness :

(1) The phrase "procedural fairness" was coined in the framework of the lively debate that took place at the international level as the pace of independent competition enforcement was getting brisker, raising expectations in terms of how parties ought to be treated by enforcers.

But "procedural fairness" goes beyond due process, and is actually a notion that runs across the board and infuses the entire modus operandi of the agency, as it encompasses every guarantee pertaining to the rights of defense, impartiality, forseeability, transparency, and the duty to provide reasons for decisions.

Talking of "good principles", this list of items may sound like just as many occasions for wishful thinking. Yet procedural fairness is not only a philosophical matter but also a very practical issue. It serves as a measure of the degree of openness needed to achieve credible and robust decisions while not compromising the effective detection and sanction of infringements.

(2) The parties' contribution to the case-handling process strengthens the reasoning and legitimacy of the agency's decisions:

In antitrust proceedings, the involvement of the parties, both claimants and defendants, is a guarantee of the soundness of the decision to come – and eventually of its acceptance by the undertakings concerned. Offering every guarantee attached to the adversarial principle, including the possibility to appear at a hearing, is going to substantiate the discussion that will lead to the decision.

In merger review, where litigation gives way to a more collaborative interaction with the parties, in search of the most competition-friendly way out to clearance, it is a good idea not to shun an open dialogue with businesses, from an early stage – especially so as to devise sound, sustainable remedies. The habit of engaging into such

communication is beneficial to the competition agency's entire activity, and allows us to slightly shift our viewpoint and look at companies not only as would-be offenders but also as the ultimate proponents of compliance.

3.2 The bigger picture: independence and impartiality:

(1) A system of checks and balances should be in place to ensure that a fully independent and impartial decision is reached. This can be achieved in many different manners.

In France, a functional separation has been gradually, and now fully, implemented: the investigation services, headed by a *general rapporteur*, launch and prosecute antitrust cases, while the board (the "college") adjudicates the case, both on substance and on the amount of the fine, with no mutual interference– to such an extent that, not unfrequently, a case brought by the investigation services is eventually dismissed by the college, either wholly or partly.

Yet, each jurisdiction will have its own way of adjusting the settings of fairness to achieve a fine-tuned balance between efficiency and legitimacy. Functional separation is what it took in France to do it, but that is not to say it cannot be performed otherwise to an equally satisfactory effect.

(2) Overall, fairness has to do with the bigger picture of checks and balances that come into play throughout the enforcement process.

The independence of the agency is a feature of it. It is not only a formal condition, but is also assessed with respect to that of the individuals entrusted with decision-making: the prevention of any conflict of interests is key here.

The independence also refers to the type of relationship that the agency entertains with government and Parliament. Being independent should not lead to fear of talking to them: it is our job when wearing our advocacy hat to talk to all relevant stakeholders, including government and Parliament, whose actions have an impact on markets. Hearings before parliamentary committees, for instance, are occasions to engage upstream in the public debate. Issuing opinions on our own initiative is another opportunity to give advice on a variety of issues – and it does happen that our recommendations are followed! (= retail in the food sector).

Different agencies have different patterns of interaction with public authorities. Broadly speaking, one could say that some agencies are, for institutional reasons, comfortable talking directly to the executive (e.g. DG Comp), while others have a history of gaining their independence by distancing themselves from the executive (Autorité), and would rather perform their mission of advocacy as part of the legislative process.

Independence goes hand in hand with accountability on overall performance: there is certainly no hindrance to independence in reporting to Parliament on our activity, or in being assessed in terms of efficiency.

Of course the "bigger picture" of checks and balances also encompasses litigation.

In this respect, fairness does not derive solely from the inner working of the agency but from the whole "regulation chain". The overwhelming need is that for a full judicial

review, on the merits of the case, readily available for the parties. The administrative stage of regulation does not need to mimick every single feature of due process but does need to be possibly challenged before a court having full jurisdiction on the subject matter.

4. "Stronger": strengthening in-house expertise and retaining a focus on competition

4.1 The modernization of the institutional design of a "good" agency requires to fit in expert human resources:

(1) A modern, well-functioning competition agency should seek to gather in-house expertise that will be the backbone of its day to day practice. Exercising a large spectrum of competences and providing stakeholders with decisions of maximum quality requires to count on a team of experts who will be able to assist case-handlers and commissioners in ensuring the robustness of the agency's decisions and opinions of all kinds.

The complexity and refinement of the policy issues and of the reasoning of the decisions are bound to increase along the development of the agency, and the parties are likely to adjust by getting better equipped with proficient competition counsels. So the institutional design of a good agency, eager to remain up to speed with its constituents, should be evolving to incorporate the fine experts that this growing sophistication will demand.

(2) Furthermore, following up on what was said earlier on the "bigger picture" of checks and balances against which procedural fairness should be assessed, these expert support services will provide a fresh look on the proceedings, a different mindset for the analysis, and an occasion for debate, all of which will prove to be challenging and hugely helpful to strengthen the agency.

An economists office is a valuable addition to the agency's institutional design – something that our Taiwanese hosts are precisely putting into place this year. It is often observed that a large proportion of a competition agency's staff has a legal background, but only a few would have trained as economists. Therefore the input of a specialists team is to be of great help, for instance to carry out an effects-based analysis. A legal department can also serve to pool together the resources that the agency needs to tap into in a variety of situations.

(3) A "good" competition agency wants in any case to reflect on how it incorporates its human capital.

Enjoying some flexibility as to the recruitment of staff is a real asset for the agency: having on the same team people from the bar, from the judiciary, from several branches of the civil service, is bound to boost creativity, and the reliability of the reasoning agreed upon by this diverse crowd.

Different institutional designs may be considered in terms of how to incorporate human capital: some agencies – mostly large ones – would go for a "matrix structure", that provides for a high degree of sector-specific knowledge (it would be the case for instance of DG Comp, or the UK OFT); others would prefer a more homogeneous structure, taking a more horizontal approach and retaining the focus on the mechanics of competition. The concern is also to

differentiate the competition agency from sector regulators and avoid building up any ideal view of a sector or industry.

4.2 How focused should a competition agency be? a hot debate between "deepening" and "widening" competences:

(1) A sole focus on competition enforcement?

While several of the principles I have attempted to set out may attract a consensus in the competition community, the issue of whether a competition agency should remain solely focused on competition enforcement is hotly debated.

Following legal reform in their jurisdictions, many agencies in the recent past have extended their remit to sector regulation (e.g. the NMa), while several others have, either from their inception or along the way, incorporated consumer protection, or neighboring issues, such as unfair trade practices.

The French experience is rather clear-cut in this respect, as we – and successive governments – have stuck to the notion that an independent body such as the Autorité should have a fixed perimeter, mustering its strength and specific skills to aim for its one objective. But of course it does mean we should be isolated, and it is the case that we have been bridging with sector regulators. A fruitful dialogue has been taking place, most notably with the energy and telecommunication industries, who can refer the competition concerns they encounter to the Autorité – which is solely competent in this respect.

(2) The rationale for the mergers of agencies:

There are two different ways for a competition agency to expand.

- It may undergo a « vertical » merger, whereby all competition powers are brought under one banner (e.g. France, Brazil), a situation I have explored a moment ago when referring to the "unification" of competences in a single-tier agency. This is a process that not only signals greater independence but brings about cost-effectiveness and capacity enhancement.

- Or it may be subject to a « horizontal » merger, through the acquisition of consumer protection or sector regulation (the Netherlands, Denmark, Spain).

What may be the political motives for such a move? It can be advocated that such mergers are meant to achieve sensible public money spending, as they allow for economies of scale.

Still, how beneficial is this really? While the rationale is allegedly of a budget-conscious nature, it is a fact that the budget of competition agencies is only a fraction of the amount of antitrust fines levied every year, which go the general State budget – and not into that of the agencies Although imposing financial sanctions is far from being their primary goal, competition enforcers are net contributors to national public finances.

In any case, one should be wary not to jeopardize the institutional design of a competition agency, which is a condition of its efficiency, for the sake of rationalization performed under budgetary constraint. The Spanish CNC is a case in point: it recently voiced out serious concerns regarding the plan to merge the agency with 5 regulatory bodies (energy, telecommunications, rail, airports and postal services), and pointed

to the dire need for adequate institutional structure ensuring the independence and effectiveness of the new authority, retention of competition advocacy functions, the means for transition and integration of staff.

One cannot help wondering whether such "mega-agencies" are actually any stronger for being bigger. Isn't competition enforcement at risk of getting diluted? In this respect, one may worry that the allocation of resources between the different departments of the agency may not favour competition, and that even in the process of adjudicating cases, the analysis of competition concerns could be mitigated with considerations pertaining to other branches of the agency.

As far as institutional design is concerned, this is obviously a serious topic for reflection, as the manifold agencies that are being established are not simply an oversize version of their previous selves but have to reshuffle their structures and processes to allow for a diversity of interests to be addressed.

After having spelled out a number of general principles that I am confident can fit in the institutional design of any good competition agency, I feel I should end up on a note that leaves room for some degree of uncertainty!

Chapter 8 Challenges to Make Efficient Competition Regime and Lessons thereof

Challenges to Make Efficient Competition Regime and Lessons thereof

Young Ho Ahn *

1. Introduction

Mr. Chairman, distinguished participants, I'm very honored to speak before such esteemed competition experts from Taiwan and many other jurisdictions at the "2012 Taiwan International Conference on Competition Policy and Law." Congratulations on the 20th anniversary of the TFTC, and I wish you continued success.

Korea experienced fast economic growth since it introduced and actively enforced competition regime 31 years ago, in 1981. I think, this could provide a good example that vigorous competition law enforcement from the beginning stage of economic development is a solid basis for creating many national world-class companies and laying the foundation for sustainable economic growth. So I hope Korea's experience can be useful for other competition authorities hoping to contribute to economic growth to envisage a desirable status and roles of competition regime. Regarding this session's topic "Creating the Best Competition Agency", I'd like to share my views on what can we refer to/ from the KFTC's development history.

I would like to begin with talking about some prerequisites to be a successful antitrust agency, then move to challenges and achievements from the 31-year history of the KFTC and finally finish with implications thereof.

2. Prerequisites to be a successful antitrust agency

You will agree that preconditions for a successful competition authority are the same as those to fulfill its roles as a guardian of market economy system. That is, a competition agency should be designed and operated in line with its goals of maximizing corporate innovation, improving consumer welfare, thus ultimately achieving sustainable national economic growth by means of facilitating fair and free market competition. I believe such requisites can be largely viewed from two different perspectives, internal and external aspects.

2.1 Internal aspects

One of the most essential requisites is to set up a crystal-clear mission and have it shared among the staffs composing of the organization. Competition authorities may fail to position itself firmly while the economy grows fast. For example, sometimes

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they might be ended up with just a part of ministries in charge of macro-economic or industry policy. Short-term development policies may take priority over competition policies.

This could disturb efficient enforcement of competition law and policy. So, in such circumstances, competition agency people should first have unwavering commitment toward a solid mission. Next, competition agencies should secure diverse resources because they determine organizational capacity. This includes, of course, material resources like budget and human resources which are the actual law-enforcing personnels.

We need to recruit staffs with antitrust-law expertise/ and legal mind-set and then continuously develop their talents. Plus, we need to set up an effective information system where useful expert knowledge generated within the agency is easily accessible in order to make the most of our human resources. Transparency, procedural fairness and ethics in internal system are also crucial. And, since we are independent law enforcing bodies, we should have high-level integrity and work ethics.

2.2 External aspects

Now, in terms of external relationship of competition bodies, the first thing to be mentioned is to change people's awareness on us. We need to pursue active competition advocacy efforts to widen competition-friendly culture across the society.

We also need to secure support/ from the general public. Also, competition agencies need to work hard to foster close relationship with other national government bodies.

The national legislative body is important since it establishes and amends the law we administer. We should work with sectoral regulators to make clear each other's role in enforcing the respective law in the same industry. Building a close cooperation with foreign counterparts cannot be overlooked as well. International cooperation between competition agencies has become more and more significant as each nation's competition regimes are being converged and cross-border enforcement is being essential as economies are going global.

3. KFTC's 31-year experience and achievements

Korea's competition regime, which was brought in 31 years ago, is viewed to cause a paradigm shift. This changed the way of economic operation and the way of economic players' thinking. Ever since then, the KFTC has solidified its position as both the only competition authority and consumer authority in the country while expanding its roles and resources to appropriately respond/ to changes of the time.

The KFTC initially started with 65 staff members in 5 divisions at the ex-Economic Planning Board in 1981. The Korea Fair Trade Act was the only legal basis for the unit back then. Currently, the KFTC has 510 employees working at 34 divisions in 9 bureaus/ and 5 local offices. It administers 13 laws. It is now a ministry-level central government body, also performing a quasi -judicial function.

As a unique feature of the KFTC, it also deals/ with the subcontracting policy to lay a level playing field/ for small and medium firms. The consumer policy is another unique feature of the KFTC to activate consumer-led competitive pressure. And prohibitive measures to curb conglomerates from forming undue economic power concentration in the country are still another unique feature of the KFTC. Let me now divide the KFTC history into 4 major periods/ and explain one after another.

3.1 The 1st Stage (1981~1986): sprouting of competition regime

In the 1960s, Korea faced ill-fated consequences of government-led economic development strategy such as deep imbalance between industries, widespread inflation, distorted market functions, monopolistic market structure and economic power concentration. To fix such problems, the country had tried to introduce competition regime since the 1960s. At last in 1981, the Fair Trade Act was established and implemented amid social consensus against its past growth strategies in the 1960s and 1970s. The initial introductory stage was characterized as public promotion and communication/ to change people's awareness and gain more support.

3.2 The 2nd Stage (1987~1997): reinforcement and independence of KFTC, fight against economic power concentration

As the country grew more democratic, many consequences and side effects of previous fast growth were revealed. This helped generate public opinions that large conglomerates should be more effectively prevented from unduly gaining economic power. Responding to this, Korean government introduced some legal mechanisms to control business expansion using cross investment and collective corporate insolvency. Korea also faced the growing need for deregulation to enhance the private sector's creativity and independence. So in 1997, the KFTC took the role of managing economic deregulation issues in general. During this stage, the KFTC also identified 26 products manipulated by long-term monopoly and took phase-specific behavioral or structural measures throughout the stages from production to sales. With the growing social demand for the competition regime, the KFTC became independent in 1994 from the ex-Economic Planning Board. It was elevated to a ministerial-level agency in 1996.

3.3 The 3rd stage (1998~2007): more solid market economy system after economic turmoil, reinforcing the consumer policy

Next stage ranges from 1998 to 2007. In the process of overcoming the 1997 economic crisis, the competition agency played a critical role in strengthening the country's economic framework. Following the nation's plan to exit the crisis, corporate restructuring and market reform were actively pursued. The Omnibus Cartel Repeal Act was established and abolished 20 kinds of cartels in 10 sets of laws. The Clean Market Project was also put into place during this period. It is an industry-specific and market-specific way of boosting competition. The project came up with comprehensive plans for 33 different industries. During this period, as an effort to reinforce consumer policy, the Fair Labeling and Advertising Act and the Electronic Commerce Act were established. The Door-to-Door Sales Act and the Installment Transactions Act were transferred from the ex-Ministry of Commerce, Industry and Energy to the KFTC. In 2007, the Korea Consumer Agency was moved from the ex-Ministry of Strategy and Finance under the KFTC's control, and in 2008, the KFTC became the only government body managing consumer policies.

3.4 The 4th stage (2008~present): autonomy of market players and strengthening international operation

During the last 4th period which started from 2008 to until now, market participants came to enjoy much more autonomy. Rather than ex-ante measures against economic power concentration, more ex-post approaches were taken. Such as public announcement were reinforced. The KFTC also focused on monitoring unfair practices in the global arena during this period. It has continuously built up its capacity to cope with complicated legal/ and economic analysis. Such ability was required to control multinational firms' market dominance abuses. As a result, the KFTC could successfully enforce against the abuse of dominance by the world's IT companies, such as Microsoft, Intel, and QualComm. The KFTC's robust global antitrust enforcement is supported by its record of regulating 52 international cartelists/ from 20 countries which had potentially harmed Korea's market.

4. Current status of KFTC and implications

4.1 Social consensus and dissemination of competition culture

Now, let me turn to where we are now to share with you some lessons. First of all, we need to draw social consensus on how competition is important. To enforce competition law, we need to set up laws and secure people and resources. You can easily guess that this is simply impossible without social consensus. The KFTC pursues diverse competition advocacy activities to spread pro-competitive climate. We also focus on preventing violations in advance rather than enforcing laws in an ex-post manner which entails considerable administrative costs. As part of this effort, we are encouraging more firms to use the Compliance Program and the Consumer-Centered Management.

Under the CCM system, firms are supported to deal with consumer damages on their own account while practicing consumer-oriented business administration. It also became mandatory in Korea that other government bodies consult with the KFTC before enacting or amending relevant laws. All types of regulations should also be assessed for their possible impact over competition on an ad-hoc basis. This is to prevent anti-competitive rules and regulations and let other agencies understand competitive perspective.

4.2 Securing due process

The second thing is to ensure fairness in enforcement procedures. We, the competition authorities, should gain trust from stakeholders and the general public. To improve the objectivity and validity of case-handling process, the KFTC set up a separate division that solely assists its independent decision-making process. Relevant regulations keep being amended in detail so as to strengthen defense rights and adversarial proceedings in ruling as well as to increase the objectivity and transparency of surcharge imposition criteria. The KFTC prohibited itself from abusing investigatory power by law and tightened ex-officio investigation threshold. At the same time, it prepared Guidelines for On-site Investigation to enrich investigation quality while reducing corporate burdens. KFTC employees are required to have a higher level of integrity than those

in any other agencies. In line with this, the Commission has operated systematic anti-corruption measures like Internal Inspection Special Team/ and Ombudsman Scheme.

4.3 Guaranteeing independence and expertise

Last but not least, we need to improve our independence and expertise that upgrade our antitrust enforcement ability. Organizational independence will keep a competition agency truly free from some specific interest groups' resistance, other government agency's intervention, and political pressure. Plus, we should secure sufficient expertise in antitrust enforcement/ to catch up with the ever complicated industries and technologies. The KFTC became independent from the ex-Economic Planning Board in 1990. Along with this physical independence, the Commission also has secured personnel independence. The Commission's final decision is made by the consensus among commissioners whose terms are safely guaranteed by law. The KFTC also increased its expert staff like lawyers, CPAs, and patent agents. A series of expert teams have also been built such as a devoted economic analysis division, an international cartel division, and a digital forensic team.

5. Closing

Now I'd like to wrap up my presentation by adding some thoughts. Despite such efforts and achievements so far, it's true that the KFTC still has more to improve. Recognizing this, it has not stopped advancing itself. I may not have to stress again here the importance of coordinating competition law and policy in the global arena. For effective international cooperation, antitrust enforcing agencies like us should also work hard to coordinate ourselves. In this sense, all those useful speeches and discussions in this meeting are very significant in enhancing the world's competition regime further. Before I close, let me congratulate again on the 20th anniversary of Taiwan's competition regime in place. I wish all of you and your systems great success. Thank you very much.

Closing Remarks

Speech at Closing Ceremony

Chairman Shiow-Ming Wu *

Distinguished guests, ladies and gentlemen, good afternoon:

It is my privilege to bring the "Taiwan 2012 International Conference on Competition Policy and Law" to a close. Through all of the sessions over these two days, it has been inspiring to see such insightful speeches and active participation by all attendees. I would like to thank our distinguished keynote speaker, panel moderators, and presenters for their hard work and contributions to such a successful event, and ensuring that all of our guests have gained something from the conference. I would also like to thank participants for making the conference interactive and generating interesting debate. Thank all of you for your effort.

With economic globalization and trade liberalization well under way, multinational businesses play an increasingly important role in trade. A growing pool of business models now operating both in and across borders, brings new challenges in the enforcement of competition law. In this environment it will be essential for competition authorities to recognize and take into account both domestic and international trends in the development of competition policy. We will also work to increase our understanding and problem-solving ability to tackle this environment.

Today, there are more than one hundred countries that have implemented competition laws. Pro-competitive policy has now become mainstream, yet there is still considerable divergence of legal standards among different jurisdictions. How to respond to the issues resulting from changes in the economic structure, such as standards for evaluating exploitative or exclusionary conduct by monopolistic and oligopolistic enterprises– is a significant issue. Competition authorities and other international bodies must also consider how to review and assess the impact of much more complex multinational mergers, and how to promote closer cooperation between competition authorities in different parts of the world to combat international cartels.

Moving forward, further information exchanges among competition authorities would assist the harmonization of differences in enforcement approaches. Bilateral or multilateral agreements can also play a role in addressing complex transnational anti-competitive conducts and seek to fulfill both local and international goals.

Finally, I would like to once again thank each and every one of you for your participation as well as my colleagues for their hard work. I hope that we will continue to work together in the field of international competition policy and law. And may good health and happiness be with you all. Thank you very much.

* Seventh-term Chairman, Taiwan Fair Trade Commission.