

Incrementally Redesigning Antitrust Enforcement: A Response to Professors Crane and Kurita

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Good afternoon. We have so far heard from two distinguished and experienced professors about the antitrust experience in US and Japan, focusing on a reexamination of institutional design.

My assignment today is to fill the gap between the two jurisdictions from a comparative perspective and hopefully synthesize them. Let me point at first that the word “agency” we use today in the antitrust context is narrower than the broader usage which we highlighted in Hokudai’s Global COE program, in that the latter includes private parties, courts, legislatures and other interested parties, as well as the specialized governmental agencies which undertake antitrust enforcement.

My comments consist of four parts. First, I will talk about institutional design in a global context and respond to Professor Crane’s argument on the horizontal relationship between the antitrust agencies (agency-agency relationship). Secondly, I speak about vertical relationships between antitrust agencies and courts (agency-court relationship) in pro-

¹ Associate Professor of Law, Hokkaido University School of Law. This is an updated and revised version of my comments to two professors in June 2010. I thank Daniel Crane, Makoto Kurita, Toshifumi Hienuki, Yuichi Terakawa and other participants of Hokudai Economic Law Workshops for enlightening comments and criticisms. Wei Han provided valuable research assistance on the institutional design of China’s Anti-Monopoly Law. I also thank Koki Arai and Naoki Ohkubo for helpful comments on my draft. The remaining errors are mine.

cedures leading to an initial decision. That is, we examine whether a vertically integrated model of an antitrust agency, which unifies multiple (prosecutorial and adjudicatory) functions in one agency, as seen in the FTC and JFTC, is well founded or not in both jurisdictions. Thirdly we briefly review and forecast the contributions of private antitrust suits. This topic can be characterized as a horizontal relationship between agencies and private parties (public-private relationship). The fourth section will conclude with a few points on the way forward to reforming Japan's Antimonopoly Law.

I Institutional Design

Here I drew a 2 by 2 matrix where antitrust agencies are classified according to their divisions of labor.

	horizontally concentrated	horizontally distributed
vertically separate	Canada; Australia; South Africa; future JP?	DOJ
vertically integrated	EU; current JP	FTC; China

Professor Crane's talk today focuses on horizontal distribution because that has been the central issue in US. However, his project has also covered vertical integration where executive and adjudicatory functions, which lead to an initial binding decision, are integrated into one agency. Whether a particular model is vertically separate or integrated depends on the domain of initial findings of facts: courts or antitrust agencies. The FTC and the current JFTC employ an integrated model, whereas Canada and other countries have another tribunal than prosecutorial agencies which hand down an initial decision based on its findings of facts. It is separation of such functions that Japan's Antimonopoly Law is expected to introduce in its future amendment.²

² I disregard here the fact that the JFTC's orders are binding without consent or initial findings of facts in trial since the 2006 amendment. For a more careful

The U.S. has employed a horizontally distributed model since 1914, and the two agencies, the DOJ and the FTC have led antitrust jurisprudence globally. China, which recently promulgated the Anti-Monopoly Law, has three agencies in place and one coordinating agency on their top. Horizontal concentration and distribution of antitrust agencies seem to be the consequences of path dependence which is highly jurisdiction-specific, and thus it is not easy to say which model fits or is better for a particular country, without paying due attention to the historical experience and jurisprudential development in each country. On the other hand, choosing between horizontally decentralized (general/generic) courts or concentrated (specialized) courts is more of a functional decision-making. I will mention this topic later in section II.

In a horizontally distributed model, a critical issue facing agencies is clearance. How should we divide or allocate cases to multiple agencies? One common thought to divide antitrust cases is to classify them into three categories: criminal cases (hard-core cartels), mergers, and the other practices that include monopolization, vertical restraints and so on. China's clearance mechanism is pretty much close to this idea, but not the same. China's Anti-Monopoly Law divides its work according to conducts: MOFCOM takes up mergers, NDRC deals with price-related conducts, and SAIC challenges non-price conducts, abuse of a dominant market position and the others. Particularly problematic nature of this clearance system is the elusive nature of pricing restraints such as loyalty rebates and price squeeze. We can characterize these practices either as exclusionary conducts by price or as non-price conducts. That characterization is done in the first stage of an analysis but also could be the end of the analysis, because the applicable standards for pricing and non-price exclusionary conducts are utterly different.

Professor Crane argued convincingly the defects of dual enforcement. Congress budgeted for the FTC as much as the DOJ and thus legislators think both agencies fungible. *Humphery's* three justifications of

analysis of Japan's model, see Akihiko Nakagawa, *Dokkinho Enforcement Kikan To Saibansho No Kankei*, 722 *Koseitorihiki* 29 (2010).

the FTC's distinctiveness from the DOJ (political independence; expertise; hybrid agency) are no more supported by the actual practice. In other words, his argument is that the FTC is homogenous with the DOJ and we cannot distinguish between them. Although the FTC was historically created to counterbalance courts which had been thought to be overly tolerant of big business, Professor Crane's argument fends off even those historical justifications: The FTC is not functioning as was originally intended. Whether we take Professor Crane's argument or not would lead to an opposite response to the fact that the FTC's Commissioners have put emphasis on the FTC Act's larger coverage than the Sherman Act.³ If the FTC and the DOJ are homogenous, this difference in coverage would be seen as a fraction, but if the FTC has a distinctive role that no other agency could play, the FTC's having a concurrent but slightly wider jurisdiction is not a fracture. How could such a peculiar contribution, which could not be made by the DOJ, be realized by the FTC? The easiest answer we could guess is the vertically integrated model it adopts. Because the FTC can utilize full powers from investigative to adjudicatory functions, the FTC could take the initiative to find new types of violations that harm competition and consumers.

Taking players' potential bias into account would shed new light on this FTC's homogenous/distinctive issue. Those who think the DOJ and the FTC are and should be fungible have concerns that the FTC is biased towards over-deterrence. Those who favor the FTC's distinctive role posit that this peculiar role is meant to correct the judiciary's bias towards under-deterrence. That is, the FTC takes up those cases that would not have been heard in courts due to the courts' bias against over-deterrence. As mentioned later as negative externalities of private actions, even Professor Crane seems to recognize the latter bias. In such a broader perspective, by taking into account the overall environment of antitrust en-

³ For a recent example, see the Statement of Chairman Leibowitz and Commissioner Rosch, In the Matter of Intel Corporation (2009). For a cautious analysis, see William Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L.J. 929 (2010).

forcement or "the governance structure," as Professor Yoshiyuki Tamura puts it,⁴ even a seemingly fracture could be given an opposite evaluation.

Talking about the fracture between the FTC and DOJ, to be sure, different standards in different industries would increase compliance costs and legal risk. However, is every fracture so bad that it should be corrected sooner? Even industry-by-industry standards might reflect the structure of each industry and peculiar competitive impacts, which may not be unwarranted. Even a fracture could accumulate discussion on a wider basis, and is welcomed if the fracture encourages further deliberation between the agencies. Single-firm conduct report is such an example. Isn't it better than having nothing issued by either agency which has led this field worldwide? Nowadays, policy guidelines have taken on a global dimension and we have seen a race to promulgate better guidelines and influence other jurisdictions. Even one agency's publishing their opinion, without an agreement within the border, could facilitate the race for better guidelines across the border. One agency's opposing grant of certiorari against the other agency is another fracture. However, in a broader perspective, it could be seen as a strategic move to prevent courts from taking the initiative to declare a new binding rule until both agencies have enough experience with possible solutions.

II How is a vertically integrated model justified?

As I have talked, we should examine institutional design both horizontally and vertically. Now we examine possible justifications for a vertically integrated agency. Let me narrow the problem to the extent that the arguments hold both for US and Japan. In other words, I refrain from talking about the "Penumbra of Section 5," which is a US specific perspective (though an external justification I expound here may be applicable in that context as well).

Professor Kurita's second point emphasizes on enriching ex-ante

⁴ Yoshiyuki Tamura, Rethinking Copyright Institution for the Digital Age, 1 W.I.P.O.J. 63 (2009).

procedure rather than preserving an adjudicatory function in the JFTC, but he also emphasizes on the JFTC's fact-finding function for effective and prudent enforcement. Though it might not be strictly the same with what he thinks, his theory might be recasted in this way: In order for the JFTC to apply the Antimonopoly Law in a responsible way, it has to find facts by itself, because which section of the Antimonopoly Act is expected to be applied dictates what facts to be found and what evidence to be gathered. However, this reasoning is deduced from the proposition that the JFTC should remain to be a key trier and thus his theory could marginalize the role of private actions. If we regard private actions as equally important, as Professor Kurita himself argues, vertical unification of investigative, fact-finding and application-of-law functions should be explained from a different aspect than the significance of a fact-finding function.

Then, how could we justify the system where both (a) administrative trials with judicial review by generic courts of appeals and (b) ordinary trials by district courts coexist? If we had to choose between vertical separation and integration, our answer would seem to depend on (i) the relative expertise of courts compared to antitrust agencies and (ii) expected fairness in each model. Both expertise and fairness are important, but increased expertise might dispel some portions of fairness concerns, as long as expertise means something that helps laypersons. Expertise should not be confused with something that is automatically accumulated with routine work nor with torturing laypersons with intractable body of knowledge and poorly defined jargon.

From a relative expertise perspective, a capacity-building justification could support a vertically integrated model. That is, a vertically integrated model, which defers the FTC/JFTC with substantial evidence test, would create another route than the DOJ actions or private actions that accumulate precedents. Substantial evidence rule alleviates the burden of unspecialized courts to find facts de novo and let them focus more on the adequacy of application of law. Through the JFTC's initiative, reviewing courts obtain experience while district courts and other courts of appeals which preside over private antitrust actions obtain precedents

to guide them.

The capacity-building justification focuses on producing precedents by the combination of the FTC/JFTC and reviewing courts of appeals. The FTC/JFTC takes the initiative to make new antitrust rules and standards, thereby capacity is built for courts through the precedents. We could call it a positive externality of government actions. Thus, the capacity-building justification is consistent with the institutional design where a vertically integrated agency and private suits coexist. As courts gain experience, the relative expertise may be closer, but the role of a vertically integrated model will not be lost. The FTC/JFTC's actions will focus more on new industries and unknown practices that require more refined knowledge and advanced research for adequate treatment.

From what I have talked so far, we can conclude that to abandon administrative trial in Japan is unsupported at least by this capacity-building justification. It is hard, for example, to believe that we even have enough precedents for judges to decide monopolization cases. Transition into a vertically separate model could only be explained by the other factor for choosing between the models: fairness. Fair trial seems to dominate the argument for an amendment in Japan. I do not mean to suggest that fairness is less important than expertise. We should not think light of the possible difference in minds between courts and agencies, as Judge Richard Posner wrote in a recent article.⁵ Courts are more concerned with fairness for respondents as well as consistency with the statutes, and this tendency might drive courts to rigid interpretations and applications of law, as have been seen in prominent Japanese cases such as Social Insurance Agency case and Toyoseimaiki case. Given that "mission-oriented" agencies might be biased but fail to realize that they are so, de novo review mixed with deference to agencies discretion might be better than substantial evidence review, as long as judges have enough

⁵ Richard Posner, Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework 19 (2010), forthcoming in Regulation versus Litigation: Perspectives from Economics and Law (Daniel Kessler ed., University of Chicago Press).

capacity to discern where discretion starts and ends. My sense is that changing the standard of judicial review may be a better way for reform in Japan, since that would increase fairness with less reform in hardware. Another possible proposal I had in my mind was the JFTC trial reviewed by a specialized court of appeals with substantial evidence test, but this formula may be more costly, even though a specialized court is a better device for judges' commitment to cultivating their expertise.

The capacity-building justification is an external reason for having a vertically integrated model, in that it contributes to a better system for courts, not for the agency itself. To tell the truth, I find it very difficult to identify internal justifications. Abandoning administrative trial would lose one independent center with its own format of opinion writing that enables full development of the FTC/JFTC's case-specific reasoning. This could decrease the depth of interactions between players and might have negative effects on the development of law. But, this is not a positive explanation that supports vertical integration from a clean slate. ABA's 1989 report to study the role of the Federal Trade Commission⁶ provides another reason for a vertically integrated model. It says that cases applying rule of reason require the careful development of a factual record and a sensitive application of difficult legal principles, and that the FTC is a less dangerous forum for developing and testing new theories because available sanctions are civil and prospective with no effect of prima facie evidence attached to its decisions. This reasoning based on weaker sanctions not only is a passive and tenuous support but also is simply inapplicable in Japan, having a different system of sanctions and damage actions.

⁶ Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43 (1989).

III Roles of private actions

Let us move on to the roles of private actions. Now we examine how courts contributed to the development of antitrust laws through private actions. Whether courts have done fairly well in private actions or not influences how we evaluate the external justification of the vertically integrated model in the preceding section (the capacity-building justification).

Theoretically private actions include not only genuine antitrust actions by competitors or customers but also contractual disputes that include an antitrust violation as one cause of action to leverage plaintiffs' bargaining power. Today we focus on the former, because the latter is prevalent in Japan but not in US due to the difference of damages available in antitrust laws.

Professor Kurita argues for activating private actions as most Japanese commentators agree. On the other hand, Professor Crane criticized the practice of private enforcement in US because negative externalities of private actions forestall government antitrust actions. Fortunately we haven't seen such externalities so far in Japan, since aggressive private actions are still few here.

Let us divide private actions into two categories: "follow-on suits" and "stand-alone suits." Follow-on suits are brought after agencies won their cases: Section 25 of Japan's Antimonopoly Act clarifies this point. Stand-alone cases are advanced without benefitting from preceding government enforcement. We would find negative externalities in the latter category and can be comfortable with follow-on suits, which usually have no substantial issue other than damages. Though comparative statistical study of follow-on suits may be an interesting project, I do not have reliable data today.

How stand-alone private actions contributed to the development of antitrust laws in US and Japan? This is not an easy task, because we do not have any agreeable and statistical method of measuring good perfor-

mance in antitrust, as Commissioner William Kovacic has written in the context of rating the agencies.⁷ We can only tell a story based on subjective evaluations of conspicuous cases as anecdotal evidence.

If the number matters (which means that we give equal weight to every issued decision), it is apparent that private actions have contributed much to the US antitrust laws' development. During the 2003-2010 term, the US Supreme Court decided 11 antitrust cases and all of them were private actions. On the other hand, we frequently hear misery state of Japanese private actions, notwithstanding the fact that we do have Supreme Court antitrust cases between private parties. As I suggested before, such an evaluation is inevitably subjective and we can naturally expect the opposite evaluations. Even lost cases are good precedents for next plaintiffs.

Japanese commentators argue that private actions particularly contributed to the development of social justifications or defenses of potential antitrust violations. These defenses could be evaded in the JFTC's analyses since all it can do is not to take any action when defenses seem to be convincing, as Professor Tadashi Shiraishi has pointed out. However, courts must write an opinion unless the parties settle, and therefore courts are pushed to clarify the way for incorporating defenses and social justifications in antitrust analysis. One caveat that needs to be mentioned is that Japanese courts in private actions seem to be very cautious in finding liability but very flexible in exonerating defendants, and this might be a bias in the opposite direction from the mission-oriented JFTC.

I do think Japanese private actions and criminal actions have produced thoughtful precedents comparable to those of reviewing courts of appeals decisions. I prepared to speak on two concerted refusals to deal cases as an example, but I skip these to save time.⁸

⁷ William Kovacic, Rating the Competition Agencies: What Constitutes Good Performance, 6 Geo. Mason L. Rev. 903 (2009). For direct and indirect measures of performance, see The Federal Trade Commission at 100: Into Our 2nd Century, A Report by Federal Trade Commission Chairman William E. Kovacic (2009).

⁸ For these cases, see Akihiko Nakagawa, *supra* note 2.

Given that private actions have contributed appreciably even in Japan, could we expect that private parties would bring more stand-alone actions? I guess not. For potential plaintiffs, it is less costly to report potential violations to the JFTC and wait until the agency takes any action. Such potential plaintiffs save enforcement costs by relying on the JFTC's enforcement. Private enforcement costs could also explain why Japan's Antimonopoly Law was revised to broaden the scope of practices subject to surcharges. For plaintiffs, it was cheaper to lobby for tougher sanctions than to bring suits themselves.

IV The FTC & JFTC: The Difference

Lastly, we compare two corresponding agencies and explore a possible reform for Japan. Comparing the FTC and JFTC, one of the largest differences is that the FTC has used civil monetary remedies sparsely, whereas Japan has broadened the scope for surcharges with no discretion given to the JFTC.

Why this difference? It is generally believed in US that follow-on treble damage actions will usually provide enough deterrence,⁹ though Professor Crane proposes a more managerial model of private antitrust enforcement. On the other hand, follow-on suits are rare in Japan except for bid-rigging cases. This reaffirms the significant incentives treble damage actions provide with private parties. As long as treble damages are follow-on suits, they exert no negative effects on public enforcement but supplement its effectiveness.

Speaking of sanctions in Japan, I largely agree with Professor Kurita's criticism against the current system: The JFTC has no prosecutorial discretion in surcharges and the surcharges are not designed flexibly

⁹ Antitrust Modernization Commission, Report and Recommendations 287 (2007)(" a need for civil fine authority could be shown only if there were significant gaps in the current level of enforcement provided by private plaintiffs seeking damages. The Commission did not receive evidence of significant gaps, however."

enough to reflex the severity of each offense. I could also add one criticism: Having no prosecutorial discretion coupled with no consent order available, the JFTC is restricted in its opportunity to settle a case. One disagreement with Professor Kurita is that I see no reason why monopolization conducts should be separated into those subject to surcharges and those that are not, as long as both satisfy the statutory requirements.

How should we adjust imposed sanctions to the graveness of offenses? The surcharges in Japan are determined as a fixed proportion of the relevant sales. We could revise the statute to incorporate some multipliers to reflex the graveness. Though we never know the discount rate of each defendant unless we could legally and reliably use fMRI and neuroscience, we can use qualitative measures as proxies for discount rates, such as the duration of an offense, the number of communications, and so on. These factors are usually considered in criminal sentencing, but not in calculating surcharges. The JFTC might think that aggravated offenses are adequately punished by criminal penalty, but the current formula for calculating the amount of surcharges is not providing adequate deterrence for severe violations.

Another potential reform for the JFTC to consider is to improve the intra-agency cooperation between economists and lawyers.¹⁰ Antitrust policy is an interdisciplinary enterprise of economics and law, but we have rarely seen that the JFTC's decisions are issued as the products of collaboration between them. Having two related expertise in one agency may be the crucial difference that distinguishes the JFTC from the courts. This attribution should be developed and reflected more in their writings.

That's all for my comments and thank you.

¹⁰ On intra-agency organizational structure, see Luke Froeb, Paul Pautler & Lars-Hendrick Röller, *The Economics of Organizing Economists*, *The Essay*, 76 *Antitrust L.J.* 569 (2009).