The LCD cartel: impacts and implications for the competition policy of Taiwan

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Abstract

This paper discusses the impacts and implications from the LCD cartel case for the competition policy of Taiwan. It begins with a historical review of the facts of this case, followed by an analysis of the legal and economic issues involved. The purpose of this paper is to first demonstrate how the differences in substantive and procedural requirements for investigating cartels have led the Taiwan, U.S. and EU competition enforcement agencies to come to different legal conclusions on the same case. Based on this observation, this paper then examines the impacts and implications this case might have on the competition law and policy of Taiwan. On the one hand, this case has accelerated the amendments of the Fair Trade Act (FTA), the competition law of Taiwan, to adopt the incentive-based leniency program to encourage reporting of collusive arrangements by cartel insiders. From policy perspective, on the other hand, this case enlivens the debates regarding whether there should be a uniform and global model for designing market regulatory mechanisms. In particular, should they vary with the different business cultures involved? This paper concludes by offering some initial thoughts on those questions.

Keywords: liquid crystal display, cartel, competition law, leniency program, Taiwan

I. INTRODUCTION: SUMMARY OF FACTS AND ISSUES

In 2006, the U.S. Department of Justice and European Commission filed charges against the major suppliers of thin film transistor liquid crystal display (TFT-LCD; "LCD") for their attempts to fix global LCD prices. The LCD is panels used in various consumer electronic devices and Taiwanese producers are among the top five global suppliers.[1] Both agencies asserted that the cartel members held nearly sixty "Crystal" meetings in Taipei from 2001 to 2006 to form consensus on prices for various sizes of LCD panels. Most of the investigated Taiwanese companies settled with the DOJ and EC. Some of their executives have served or are serving jail terms in the United States. Only one company, AU Optronics ("AUO") brought this case to American courts. Samsung, who was the first to report the case to the DOJ and EC, was exempted from liabilities under the leniency programs in both jurisdictions.

None of the investigated suppliers is American or EU company. However, both the US and EU applied the "extraterritorial effect" doctrine in their competition law to establish their jurisdictions over this case. The AUO, on the other hand, challenged that the decisions on jurisdiction were made without taking due notice of the principle of international comity.[2] However, the EU still held the meetings had the potential to create "substantial, direct, and foreseeable" effects within the EEA areas, which is sufficient to establish extraterritorial jurisdiction under the EU competition law.[3] The AUO further asserted that both the DOJ and the European Commission had failed to prove the existence of a collusive agreement on prices among the LCD suppliers. Even an agreement could be inferred, it had never been implemented and therefore could not have affected the competition in the US or the EU market. But both the DOJ and European Commission came to the opposite conclusions on this defense. Emphatically, they pointed out that

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[1] Up to August 2011, the top five global suppliers and their respective market shares in terms of global sales are Samsung (Korea, 27.6%), LG (Korea, 26.4%), Chimei Innolux (Taiwan, 15.9%), AU Optronics (Taiwan, 15.8%), and Sharp (Japan, 5.9%). *See Korea: Samsung and LG dominating world LCD TV panel market*, WHAT HI-FI: SOUND AND VISION (August 11, 2011) *available at* http://www.whathifi.com/news/korea-samsung-and-lg-dominating-world-lcd-tv-panel-market (last visited February 6th, 2012).

[2] COMP/39.309-LCD, at paragraph 232-234.

[3] The European Commission in the "Wood pulp" case adopted the standard. *See* A. Ahlstrom Osakeyhtio v. Commission of the European Communities Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, and 125 to 129/85 [1988] ECR I-5193, at paragraph 16.

implementation was not a prerequisite for the violation of competition law on cartel.[4] On March 13, 2012, the verdict was returned. The jury found the AUO and two of its executives conspiring with other LCD makers to fix the LCD prices.[5] AUO could face up to $1 billion fines based on the illicit gains of $500 million concluded by the jury. The two convicted executives could be incarcerated up to 10 years according to the Sherman Act, the main antitrust legislation in the United States.

This case placed Taiwan under spotlight in international antitrust arena and stirred panic in its other domestic industries as well. The imposed fines in this case were far beyond the maximal level under the Fair Trade Act of Taiwan ("FTA"). The application of U.S. and EU antitrust laws and leniency programs also surprised Taiwanese companies who in general were still unfamiliar with the extra-territorial effects of economic law. Additionally, this case offers antitrust practitioners and researchers in Taiwan the opportunity to reflect upon the following two important policy issues. Firstly, the provision on the definition of cartel in the FTA (Article 7) specifically requires the arrangement under investigation be capable of affecting the conditions of market supply and demand to constitute a violation. Hence, the Taiwan Fair Trade Commission (TFTC) is under the obligation to prove that suspected collusion have the existing or potential effect of distorting market competition. In contrast with the US and EU practices, this requirement frequently imposes a higher burden of proof on the TFTC. Secondly, this case exposes the weakness of the FTA in prosecuting international cartel. The maximum fine for collusive arrangements in the FTA is capped at 100 million New Taiwan Dollars (less than $3 million). Obviously, it lacks the deterring effects as one might expect from the US and EU laws.[6] The effectiveness of the leniency program in detecting cartel is also missing in the FTA. Both phenomena suggest the needs to enhance the FTA's regulatory functions.

This paper elaborates on the first issue in the second part. It compares and analyzes the laws on cartel of the United States, European Union, and Taiwan. The analysis intends to show how the differences in substantive and procedural legal requirements have led the TFTC to come to the different investigation conclusions from the other two jurisdictions on the same case. Part three describes the impacts of this case on the future enforcement of the FTA. Obviously, this case plays a part similar to a catalyst for accelerating the process

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[4] Case 19/77, Miller v. Commission [1978] ECR 131, paragraph 7-10; Case C-277/87, Sandoz v. Commission [1990] ECR 1-45, at paragraph 3.

[5] *Jury Convicts AUO, 2 Execs of LCD Price-Fixing Plot*, Law360, *available at* http://www.law360.com/competition/articles/315775?nl_pk=ea9af4fa-6877-47f2-a70d-93f11a4cdcc0&utm_source=newsletter&utm_medium=email&utm_campaign=competition (last visited March 14, 2012).

[6] The total fines imposed by the U.S. on Taiwanese LCD companies were more than 890 millions U.S. dollars.

of FTA amendment. In this part, the paper introduces the newly drafted leniency and its related compliance programs in more details. Part four considers the implications from this case. Although the FTA has been implemented for more than twenty years in Taiwan, its regulatory authority has not been uniformly recognized in the past. This case inspires interested parties in both the private and public sectors to re-acquaint the law and to re-engage in dialogue regarding the optimal mode of regulatory mechanisms for Taiwan in a rapidly globalizing world. Part five concludes this paper.

II. THE LCD CARTEL AND THE APPLICABLE LAWS: A COMPARATIVE REVIEW

Of all antitrust violations, there is an emerging global consensus to treat cartel as the one most detrimental to market competition. From economic perspective, collusive agreements on price, output, or sale territory eliminate business options originally available to market participants. Mutually consented schemes among cartel members not to compete are also far less likely to be counteracted by the competition from non-members in the market.[7] Consequently, cartel tends to create more direct and instant pernicious effects to consumers than firms' unilateral business arrangements. In a large part, those concerns explain why a harsher view towards cartel has developed.

But detecting and punishing cartels under competition law is not easy. In concept, the existence of a collusive "agreement" is a priori condition for establishing a cartel. In reality, however, implicating evidence for that matter is usually hard to find. This evidentiary problem will become more acute in international cartel. In response, an increasing number of states have adopted incentive-based mechanisms such as the leniency program to encourage the provision of evidence from cartel members.

This paper discusses those issues and the laws involved in the LCD cartel case in this section.

A. U.S. Law on International Cartel

1. Substantive Laws

Section 1 of the Sherman Act is the major competition law on cartel in the United States. It provides that "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 declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a

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[7] HERBERT HOVENKAMP, ANTITRUST ENTERPRISE : PRINCIPLE AND EXECUTION, 109 (2008).

felony[.]"[8] In establishing that the investigated arrangements will affect trade or commerce among states or with other nations to justify the extraterritorial application of the Sherman Act, the courts usually applies the following three sets of tests.[9]

The first test is the one adopted by the U.S. Supreme Court in McLain v. Real Estate Board of New Orleans.[10] Under the test, the DOJ needs to prove that the defendants' conducts "is itself in interstate commerce or . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce."[11] In practice, the test has been flexibly interpreted to include either the conducts lie "in the flow of commerce" or have the potential of negatively affecting interstate commerce.[12] The former standard imposes upon the government the obligation to establish a factual nexus between the investigated activities and its impact on commerce. The government could not simply make conclusive statements on this requirement, but should specifically prove that there is a continuous and uninterrupted flow of the relevant products or service into the relevant market. With respect to the "affecting commerce" standard, the Court has required the government to show that the alleged activities have "as a matter of practical economics" a not insubstantial effect on the interstate commerce involved.[13]

The second test is the Alcoa test. In this famous case,[14] U.S. Judge Hand applied a two-prong standard to cartel affecting import commerce. In one, price-fixing cartel must have substantial adverse effect on U.S. market. In the other, the cartel members must intend the effect. Acknowledging the controversy of proving intent in law, Hand argued that it might be inferred from the facts that the effect was reasonably foreseeable.

The third test is the criteria set in the Foreign Trade Antitrust Improvements Act ("FTAIA"). Under this test, the Sherman Act applies to non-import commerce involving trade or commerce with foreign nations if (1) the cartel has a "direct, substantial, and reasonably foreseeable effect" on U.S. market,[15] and (2) "such effect gives rise to a claim under the Sherman Act or the Fair Trade Commission Act".[16]

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[8] 15 U.S.C. §1.

[9] Mark S. Popofsky & Anthony Biagioli, *The Sherman Act's Criminal Extraterritorial Reach: Unresolved Questions Raised by* United States v. AU Optronics Corp. 2011 CPI ANTITRUST CHRONICLE 1, 3-4 (2011).

[10] 444 U.S. 232 (1980).

[11] *Id.*, at 242.

[12] ABA Section of Antitrust Law, CRIMINAL ANTITRUST LITIGATION HANDBOOK 265 (2nd ed., 2006).

[13] 444 U.S. 246.

[14] United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945).

[15] 15 U.S.C. §6a(1)(A)-(B).

[16] 15 U.S.C. §6a(2).

On the other hand, the Third Restatement of Foreign Relations Law requires the courts to take international comity into consideration when attempting to establish extraterritorial jurisdictions. Section 403(1) of the law limit the exercise of jurisdiction when doing so would be "unreasonable." Under section 403(2), the court should consider several relevant factors to determine the "unreasonableness" of jurisdiction including the substantial, direct, and foreseeable effect from the activity. One interesting issue in the LCD case is that LCD is a "star" industry encouraged and subsidized by Taiwanese government. Given its importance to the economy of Taiwan, can the Taiwanese defendants argued under section 403(2)(c) that the U.S. court should abstain from exercising the jurisdiction over this case after evaluating "the importance of [regulating the LCD industry] to regulating state?" But the U.S. Supreme Court seems to hold otherwise. In Hartford Fire Insur. v. California, the Court held that "the fact that conduct is lawful in the state in which it took place will not, of itself, ban application of the United States antitrust laws, even where the foreign states has a strong policy to permit or encourage such conduct."[17]

2. Procedural rules

To solve the problem of proving agreement in prosecuting cartel, the DOJ issued Corporate Leniency Policy and Leniency Policy for Individual in 1993 and 1994 respectively. The purpose is to encourage whistleblowers to report and provide implicating evidences to facilitate the investigation by the DOJ. Applicants of the policies will be immune from antitrust criminal liabilities if they meet certain conditions.[18] In the case of corporate leniency policy, the general requirements may be summarized as follows:

(1) The applicant must be the first to report the illegal activities to the agency before the DOJ commences an investigation or does not yet have evidence that is likely to result in a sustainable conviction.
(2) The applicant took prompt and effective actions to terminate its part in the activity being reported after its discovery.
(3) The applicants must provide complete and candid information and cooperate continuously and completely with the DOJ to advance its investigation.

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[17] 509 U.S. 764, 795 (1993).

[18] For the U.S. successful experience of using the leniency policy, *See* Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks at the 24th Annual National Institute on White Collar Crime (Feb. 2, 2010) http://html.documation.com/cds/ABA10/PDFs/011.pdf (last visited March 13, 2012)

(4) The applicant did not coerce another party to participate in the illegal activity or was not a leader in, or originator of, the activity.

The U.S. leniency policy is obviously a winner-takes-all system in which immunity is granted only to the first applicant. The DOJ further sets up a "marker" system to encourage earlier reporting. Under the system, applicant who has in control the minimum amount of incriminating evidences as was prescribed by the DOJ could apply to the agency to retain its priority position before more complete evidences are gathered. If the DOJ approves the application, the applicant would have a specific time period to collect more complete evidences and would still be qualified for immunity.

Additionally, for defendants who reported evidences to the DOJ during the plea bargaining procedure of the first case concerning the existence of another cartel, they could be granted full immunity or reduction of criminal penalties for the first case ("leniency plus"). In contrast, if the defendant chose not to report but the DOJ was later aware of the violation and successfully convicted the second cartel, the DOJ could suggest the court to increase its criminal penalties ("penalty plus). Similarly, the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") limits the civil liability for successful applicant of the leniency policy to damages actually incurred by the plaintiffs and attributable to commerce done by the defendant in the relevant market. The regular triple-damage rule will not apply.

B. EU Laws on International Cartel

1. Substantive Laws

Article 101 of The Treaty on the Functioning of the European Union ("TFEU") is the main antitrust statute against cartel. The provision covers price and non-price arrangements by cartel member "which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market[.]" Judging from the wordings, the application of the EU law requires the activities to have adverse impacts on trade between member states. The EC has interpreted the requirement as meaning that they must be "appreciable"[19] and has been determined in practice by either the flow of pattern of trade or the alteration of market structure.[20]

Similarly, as long as the activities are intended or have created anticompetitive effects within the internal market, they fall within the EU jurisdiction no matter where the

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[19] Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty Paragraph 3, 2004/C 101/07.

[20] FAULL & NIKPAY : THE EC LAW OF COMPETITION, at 96 (2007).

activities are undertaken. In its early phase of development, however, European courts were more reserved in applying this "effect" doctrine to establish extraterritorial jurisdiction. In addition to the presence of adverse market effects, the courts would find for evidence capable of linking non-Community cartel members with Community members before declaring the EU law governable. For example, in *Dyestuffs*, the European Court of Justice upheld the Commission's jurisdiction over a company incorporated in UK (which was not a Community member at that time) because its Belgian subsidiary was acting under its instruction and was in nature an agent for the parent company. Therefore, the parent company and its subsidiary should be treated as a "single economic entity" under competition law and the liabilities from the activities should be imputed upon the parent company.[21]

Nevertheless, the European Court of Justice did not follow the single-economic-unit theory in its leading decision on extraterritorial jurisdiction, the *Wood Pulp* case. In that case, the Court held that extraterritorial jurisdiction over activities undertaken outside the European Community could be established insofar as the activities were "implemented" in the area of European Community.[22] By implementation, the Court referred to sales to Community buyers. It is therefore immaterial whether the sales were made through a subsidiary or other independent intermediaries, such as distributors or retailers.

Although the EU also stressed the importance of "international comity", the EC would exercise self-restraint in extending jurisdiction only when the importance of enforcing foreign laws or policies outweighs the interest of maintaining competition in the European Union. [23]

2. Procedural Rules

Unlike the U.S. Law, EU competition law does not impose criminal liabilities on cartel violators. The European Commission relies mainly on its power to reduce administrative fines to create the desired incentive of reporting by cartel insiders. According to the "Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases" ("Notice"), a cartel member will be granted full immunity of fines if it is the first to report incriminating information or evidence sufficient to assist the EC in carrying out inspections or discovering infringements.[24] The reporting member must cooperate fully,

[21] *See* Case 48/69, Imperial Chemical Industries [1972] ECR p. 619.
[22] VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 27 (7th ed., 2000).
[23] EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 1047 (2007).
[24] C298/17, paragraph 8 & 9.

genuinely and continuously with the Commission during the investigation and should end its participation in the cartel immediately after reporting. It did not destroy, falsify or conceal relevant information or evidence relating to the alleged cartel and has not disclosed the fact or any of the content of its application before the Commission has issued a statement. [25] An undertaking that coerces other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it meets the relevant requirements and conditions.[26]

Cartel member who fails to be the first to report violations may still apply for reduction of fines if it could provide the Commission with evidence of the alleged violations that could add significant value to the evidence already in the Commission's possession.[27] Evidence with added value is determined according to “the extent to which the evidence provided strengthens, by its very nature and or its level of detail, the Commission's ability to prove the alleged cartel.”[28] Under this standard, direct and written evidence originated from the period of time to which the facts pertain will have greater added value than indirect and evidence subsequently established. Also, evidence needed more corroboration from other sources of evidence would be considered less valuable than independently more compelling evidence.

The fines for qualifying applicants will be reduced according to the timing of reporting. Under Paragraph 26 of the Notice, the fines for the first qualifying applicant could be reduced by 50% the maximum, the second applicant by 30%, and the third applicant by 20%.

C. Cartel under the Taiwan Fair Trade Law (pre-2011)

1. Substantive Laws

In comparison with the U.S. and EU laws, the FTA differs in the following two aspects. First, the definition of cartel is limited to collusion among competitors. In other words, concerted actions among upstream and downstream firms will not be characterized as a cartel under Article 7 of the FTA, though they might still be regulated by provisions on vertical arrangements. Secondly, Article 7 also requires that the concerted actions “would affect the market function of production, trade in goods, or supply and demand of services” before they are declared illegal. With respect to the second difference, the TFTC has not been clear on the criteria for assessing the adverse market impacts from the investigated

[25] *Id.*, at paragraph 12.
[26] *Id.*, at paragraph 13.
[27] *Id.*, at paragraph 23 & 24.
[28] *Id.*, at paragraph 25.

concerted actions. In principle, the TFTC is not required to prove the "concrete" and "specific" harms to competition by a cartel; a mere "danger" towards that possibility is usually sufficient to hold the members liable. On some occasions, however, the TFTC will disqualify an action as concerted by stressing that the market conditions accompanying the action would counteract the potential harms that might arise from the action. The factors having been considered by the TFTC include low aggregated market shares of cartel members, easy market entry, high product homogeneity among competitors, and insignificant or non-existent price effect from the action. For example, the LCD cartel has been exonerated from the FTA liability mainly due to the TFTC's failure to prove that the cartel has led the global LCD prices to move in the same directions by identical degrees.

With respect to the jurisdictional issue, the FTA is extraterritorially applicable to mergers outside Taiwan. Foreign companies who have substantial nexus with Taiwanese market (e.g. non-trivial amount of sales, presence through Taiwanese representative office or subsidiary) are under the obligation to file pre-merger notifications to the TFTC for mergers taking place exclusively in foreign jurisdictions. However, the TFTC has never asserted its exterritorial power in cartel cases.

2. Procedural rules

Before introducing and implementing the leniency program in 2011, the TFTC enjoyed only limited power of investigation under the FTA. The agency could conduct *ex officio* investigations on suspected violations and request the defendants to submit the documents or to summon the witnesses critical to the investigations. But the TFTC lacked the power to search the defendant's residence and seize the incriminating evidences discovered during the investigation. "Dawn raid", an effective investigative technique frequently employed by the U.S. and EU enforcement agencies, is a power reserved for the court and prosecutors in Taiwan. Although concerted actions incurred both administrative and criminal liabilities under the FTA, it is rare to observe cartel defendants being held liable for criminal fines or jail terms. One of the reasons for this unbalanced result of law enforcement is that the FTA follows an "administrative-first" enforcement rules (Article 41). Criminal penalties apply only to recidivists. Although this enforcement principle has been criticized for rendering the FTA ineffective in preventing cartelistic behavior, it could still be justified for the following two reasons. In law, the principle is based on the consideration that criminal penalties should be reserved as a regulatory means of the last resort due to its severity and irreversibility. In practice, the TFTC's expertise and experience in regulating market business activities makes it enjoy a sort of institutional comparative advantage in discovering and substantiating incriminating evidences for cartel. That in turn reduces the enforcement costs for criminal investigation by prosecutors and avoids the potential conflict of judgments between these two agencies.

On the other hand, the proviso of Article 14 of the FTL allows cartels to be exempted from antitrust liability if they would generate net welfare-enhancing market effects. For example, a joint venture among competitors to form a new research center to develop new product could be viewed as beneficial to competition, even though it has the potential of diminishing the degree of competition among members of the joint venture by internal rule of cooperation.[29] Similarly, Article 46 of the FTA grants immunity to anticompetitive activities in industries regulated by specific legislations. In Taiwan, one f the most controversial and hotly debated cases concerning this exemption is the disputes relating to rules enacted by professional associations under their legally authorized power to self-regulate. This paper discusses the issues in Part IV.

III. IMPACTS FROM THE LCD CARTEL CASE FOR THE FTA

The LCD cartel case was widely covered by media in Taiwan. Within the government, an across-agency task force was set up to assist the defendant companies in responding to U.S. and EU investigations. The huge sums of fine imposed on Taiwanese LCD companies aroused panics within other domestic industries as well. At the same time, this case inadvertently drew out a sense of nationalism and cultural relativism among Taiwanese firms. Some companies interpreted the extraterritorial application of antitrust law by the U.S. and EU as a masquerade for trade imperialism. In a society where a handshake can be honored as a binding contract, it was understandable to observe the leniency program been denounced as a system to encourage betrayal. It not only ran against the core value imbedded in Asian business culture but could also be strategically used by companies to entrap their competitors if the enforcement agencies lack the caliber to distinguish cartel initiators from followers. Alternatively, this case also sent a wake-up call to the much more realistic Taiwanese companies to reacquaint a law used to be only remotely relevant for their global business planning. Never before had antitrust law and competition theories attracted the degree of interest from Taiwanese business community as it does today. The demand for antitrust consultation from the private sectors surges as Taiwanese firm becomes acutely aware of the consequences of its violations.

As has been pointed out previously, the FTA is frequently criticized as being ineffective in detecting and deterring cartels due largely to its inadequate penalties. However, for reasons too complicated to be described in details here, the FTA amendments proposed by the TFTC have been in and out of the Congress several times without being able to gain the approval of the legislators. Somewhat unexpectedly, this case serves as a catalyst to

[29] *See also*, DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors (2000).

rekindle the legislators' interest in making legal changes. This section describes some of the progresses made after 2011 on the regulation of cartel.

A. The New Formula for Calculating Cartel Fines

To enhance the deterrent effect and incentive to report violations under the new leniency program, the 2011 revised Section 2 of Article 41 of the FTA follows the EU model to increase the maximum fines for cartel violations to 10% of the violating company's total sales income of the previous fiscal year if their activities are deemed to be in serious violations. And under the same revised article, the TFTC is under the obligation to promulgate the regulations with regard to the calculation of the total sales income of the previous fiscal year, definition of serious violations, and calculation of administrative fines. Those regulations ("the Regulation") were promulgated by the TFTC in 2012. Under the Regulation, total sale income will be determined by the total business revenue in the preceding fiscal year when the TFTC made the final decision. The term "serious violations" refer to activities that will seriously impede market competition and have met one of the following conditions:

(1). The sale amount of the relevant products or services during the periods of violation exceeds 100 million New Taiwan Dollars;

(2). The gain from the violations has exceeded the maximum fines stipulated in Section 1 of Article 41.

To what extent will concerted actions be deemed as serious violations will be evaluated by the violators' motives and purposes, the scope and extent affected by the actions, the period for which the actions last, the market structure in which the actions occur and the violator's market positions.

Similar to the EU's guidelines on the calculation of antitrust fines,[30] the amounts of overall fines for cartel violators are reached by measuring first a basic amount for violation then having it adjusted with the specified mitigating or aggravating factors in the Regulation. The basic amount for violation is fixed at the level of 30% of the total sale income from relevant products or services during the period of violation. The fines could be reduced if the defendants cease immediately their actions when investigations begin or cooperate genuinely with the investigations. In contrast, if the defendants are initiators or instigators of the cartels, repeated offenders of Article 14, or refuse to cooperate with the TFTC's investigations, the fines could thereby be increased.

B. The Introduction of the Leniency Program

[30] *See* Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02).

The amended Article 35-1 formally inaugurates the leniency program into the FTA. In its totality, the program might generally be viewed as a revised reproduction of the EU leniency program. Under the new law, there are two types of leniency applicants: those who report and provide the incriminating evidences sufficient to initiate an investigation by the TFTC ("investigation-initiating" application) and those who report evidences with added probative value after the TFTC had commence its own investigations ("investigation-assisting" application). Upon the authorization of Section 2 of Article 35-1, the TFTC further enacted "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases"[31] ("Leniency Regulations") to specify the legal requirements for both types of applications. Similar to the U.S. and EU law, the Leniency Program imposes upon candidate applicants several obligations to fulfill. For example, they should terminate immediately the actions and cooperate completely, honestly and continuously with the TFTC during investigations (Article 6). The same article also prohibits the applicant from forging, concealing, or destroying relevant materials or evidences. And without the approval of the TFTC, an applicant is prohibited from revealing any information regarding the investigation to any person before the final decision on the case is made.

The Leniency Regulations also offers specific guidelines for candidate applicants on the types of materials or information that will be considered as sufficient evidences to be qualified for the application. In a nutshell, investigation-initiating applicants must provide evidences still unknown to the TFTC and could enable the TFTC to gain the information regarding the skeleton of the cartel and the time and place the collusive agreement was made and its contents to start the investigation (Article 4). For investigation-assisting applicants, they must describe in specificity how and to what extent they were involved in the cartel and provide evidences within their possession and capable of proving the culpability of the cartel (Article 5).

Under Article 7 of the Leniency Regulations, full immunity of fines will be granted to the first applicant upon their fulfillment of the conditions imposed by the TFTC. It is applicable to both the investigation-initiating and investigation-assisting applications. For investigation-assisting applicants unqualified for full immunity, the TFTC has the discretion to reduce the fines by 30% to 50% for the first applicant, 20% to 30% for the second applicant, 10% to 20% for the third applicant, and up to 10% for the fourth applicant (Article 8). Unlike the U.S. model, the Leniency Regulations allows cartel initiators or instigators to file for immunity or fine reductions. It is because of the difficulty in practice in verifying the role an applicant played in a cartel. And in theory at least, initiators or instigators could also be the parties more likely to possess and provide

[31] Enacted and promulgated per Kung-Fa-Tzu Order No. 10015614641 on January 6 2012.

the information with higher probative value to the TFTC. Similar to the EU model, applicants who coerced the participation in or restrained the withdrawal from the cartels will be prohibited from applying for immunity of fines, but they are still qualified for fine-reduction applications (Article 2).

C. The Issuance of Guidelines on Competition Compliance Programs

Taking into consideration the increasing costs cartel violations might cause companies, there is a trend for firms to adopt a type of "fix-it-first" antitrust compliance program within the organization to prevent and detect potential violations. Although the role such programs should play in terms of antitrust policy is still debated,[32] they offer several advantages to business. It reduces the risks of violations by preventing business employees from engaging knowingly or unintentionally in activities with higher probabilities of being considered illegal and save the litigation costs for the business. It assists the business to detect its own violations at their early phase and alerts the management to take immediate steps for leniency applications. Also, it avoids the damages to business image from media coverage on suspected violations and investigations. And when a firm is portrayed as being voluntarily law-abiding, compliance program could even attract more business opportunities and increase its profits. To bring about those advantages, the TFTC issues and publishes guidelines for the business on how to construct an effective competition compliance programs. There are two guidelines on this subject. Both are suggestive and legally non-binding.

"The TFTC's Guiding Principles for Enacting Antitrust Compliance Programs by Enterprises" is in essence a general "wish list" that the TFTC would like to have it included in the programs by enterprises. They might be categorized into the following groups.

[32] There are basically three possibilities for the compliance programs to play a role from the policy perspectives. First, it could be used a "pass" to immunize a business from any antitrust investigation. On the other hand, some have held the view that compliance program should be irrelevant for establishing liability. Lying in between is the view that the relevance of a compliance program to the determination of competition liability varies with the types of violation under review and the specific contents in the programs. *See*, Joseph Murphy**,** *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play*? Paper prepared for the OECD Competition Committee, Roundtable on Promoting Compliance with Competition Law 4-5 (October 7, 2011), *available at* http://www.oecd.org/dataoecd/12/13/48849071.pdf (last visited March 12, 2012).

1. The programs should include mechanisms to foster an environment of complying the antitrust law. For example, the responsible person(s) promoting the programs should be a high-ranking management of the enterprises. S/he should report periodically to the board of directors for the progress of this program and the risk of antitrust violations facing the enterprise. Adequate resources should be devoted to this program and related educational trainings on antitrust law be provided to employees.

2. The programs should stipulate, according to the divergent degrees of risks of violations facing various internal departments, the policies and procedures for compliance. The policies and procedures should be periodically updated to cope with the changes of domestic laws or laws of the countries with which the enterprise has business ties. On learning that violation might have occurred, the procedure should require prompt notifications to the TFTC. In case that the enterprise has been involved in illegal activities, it should immediately seek for legal consultation and apply for the leniency program as soon as possible.

3. The programs should provide educational and training courses on compliance. The courses should be aimed at educating and training all senior managements, all employees who might contact the competitors and those who are responsible for price determination and product marketing. The courses should involve the introduction of the types of conducts with higher probability of being considered illegal under the antirust laws, the contents of antitrust law and its liabilities, the leniency program, and the channels for reporting violations.

4. The programs should establish internal control, auditing, and reporting mechanisms. For internal-control mechanisms, the programs should provide a process capable of defining, evaluating, and reducing the risks of violation. Internal-auditing and reporting mechanisms should be able to aid the judgment of the existence of violations, and the adoption of appropriate measures to terminate the illegal activities and encourage reporting.

5. The enterprise should consider including in the programs a system to reward complying and discipline defying employees.

The “Antitrust Compliance Guidelines for Enterprises”, on the other hand, depicts in more details the conducts of which enterprises should be more cautious in their daily business operations. The followings are some of the major suggestions by the TFTC tailored to the making of the compliance programs for preventing cartel liabilities.

1. Before contacting the competitors or attending meetings of business associations, an enterprise should ask for the programs of those meeting and have them consulted with antitrust professionals.

2. When competitors attempt to discuss sensitive information such price, output, production capacity, or the client list, it should reject and report immediately to the enterprises.

3. Enterprises should be highly alert to any information exchanges between industries through letter, e-mail, or telephone. They should keep written records regarding the time, places and contents of the meetings, telephone communication, or personal contacts with competitors, and their insisting on not discussing sensitive information.

4. Enterprises should be cautious of the resources that they obtain competitors' price information and the nature of those obtained information. Past information obtained from open platforms are usually less likely to cause antitrust concerns than current or future information available only through private-sharing mechanisms.

5. It is suggested that enterprises refrain from making internal business decisions through public announcements to allow their competitors the opportunities to adjust their prices and capacities accordingly, or to facilitate the exchanges of sensitive information.

IV. IMPLICATIONS FOR COMPETITION POLICY AND CULTURE: IS ASIA UNIQUE?

The LCD cartel case is a watershed case for Taiwan. In addition to the impact on the FTA amendments, the case has also shed lights on the discussion on current regional or even global competition policies towards cartel. In this section, this paper offers some initial thoughts on two broader issues from this case. Legally, it is interesting to probe further into the questions arising from the application of current antitrust reviewing and evidentiary standards for cartel. From economic and cultural perspectives, the case provides another opportunity to evaluate whether and how the differences in market scales and business culture should be accommodated into the process of designing regulatory mechanisms for market competition.

A. The Reviewing Standards and the Evidentiary Thresholds

In the past decade and especially for "hard-core" cartels,[33] a growing number of states have joined force with the U.S. or the EU to favor the rule of per se illegal as their reviewing standard. In contrast, the rule-of-reason standard requires the courts to consider

[33] "Hard-core cartels refer to concerted actions specifically on fixing prices or output, bid rigging, or dividing market. They are often treated as more likely to harm competition than other types of cartels. *See* OECD POLICY BRIEF, REPORT ON HARD CORE CARTELS-HARM AND EFFECTIVE SANCTIONS, May 2002, *available at* http://www.oecd.org/dataoecd/30/10/2754996.pdf. (last visited March 23, 2012)

and balance the pro and anticompetitive effects inherent in the conduct under investigation. The per se rule is a product of judicial economy. The conducts subject to per se review are those whose "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."[34] More relevantly, proving the existence of a collusive "agreement" is usually very costly if not impossible for the enforcement agencies. Although collusive agreements might be inferred from indirect or circumstantial evidences, yet the approaches are imperfect and controversial. The limit somehow explains the increasing popularity of the leniency program among global competition agencies.

From theoretical perspectives, the per se rule rests upon a critical assumption. Simply put, it predicates upon a belief that the probability and costs for the rule to over-kill competitively neutral or benevolent activities are rare and negligible. But such a belief needs to be re-examined, at least for issues cutting across the maintenance of competition and the promotion of dynamic innovation. In some industries, high-tech or biochemical industries for example, cooperation between competitors might entail benefits that the enforcement agencies won't be able to observe, let alone evaluate, in the short run. Theoretical and empirical studies on the potential redeeming virtue from conducts in such industries abound, with results varies with the assumptions and methodologies adopted. To be sure, the economic models in those studies are frequently too complicated to enlighten the court or the jury in reaching sound decisions. But even a clear-cut rule is required for the administration of justice, that consideration should not automatically lead policy makers to favor the standard of per se illegal. A streamlined or "truncated" rule of reason or a rebuttable rule of presumed legal could all be the alternative policy options. Whatever the enforcement agencies' choices might be, they should be made upon the assessment of the net market effects from concerted actions and its frequency of appearing in the industries where they are observed. Defining and treating a concerted action as "hard-core" and per se illegal by looking simply at the kinds of agreement (e.g. "price" or "sales territories") embraced by participating members is not only formalistic but also tends to over-simplify the economic reality of competition. One starting point for reshaping the current enforcement landscape would be to place more weight on the "effect" or "volume of commerce" requirements in cartel investigations.

The LCD cartel case also rekindles the discussion on some of the evidentiary issues associated with cartel prosecutions under antitrust law. Procedurally, for example, the AUO has questioned in its litigation against the DOJ regarding the reach of the grand jury's subpoena power. Under Rule 26 (c) of the Federal Rules of Civil Procedure of the United States, the courts have the authority to limiting disclosure of evidence produced in

[34] Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5 (1958).

civil discovery.[35] In 2009, the DOJ petitioned the court's permission to copy all documents produced in the previous civil litigation on the same case, including documents brought into the U.S. for the purpose of complying with the civil discovery orders. The court denied the petition and the DOJ moved to obtain the foreign documents by serving grand jury subpoenas on the U.S. law firms who held those documents.[36] The district court granted the motion to quash the subpoenas by the law firms. Judge Illston cautioned that authorizing the grand jury to subpoena directly foreign documents would have the effect of expanding its power outside its geographic scope and was unprecedented. The court suggested that the DOJ should use more ordinary method such as issuing letters rogatory or mutual legal assistance treaty to obtain documents locating outside the U.S. jurisdiction.[37] On appeal, the Ninth Circuit reversed the order and recognized the power of the grand jury to subpoena the foreign documents that "[b]y a chance of litigation [come] within its grasp."[38] The AUO petitioned for a writ of certiorari to the Supreme Court of the United States, arguing that the Ninth Circuit's decision have conflicted with long-settled principles governing the geographic reach of a grand jury's subpoena. It specifically pointed out the possibility that the Ninth Circuit's decision would encourage the DOJ to obtain the foreign-based documents by "simply announce[ing] an investigation and then wait to capitalize on the domestic civil discovery which is sure to follow[.]"[39] The decision would defy the principle of international comity and foreign sovereignty frequently recognized by the Court. However, the Court denied the certiorari in June 2011.[40]

As a significant portion of recent cartel defendants was convicted by settlements with the DOJ, the AUO litigation also offers a rare opportunity for us to observe how information or documents obtained through leniency program interact with substantive evidentiary requirements. To infer the existence of a collusive agreement from information exchange among competitors is theoretically and practically challenging.[41] Facing the inherent difficulties, one of the common solutions is to categorize the information being exchanged and to establish the "agreement" requirement accordingly. For example,

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[35] FED. R. CIV. P. 26(C).

[36] Note, *In re Grand Jury Subpoenas (White & Case LLP)*, 627 F.3d 1143 (9th Cir. 2010), 124 HARV. L. REV. 2099, 2100 (2011).

[37] *Id*., at 2101.

[38] 627 F.3d 1144, *cited from id*.

[39] Nossaman LLP v. United States of America, Petition for a Writ of Certiorari (NO. 10-1176), p.25.

[40] White & Case LLP v. U.S., 131 S. Ct. 3061 (2011)(cert. denied).

[41] *See* OECE Policy ROUNDTABLES: INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW 21 (October 2010).

sensitive (price, cost, or output), current or future, and exclusive information are considered to be more likely to facilitate the formation of cartel than insensitive, past, or publicly available information. It is therefore more likely that the sharing of the former type of information would be equated with the intent to collude and the existence of a collusive agreement. However, such an approach is logically questionable. The development of U.S. case law has also shown a clear trend towards requiring the information exchanged to have the potential of leading to anticompetitive market outcomes.[42] The Court will consider the market structure of the industry in addition to the nature of the exchanged information to determine its overall economic effects.[43]

In criminal trials, the DOJ by law is required to prove beyond reasonable doubt this rather complicated and time-consuming burden of proof. To pass the evidentiary hurdle, the DOJ will have to convince the jury by excluding the possibility that anti-competitive effects from information–sharing activities could still be unlikely to occur under the surrounding market structures.[44] In the context of international cartel, this strict evidentiary standard should apply equally to such requirements as the "volume of commerce" affected by the cartel and the "substantial, reasonable, and foreseeable" effect in establishing extraterritorial jurisdiction. Given the verdict against the AUO, the acquittal of two of its high-ranking executives and a hung jury for the third one[45] may send a message to antitrust legal community.[46] In passionately pursuit of price-fixing behavior and hail a pre-trial guilty plea as a "success", the victory might come with costs frequently neglected by the enforcement agencies. The cost consists of the compromised due-process protections in plea-bargaining proceeding. It also includes the risk of unwarranted

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[42] OECD, *id*., at 40.

[43] US v. United States Gypsum Co. et al., 438 US 422, 441 (1978).

[44] The defense lawyer in the AUO litigation did present evidence showing the prices for LCDs during the alleged conspiracy plunged instead of increased. Karen Gullo, *AU Optronics, Two Executives Convicted of Panel Price Fixing*, BLOOMBERGBUSINESSWEEK (MARCH 13, 2012), *available at* http://www.businessweek.com/news/2012-03-13/au-optronics-two-executives-found-guilty-of-price-fixing (last visited March 20, 2012).

[45] *Id*.

[46] Even in jurisdictions without criminal liability, the concern this paper raise here is still applicable. In Europe, the debates on whether the investigative techniques used in competition cases and the huge fines imposed upon cartels have violated the European Convention on Human Right are rapidly emerging. The EU Court of Justice has also held that competition fines amount to criminal sanctions defined under the Convention. *See* Marco Bronckers & Anne Vallery, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, 34 WORLD COMPETITION: LAW AND ECONOMICS REVIEW 535 (2011).

expansion of the coverage of antitrust law to activities that might not violate well-established rules by the Court.[47] The latter occurs in particular when the prosecutors accepted wholesale the evidences gathered from leniency program in order to leverage a guilty plea from the defendant enterprises.

B. Should the Differences in Market Scales and Business Culture be Accommodated into the Process of Designing Regulatory Mechanisms for Market Competition?

From non-legal perspectives, significant policy implications could be drawn from this case as well. Central to those implications is the on-going debates on whether there should be a uniform understanding and global definition of "competition". In particular, can domestic market scales and unique business culture justify competition-restraining business arrangements? Arguments for or against the issue were reflected in part in the efforts by governments to harmonize domestic trade and competition policies. Internationally, the failure to incorporate competition law into the WTO framework is also closely related to this complicated and unsettled issue.

In Taiwan, those who are skeptical of the need of a strong competition policy against cartel frequently justify their views by referring to the differences in the business models and market scales between Taiwan and the states with more antitrust enforcement experience. Unlike the U.S. or the EU, Taiwan is a small economy with exports as its major economic driving force. The realization of economies of scale is particularly important for an economic entity consisting predominantly of small-and-medium enterprises like Taiwan or many other Asian countries. A certain degree of cooperation among competitors should therefore be tolerated to enhance their competitiveness abroad as well as the local economic prosperity. In the context of trade policy, such arguments could also be used to justify government's subsidies or tax relieves to a certain cheery-picked industries. In reality, this could be a quite popular view towards competition in most Asian countries.

However, the LCD cartel case seems to caution against this viewpoint. With more states accepting or adopting the extraterritorial doctrine, it weakens any antitrust defenses based upon economic or trade variances across nations. On the bright side, this might facilitate in the convergence of international antitrust rules in the long run. Business benefits from more uniform regulations because they reduce the costs for business planning. However, it is also quite predictable that more acute disputes regarding the prosecution of international cartels by large and economically more advanced countries will be raised in the short run. For example, the exemptions of "export cartel" and cartels initiated by "small-and-

[47] *See* Keith N. Hylton, *Intel and the Death of U.S, Antitrust* Law, THE CPI ANTITRUST JOURNAL, February 2010 (2).

medium enterprises" under the proviso of Article 14 of the FTA could in effect be rendered inoperative by an investigating state's assertion of extraterritorial jurisdiction. Expansion of domestic jurisdiction by the investigating state might therefore generate the controversy regarding its illegitimate intervention of the investigated state's sovereignty. The extraterritorial doctrine could even be interpreted by investigated business as a tool to cover up trade protectionism.

The impact of cultural differences on competition law has not been systematically studied. But cultural differences did affect the rigor of a state's competition policy. [48] Its influences are reflected in the attitude towards the types of activities that should be deemed illegal as well as the remedies adopted to cure the violations. In Japan, for example, the tradition favors a stable society. Stable relationship with suppliers, distributors, or banks is especially important for Japanese business when shortage of supplies occurs or the transaction costs are relatively high.[49] It has led many business people to believe that cartels and bid rigging are not always bad and may not deserve severe punishment.[50] Korean competition policy in its early phase of enforcement stressed more on economic concentration and unfair business practices than merger and cartel, which matched well with their culture of protecting the weak from the strong.[51] Similarly in Taiwan, the incorporation of the leniency program has aroused concern for encouraging betrayal in business community. Some have also questioned its effectiveness because whistleblower could be ostracized and seriously punished by its colleagues in future business interactions.

Cultural differences vary significantly across regions. There could be divergent indicators to demonstrate their impacts on competition law and policies.[52] For the convenience of exposition of this paper, they are understood to simply reflect the different degrees of belief in the laisser-faire philosophy. States with stronger competition policy tend to have more confidence in market's self-correcting function while the others with more reserved attitudes towards accepting the ideas wholesale. The disparity is nicely illustrated by comparing a recent FTA case on lawyers' cartel with a similar decision by the U.S. Supreme Court decades ago.

In 2010, the TFTC fined Taiwan Bar Association for prohibiting its members from offering online legal services. The association offered two main justifications for its

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[48] *See* Ki Jong Lee, *Culture and Competition: National and Regional Levels*, 21 LOYOLA CONSUMER LAW REVIEW 33 (2008).

[49] Akinori Uesugi, *How Japan is Tackling Enforcement Activities Against Cartels*? 13 GEO. MASON L. REV. 349, 353-54 (2005)

[50] *Id.*, at 349.

[51] Lee, *supra* note 48, at 50.

[52] *See e.g.* Lee, *id.*, at 34-40.

decision, which were accepted later on administrative reviewing proceeding.[53] First, lawyers are not business entity. Their practices are colored more by the search for public interest than the pursuit of maximized profits. Secondly, allowing online legal services increases the risk of fraud and will exacerbate the information-asymmetry problem already prevalent in the market for legal services.

In contrast, the U.S. Supreme Court rebutted the similar defenses in Bates v. State Bar of Arizona[54] more than thirty years ago. In a fairly stringent tone, the Court denounced the belief that lawyers are somehow above commerce or trade as having become an "anachronism."[55] Equally unconvincing to the Court was the banning of advertisements for legal services on the basis of protecting uninformed consumers from ill-intentioned lawyers. Implicitly, the Court re-affirmed the prospect of relying on market to address its own failures by the following statement:[56]

> "For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust."

Although conflicts persist, convergence is in sight. We have seen competition enforcement agencies in both large and small economies undertake the effort of making "competition advocacy" to their regulatory counterparts. While the efforts may not eliminate completely the potential conflicts between trade and competition policy, it may nevertheless serve as reminders for the potential of over-regulations. International organizations such as International Competition Network (ICN) or the OECD Competition Committee also provide platforms for dialogues among members who hold conflicting views on the merits of competition. They offer the opportunity for disagreements occasioned by economic and cultural differences to be presented, debated, accommodated, and reflected in their published guidelines on best practices or policy suggestions. In return, those endeavors by international organizations enhance mutual awareness of the developments of competition law in economically and culturally distinct jurisdictions. They increase the chances of establishing a common ground upon which global competition laws could be harmonized in the long run.

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[53] But the TFTC made a second decision to fine the association for the same conduct in April 2012.

[54] 433 U.S. 350 (1977).

[55] *Id.*, at 372.

[56] *Id.*, at 379.

V. CONCLUSION

This paper uses the LCD cartel case to illustrate how it has reshaped the enforcement landscape of Taiwan's competition law. The most notable change it brought about is the introduction of the leniency program. How the program will fit into the legal system and cultural tradition of Taiwan remains to be seen. But it definitely has reinvigorated the interest in competition law and policy from Taiwanese business in industries other than the LCD. This paper then discusses some of the measures taken by Taiwanese government to aid the business in reducing the risk of violations. Alternatively, this paper also examines some of the legal issues derived from this case. In particular, the AUO's litigation reveals that evidences gathered through leniency program should be evaluated under the stricter beyond-reasonable-doubt standard in trial. It will be more challenging for the enforcement agency to convict a cartel than when the case is settled during the plea-bargaining procedure. It thus offers policy makers and enforcers an opportunity to examine to what degree the increasing successful rate of conviction co-exists with the sacrificing of procedural protection or even the misapplication of the law. This paper concludes by elaborating on some of the economic and cultural justifications for refuting a one-size-fits-all approach of interpretation of competition law. Although economic and cultural disparities should be duly recognized, constant dialogues among global agencies on those regional differences should help to bridge the gap and foster a more competition-friendly business environment.

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