CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Cornell Law Library

Cornell Law Library
Scholarship@Cornell Law: A Digital Repository

Cornell Law School Inter-University Graduate Student Conference Papers

Conferences, Lectures, and Workshops

4-16-2005

Antitrust Analysis of B2B Transaction

Akira Inoue
University of Virginia School of Law, ai8p@neon.mail.virginia.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/lps_clacp

Part of the Commercial Law Commons

Recommended Citation
Inoue, Akira, "Antitrust Analysis of B2B Transaction" (2005). *Cornell Law School Inter-University Graduate Student Conference Papers.* Paper 7.
http://scholarship.law.cornell.edu/lps_clacp/7

This Article is brought to you for free and open access by the Conferences, Lectures, and Workshops at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law School Inter-University Graduate Student Conference Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

ANTITRUST ANALYSIS OF B2B TRANSACTION

Akira Inoue [1]

I. Introduction
II. Characteristics of B2B Transaction
(1) Procompetitive Effects of B2B
(2) Anticompetitive Effects of B2B
(3) Facilitation a Formation of Buyers' Agreements
(4) Summary of Analysis
III. Analysis of Oligopsony
(1) Suppliers' Harm due to Oligopsony
(2) Consumers' Harm due to Oligopsony
(3) Oligopsony and Procompetitive Effects due to Joint Purchasing
(4) Difference Between Oligopsony and All-or-Nothing Deal
(5) Difference Between Oligopsony and Collusion to Reduce the Price by Increasing the Quantity of Input Purchased
(6) Summary of Analysis
IV. Analysis of Buyers' AnticompetitiveAgreement s
(1) Legal Responses to Buyers' Anticompetitive Agreements in the U.S.
(2) Legal Responses to Buyers' Anticompetitive Agreements in Japan
(3) Interpretation of the Japanese Antimonopoly Law
(4) Summary of Analysis
V. Several Factors to Find Buyers' Agreements
(1) Factors to Infer Buyers' Agreements
(2) Summary of Analysis
VI. Concluding Remarks

I. Introduction

As an internet technology developed, especially advances in semiconductor technology making it possible to increase both processing speed and capacity, there have been reported almost daily in Japan new establishments of electronic market places on web sites where businesses can purchase and sell goods and services from others just like they do on real market places. This is called the business-to-business electronic market place ("B2B") and has been heralded as one of the most revolutionary

[1] LL.M. expected May 2005, University of Virginia School of Law; LL.B. in 1996 and LL.M. in 1998 at the Chuo University in Japan as the Chuo University Scholarship Student. Passing the Chuo University Faculty of Law Assistant Professor Examination in 1999. Passing the Japanese Bar Examination in 1997 and admitted as the member of the Tokyo Bar Association in 2000. From 1988 to 2000, trainee at the Legal Training and Research Institute of the Supreme Court of Japan. Since 2000, the member of the Japan Copy Right Institute and the Japan Civil Law Institute.

innovation in the business world.[2] This new technology gives great benefits to both sellers and purchasers. As to the purchasers, because they can negotiate several sellers through B2B almost at the same time, they can reduce the costs of procuring raw materials. In addition, they can obtain the most recent information as to price and quantity supplied at the specified time through B2B, which is almost impossible at real market places. On the other hand, sellers are able to find purchasers who need their products easily. Needless to say, in real marketplaces, finding purchasers is no easy and is also a time consuming and costly task. For businesses being able to supply high quality products but lacking network in real market places, a transaction through B2B gives greater business opportunities.[3]

One of the examples of newly created B2B in the U.S. is "Covisint." [4] On September 2000, the Federal Trade Commission ("FTC") approved the establishment of "Covisint" formed by five automobile corporations in the U.S. for the purpose of procuring raw materials through the internet with low price and high efficiency. The main concern of the FTC was that its formation should be a violation of the section 7 of the Clayton Act. However, the FTC concluded that it would let Covisint go forward with the

[2] The Federal Trade Commission, *Entering the 21st century: Competition Policy in the World of B2B Electric Market Place*, introduction (2000), *available at* http://www.ftc.gov/os/2000/10/b2breport.pdf (last visited Jan. 31, 2005) [hereinafter *Staff Report*]. Staff Report includes a description of various aspects of B2B and efficiency it provides, and outlines the guideline to cope with antitrust concern in the context of B2B.

[3] Nikkei Computer. Co., *B2Btointernettorihikisho* [*B2B and Transaction Through Internet*], NIKKEI COMPUTOR, Jun 19, 2000, at 206-207 [hereinafter *Transaction Through Internet*].

[4] The Federal Trade Commission, *FTC Terminates HSR Waiting Period for Covisint B2B Venture*, (2000), *available at* http://www.ftc.gov/opa/2000/09/covisint.htm (last visited Feb. 2, 2005) [hereinafter *Press Release Covisist*]. *See also* F. Martin Dajani, *Beyond Covisint-Antitrust Scrutiny of B2B Exchanges*, 57 J. MO. B. 186, 186-190 (2001). *See also* Compuware Corporation, *About Covisint*, *at* http://www.covisint.com/about/ (last visited Feb. 4, 2005). It describes Covisint as central hub where suppliers of all sizes do business in single environment using the same interface, user i.d., and pass word. *Id*.

reservation that the FTC was continuing concern about its operation.[5] Also, in Japan, in the fields of information equipment, software, and components of automobile, especially after 2000, several B2Bs have been created.[6]

Because, as mentioned before, it is easy on the web site for many sellers and purchasers to join a transaction at the same time compared to real market places and easy to communicate with each other, we can expect substantial reduction of the costs concerning each transaction.[7] In fact, Matsushita Electric Corporation announced that it could achieve from 10% to 15% of cost reduction by procuring components of television through B2B which had started its operation on April 2000.[8] After this announcement, a lot of businesses directed their attention to B2B in order to reduce costs concerning each

---

[5] *See, e.g.*, *Press Release Covisist*, *supra* note 4. It says that "because Covisint is in the early stages of its development and has not yet adopted bylaws, operating rules, or terms for participant access, because it is not yet operational, and because its founders represent such a large share of the automobile market, the Commission cannot say that implementation of the Covisint venture will not cause competitive concerns." *Id*.

[6] *See e.g.*, GYO HAYASHI, NIHONBAN DOTCOM BUSINESS SEIRYOKUZU [POWER BALANCE IN INTERNET BUSINESS IN JAPAN] 2-16 (Askee, 2000).

[7] *Transaction Through Internet*, *supra* note 3, at 206. In Japan, the primary form of transaction on B2B has been conducted with using the "auction function." Under this form, in a transaction of its initiative in a seller, after several purchasers bit for it, a seller compare the price presented by each purchaser and conclude the transaction with the purchaser who presented the highest price. On the other hand, in a transaction of its initiative in a purchaser, after several sellers bit for it, a purchaser compare the price presented by each seller and conclude the transaction with the seller who presented the lowest price. *Id*. at 207. Other form of transaction on B2B in Japan has been the catalogue sales. In fact, in addition to hosting auctions, most of B2Bs post online catalogue, which are essentially the electronic equivalent of paper catalogues. Online catalogues are often tailored for specific customers by including specialized pricing or product selections. *Id*. at 207-208.

[8] YOHJI TANIGUCHI, DENKISHOTORIHIKISHIJOH KOHCHIKU [ESTABLISHMENT OF WEB-BASED MARKET PLACE] 18-22 (Seiseisha, 2000). In Japan, the importance of establishing internet market places and realization of procurement of raw materials through them has been recognized after 1996. It has been, however, the main hurdle of this realization that the only internet resource available at that time for businesses was the low speed internet. It can be said that the recent developments of the broadband internet all over the country made it possible to establish the internet market places. In addition, other characteristics to be pointed out in the course of development of B2B in Japan is, different from the U.S., B2B had been established not by venture companies but by corporate giants to lower their procurement cost. *Id.* at 20-22.

transaction by purchasing raw materials through the internet jointly with competitors.[9] After the bubble economy came to a deadlock, the Japanese economy has been suffering from depression and struggling cost reduction as well as restructuring. Due to its potential procompetitive effects, that is, the possibility to reduce costs dramatically, this new market place is expected to turn around the Japanese economy.[10]

However, the fact that buyers communicate easily through the internet means they can form a cartel or conclude agreements easily to restrain free competition on the web site markets[11] and detect deviation[12] from them. There must have been

[9] The Fair Trade Commission in Japan, *Genzairyotouno choutatuwomokutekitosuru kigyoukanndennsishoutorihikisijounoseturitunikannsuru jigyoukshakaranosoudannjireunituite* [*Consultation Case Concerning Establishment of E-Commerce market with the view to Purchasing Raw Materials Jointly*], (2000), *available at* http://www.jftc.go.jp/pressrelease/12index.htm#dec (last visited Feb. 2, 2005) [hereinafter *Consultation Case Concerning B2B*].

[10] Conor Maguire, *B2BhaEUtonihonnodokusennkinnsiseisakujounokyouteinokibantonaruka* [*Whether B2B become a foundation of treaty concerning antitrust policy between EU and Japan*], (2000), at http://www.jmcti.org/jmchomepage/jmcjournal/data/2000_09/kikou01.pdf (last visited Dec. 22, 2004).

[11] It has been recognized that easy communication through web-based communication tools might facilitate the formation of cartels or other form of anticompetitive agreements. *See e.g.*, U.S. v. Airline Tariff Publishing Co., 58 FR 3971, 3974 (Department of Justice Jan. 12, 1993) (Proposed Final Judgment and Competitive Impact Statement). It said that "These agreements, understandings, and concerted actions were reached and effectuated through each of the airline defendant's use of the computerized fare dissemination services of ATP to (1) exchange proposals and negotiate fare changes; (2) trade fare changes in certain markets in exchange for fare changes in other markets; and (3) exchange mutual assurances concerning the level, scope, and timing of fare changes. The combinations and conspiracies alleged in the first cause of action had the effect of depriving consumers of scheduled air passenger transportation services of the benefits of free and open competition in the sale of such services." *Id*. at 3974.

This case was a sellers' price fixing case not buyers'. However, what is notable is that sellers relied heavily on computerized communication as indicated above. It cannot be denied that, compared to real market places, participants in B2B transaction tend to use web-based communication more than when joining real market places, because, faced with more convenient way of communication, there are no reasons for their withholding to take advantage of it. In this sense, an antitrust concern that web-based communication facilitates the formation of cartels would apply to purchasers' participants of B2B transaction. In addition, this case demonstrates that as commerce shifts to the electronic marketplaces and courts confront the question of whether communication concerning price between competitors constitutes an unlawful antitrust activities, the critical inquiry shifts from whether the firms meet the agreement to whether or not it is possible to find an agreement from a record of communication, in other words, whether or not it is possible to find that their observed interactions constituted the forbidden process and that so can be enjoined under the section 1 of the Sherman Act. An obtaining a record of communication between competitors as to challenged conduct would be easier in transactions on the web site than ones using telephones or writing letters, since communications

buyers' agreements long before B2B and these agreements were concluded without using internet based communication. However the potential for B2B to aid buyers' agreements is worth focusing on[13] because the newly enhanced ability of commercial buyers to reach purchasing agreements might lead to anticompetitive collusive monopsony ("oligopsony")[14] agreements[15] to lower input prices by conspiring to depress the quantities of input purchased.[16]

---

among parties are to be recorded at servers located in internet providers. However, as explained later in this article, even when a record of communications should be obtained, direct evidence to find agreements is not always easy. In addition, since the most of B2Bs lack the signaling system to inform competitors of their prospects about future price, it would be sometimes difficult to infer agreements only from a record of communications.

[12] Jonathan B. Baker, *Identifying Horizontal Price Fixing in The Electronic Marketplace*, 65 ANTITRUST L.J. 41, 44 (1996). It says that "improved information exchange may also facilitate coordination by reducing any single firm's incentive to deviate from a coordinated…But if rivals can detect and will match price reductions very quickly, as may occur when prices are posted in the electronic marketplace, this incentive can be greatly weakened." *Id*. at 44.

[13] *Id*. at 44-45.

[14] Monopsony is the "term used to describe the situation where there is only one seller of a product, monopsony where there is only one buyer." In re Beef Industry Antitrust Litigation, 907 F.2d 510, 514 (5th Cir. Tex. 1990). The court in this case defined the term "monopsony" by quoting RICHARD POSNER & F. EASTERBROOK, ANTITRUST: CASE, ECONOMIC NOTE AND OTHER MATERIALS 148 (2d ed. 1981). The classic example of monopsony is said to be the company town existed even today in rural area of Japan. The company was often the only employer for hundreds of miles and thus it had a captive labor market. The residents, sellers of labor, had the only one purchaser to which to sell their labor. Because there are no other competitors for labor force, the company usually pays artificially low wages and otherwise takes advantage of captive labor market. Eventually residents leave the company town, exiting the market and reducing the output of labor. It is this exiting from the market that antitrust regulators seek to prevent. When buyers have market power, in the short term, prices are reduced as sellers reduce their margins and increase efficiencies in order to meet the demand of a powerful purchaser. However, at some point, sellers may no longer find it profitable to produce the goods and services and eventually leave the market, making it less competitive. *See generally* Dajani, *supra* note 4, at 190.

On the other hand, according to Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrision*, 37 ANTITRUST BULL. 151, 152 (1992), the term "oligopsony" is used to refer a buyers' agreement to "restrict output (purchases) on the buying side of a market, thereby depressing purchasing prices." *Id*. at 152.

[15] There are no examinations about natural monopsony in Japan. However, in the U.S. it has been pointed out that the antitrust law does not appear to forbid the existence of natural monopsony itself. *See* Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1568 (1989). It also says that "[n]atural monopsonies arise from the existence of a single buyer, where the buyer's sole participation is due to circumstances beyond the buyer's control. The result is appropriate because the buyer cannot do much about the fact that no one else wants to buy the product in question. This is not to say that there will be no adverse consequence for social welfare, but there is no remedy." *Id*. at 1568. In other words, a dismantling of a single buyer of natural monopsony into small units to

Although, as mentioned above, transactions through B2B include antitrust concerns, especially oligopsony agreements which could be facilitated by easy communications, in Japan, there have been few studies on this area. Also, the only guidelines issued by the Fair Trade Commission in Japan ("FTCJ") is Consultation Case Concerning B2B.[17] This is because all the factors which could facilitate the formation of oligopsony agreements are relatively new in Japan.

The first of all, the formation of B2B has started recently in Japan. Traditionally in Japan, sellers have had a strong bargaining power advantage over purchasers. Sellers have been corporate giants, who always purchased raw materials from their subsidiaries and sold their final products to consumers. Consumers have been, in general, willing to accept proposed prices from corporate giants without thinking whether it was too expensive. Therefore little attention has been focused on anticompetitive effects which might be caused by buyers' agreements. Consumers have never dreamed of forming buyers' cartel to negotiate the corporate giants to lower the proposed prices.

In addition, in general, buyers are numerous and it has been difficult to unify them into agreements. The internet, however, drastically changed the bargaining

---

eliminate its market power would impose welfare losses of uncertain magnitude, which means that productive inefficiencies would result. However, when a natural monopsony abuses its market power to influence price, it would fall within the prohibition of the section 2 of the Sherman Act.

[16] Costs concerning reaching agreements to fix the price are one of the principal costs in forming a price fixing cartel. *See e.g.*, RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 51 (University of Chicago Press 1976). It discussed such a cost in the context of sellers' cartel. However, on B2B market places, these costs can be reduced through web-based communication.

[17] *Consultation Case Concerning B2B*, *supra* note 9. In the guidelines, the FTCJ pointed out several antitrust apprehensions concerning B2B by citing the real cases it had been consulted. However, the FTCJ did not clarify any criteria to decide an antitrust illegality of each case. Since there have been no recommendations nor hearing cases which the FTCJ dealt with concerning B2B, in concluding its analysis, the FTCJ says that, although it is desirable that B2B will be established more and more since it gives procompetitive effects on the national economy, because whether or not it includes an antitrust illegality depends on the way of its operation, the FTCJ's basic policy of B2B is that it will continue its further supervision on B2B transactions.

power balance between sellers and purchasers. It has made it possible for purchasers to obtain as much information as they can with extremely low costs and to communicate with each other. This aspect can enhance a formation of cartels among purchasers to decrease the input purchased and lower the prices. Further, on B2B, the number of participants in a given market is relatively small compared to real market places, which could make it possible to unify buyers into agreements.

The second factor which could facilitate the formation of oligopsony agreements in Japan is that because of the long lasting depression even corporate giants are forced to participate in internet market places to reduce procurement costs of raw materials, after examining well if it would contribute more cost reduction than dealing with their subsidiaries. Because Japanese corporate giants have been so conservative and unwilling to transact with the businesses which have not dealt with them before, without the long lasting depression, it can be said that there was only a small possibility for corporate giants to join B2B.[18] Corporate giants, with initial huge bargaining power, have participated in B2B as purchasers and raised an antitrust apprehension due to their buyers' agreements. It should be noted that in Japan buyers who have raised an antitrust

[18] *See generally* International Information Study Group at Chiba University Faculty of Horticulture Economy Division, *Aiteinosinpotoryutuseido* [*Development of IT technology and distribution system*], (2004), *available at* http://www.h.chiba-u.ac.jp/glocal/lec10404.htm (last visited Jan. 30, 2005). According to this article, at the perfectly competitive market places, purchasers might look for the best suppliers, including the one which they have never dealt with before, in order to reduce their costs concerning manufacturing their products. In order to find the best supplier, purchasers have to compile as much information as they can, which would force them to incur a lot of costs. On the other hand, given that purchasers would transact with suppliers within their hierarchy, although they do not have to incur costs in order to find the best supplier, total costs concerning manufacturing their products should be higher. Whether purchasers would choose to look for the best supplier or transact with suppliers within their hierarchy depends on a lot of factors, such as economical condition, nationality, traditional way of transaction in the country, and so on. It cannot be denied that, in spite of the fact that web-based communication tools drastically reduce the costs to look for the best supplier, generally speaking, corporate giants in Japan are reluctant to deal with new suppliers, but rather prefer procuring raw materials and components within their hierarchy. In this sense, it can be said that the long lasting depressions gave corporate giants an incentive to participate in B2B transaction and to deal with new suppliers.

apprehension because of buyers' cartel are not consumers and newly established joint ventures but in most cases corporate giants and their subsidiaries. The present circumstances in Japan are different from the U.S. in that corporate giants rather than consumers and newly formed joint ventures have taken advantage of convenient tools of communication on B2B.

As explained above, all the factors which could facilitate the formation of oligopsony agreements are relatively new in Japan. The emerging of high speed internet which have made it possible to communicate more effectively on B2B and the long standing depression which forced corporate giants with huge bargaining power are all newly appeared factors. Due to the emergence of these factors, an antitrust apprehensions of buyer cartels has arisen in Japan. For the reason explained above, in Japan, there are few studies on oligopsony agreements which could be caused by convenient tools of communication through the internet as well as B2B and only the guidelines issued by the FTCJ is Consultation Case Concerning B2B.

The FTCJ points out several antitrust concerns in its guidelines named Consultation Case Concerning B2B: First, in B2B transactions, there might be unreasonable restrictions on trades; Second, participants of markets tend to restrict competition through web-based communication among sellers or buyers. Third, given that, participants are obliged to buy anything on B2B, such a conduct might cause an antitrust illegality as unreasonable restrain of trade; and Fourth, given that procurement of raw materials on the B2B market places should be indispensable for participants, a foreclosure from the market should be a violation of the Law Concerning Prohibition of

Private Monopolization and Maintenance of Fair Trade[19] ("Japanese Antimonopoly Law").[20] In this guideline, however, the FTCJ does not analyze an antitrust concern that B2B transaction might encourage the formation of oligopsony agreements among buyers.

This article seeks to provide a lodestar in applying the Japanese Antimonopoly Law to real cases concerning B2B in which the exercise of market power by buyers would cause an antitrust illegality. The cases which would be accused as the exercise of market power under the Japanese Antimonopoly Law are that buyers agree to reduce the price by lowering input purchased. Absent an agreement among buyers, even if an input purchased at a market has actually been lowered, such a business activity would not be a violation of the Japanese Antimonopoly Law as explained later in this article. Thus, this article focuses on cases with buyers' agreements and provides the criteria to determine an antitrust illegality under the Japanese Antimonopoly Law. Also,

[19] Law No. 54 of 1947 in Japan. The Japanese Antimonopoly Law prohibits (1) to restraint "free and fair competition" by consulting with other entrepreneurs, (2) to unjustly maintain its monopolistic position or unjustly exclude other competitors, or (3) to distort any competition by using any of the 16 types of unfair trade practices. Among the three conducts as mentioned above, the conduct referred to in item (1) is called "unreasonable restraint of trade (cartel)," which means "to mutually restrict the business activities by making cooperative decision concerning sales price, sales volume, consolidation of manufacturing facilities and restriction of business partners among competitors, and thereby causing to substantially restrict the competition in any field of trade. This unreasonable restraint of trade constitute conducts such as "bid rigging," "price cartel," "market segmentation cartel," "transaction terms cartel," "cartel on supply restriction," "trading partner restriction cartel," and others. The conduct stated in (2) above is called "private monopolization," which means for the entrepreneurs to "exclude or control the business activities of other entrepreneurs, thereby causing contrary to the public interest, a substantial restraint of competition in any particular field of trade." Specifically, this means any conduct by a company with high market share to exclude participation of new entrants or restrain the business activities of other competitors by using unjust means (in many cases, but not limited to, any means that violate the law) in order to increase or maintain its market share. "Unfair Trade Practices" described in (3) above means 16 types of conduct designated by the FTCJ which may inhibit fair trade (efficient competition). These types of conduct are prohibited as preliminary acts of aforementioned cartel or private monopolization. These conducts are (i) concerted refusal to deal, (ii) other refusal to deal, (iii) discriminatory pricing, (iv) discriminatory treatment of transaction terms, etc., (v) discriminatory treatment in a trade association, (vi) unjust low price sales, (vii) unjust high price purchasing, (viii) deceptive customer inducement, (ix) customer inducement by unjust benefits, (x) tie-in sales, etc., (xi) dealing on exclusive terms, (xii) resale price maintenance, (xiii) dealing on restrictive terms, (xiv) abuse of dominant bargaining position, (xv) interference with a competitor's transaction, and (xvi) interference with internal operation of a competitor's company.

[20] *Consultation Case Concerning B2B*, *supra* note 9.

this article analyzes several tangential facts and circumstantial evidence to infer buyers' agreement. This is because, in the real practices under the Japanese Antimonopoly Law, in spite of the fact that finding an agreement among buyers is often the decisive point in cartel cases, obtaining direct evidence to find an agreement is not always easy task even on B2B. Namely, in Japan, the proof of an agreement in cartel cases has tended to rely heavily on direct evidence and the information provided by whistle blowers. However, both direct evidence and the information from whistle blowers are not always obtainable and continuing relying on them could promote the illegal interrogation practices. As explained later in this article, Japan has a bad interrogational tradition that illegal ways such as fraudulent means have been used to obtain direct evidence and one of the factors that caused this tradition was the heavy reliance of direct evidence by both the FTCJ and courts. In addition, in Japan, there are no protections on whistle blowers. Therefore the examination on tangential facts and circumstantial evidence are always necessary in cartel cases.

Part II of this article describes the characteristics of B2B transaction, explaining its procompetitive and anticompetitive effects and how it may facilitate formation of buyers' agreements to lower the input and drive down the price.

Part III of this article analyzes both procompetitive and anticompetitive effects of buyers' agreements from the viewpoint of economics. This gives an overview of how both suppliers and consumers might be affected due to collusive buyers' agreements to exercise market power.

Part IV of this article summarizes legal responses to buyers' anticompetitive agreements in the U.S. as well as in Japan and interpretation of the

Japanese Antimonopoly Law and provides a framework in applying the Japanese Antimonopoly Law to real cases in which buyers' oligopsony agreements causes antitrust concerns. As explained later in this article, in order to determine a certain business activity as a violation of the Japanese Antimonopoly Law, it is necessary to find that such a business activity substantially restrains the competition through an agreement.[21] Even when input of purchased has been reduced, absent an agreement among purchasers, such a business activity would not be a violation of the Japanese Antimonopoly Law.[22]

---

[21] The Japanese Antimonopoly Law, art. 2, para. 6.

[22] In Japanese judicial precedents, it has been construed that in order to determine certain business activity as a cartel, a concurring of intent among the parities based on communication is necessary. *See* Toshiba Chemical Co. v. Fair Trade Commission, 906 HANREITIMES 136 (Tokyo Hi. Ct. Sep. 25, 1995). In this case, the FTCJ issued the recommendation to the companies including Toshiba Chemical Co. ("Toshiba Chemical") on the ground that they formed the cartel in violating the Japanese Antimonopoly Law, art. 3. on June 6, 1989. Seven companies except for Toshiba Chemical accepted the recommendation. Accordingly, the FTCJ issued the judgment the content of which was the same as the recommendation and the Punitive Penalty (Surcharge) order to seven companies on August 8, 1989 and seven companies accepted them. On the other hand, since Toshiba Chemical refused to accept the recommendation, the FTCJ commenced the hearing on August 8, 1989 and rendered the judgment that Toshiba Chemical violated the Japanese Antimonopoly Law, art. 3. on September 16, 1992. Toshiba Chemical filed the litigation at the Tokyo High Court seeking denial of the judgment by the FTCJ. The Tokyo High Court rendered the judgment remanding the case to the FTCJ on the ground that the hearing proceeding at the FTCJ violated the law because one of the referees had participated in the investigation conducted before the hearing on February 25, 1994. The FTCJ reformed the member of the hearing and rendered the same judgment on May 26, 1994 against which Tochiba Chemical filed the litigation at the Tokyo High Court. The court rendered the judgment on September 25, 1995 and said that the term "mutually" used in the Japanese Antimonopoly Law, art.2, para. 6. meant that several businesses recognized and anticipated that others would raise the price of same kind and content of commodities almost at the same time. It also pointed out that although it was not necessary to communicate explicitly about how much price to raise, it is necessary for each business to anticipate others would raise the price based on their communication. It should be noted, however, that in this case the court found the content of communication among competitors prior to and after the price raise, participants of the communications, date, place and time of each meetings and same business conducts adopted by conspirators. Therefore, it can be said that the court almost found direct evidence to infer the agreement among competitors. The judgment had recognized the main point of this case as the question concerning whether there were enough inferences of communication among the competitors as to their price raise and explained the general principal to find an agreement from tangential facts. It was not necessary to mention, however, this general principal because it was able to find the agreement from direct evidence. Rather, the main point of this case was whether the withdrawal from the agreement should be admitted because colluding companies except for Toshiba Chemical had already admitted the charge before Toshiba case had been commenced at the FTCJ and only Toshiba Chemical had contended that it did not concluded the agreement. In other word, since the agreement among parties had been found before the commencement of Toshiba case, only point to be discussed at Toshiba case was not whether or not it

was able to find the agreement but whether or not withdrawal from the agreement already found should be admitted. In this case, however, Toshiba Chemical exchanged information as to the price raise with seven companies before the meeting held on June 10, 1987 and consented such a price raise clearly before the meeting. In addition, there was no evidence introduced from Toshiba Chemical as to its withdrawing from the agreement. Therefore, even if Toshiba Chemical did not express its view concerning the price raise clearly on the meeting, the argument that it had withdrawn from the agreement, had it raised, would not be admitted in this case.

See also Kyowa Excio Co. v. Fair Trade Commission, 552 KOSEITORIHIKI 25 (Tokyo Hi. Ct. Mar. 29, 1996). In this case, ten companies formed the body named *Kabutokai* in which they exchanged the information and agreed to cooperate to decide which company would obtain orders in bidding. Based on this agreement, ten companies colluded in connection with which company would obtain the orders in twenty seven biddings conducted from April 1, 1981 to June 15, 1983. The FTCJ, after finding the agreement, ordered the Punitive Penalty (Surcharge) order to three companies including Kyowa Excio Co. ("Kyowa Excio") all of which actually obtained orders in the biddings. Two of the three companies accepted the order by the FTCJ. On the other hand, since Kyowa Excio refused to accept the order by the FTCJ, it initiated the hearing proceeding and rendered the judgment demanding Kyowa Excio to pay the Punitive Penalty (Surcharges) on March 30, 1994. As Kyowa Excio filed the litigation seeking the denial of the judgment of the FTCJ at the Tokyo High Court, it dismissed all the claims by Kyowa Excio on March 29, 1996. In rendering its judgment, the Tokyo High Court detailed its finding agreements among the parties of *Kabutokai*. Eight companies of the ten members of *Kabutokai* lacked any intention and capability to get orders as to given work at the time of forming *Kabutokai*. In this regard, the court said that because even if they lacked the intention and the capability, they were able to expect a substantial collateral for their contribution for two companies in obtaining orders, there were the agreements among ten companies of *Kabutokai*. As the judgment detailed, since it is almost impossible to know the intention and the capability of other competitors and therefore it is quite natural to act on the premise that the competitors have the intention and the capability to get orders, it is appropriate to find that ten companies were the member of the agreement. In this case, although it was assumed that the content of implicit agreement was to decide the companies which would obtain orders in biddings through consultation among the members and cooperation by other members, all of them were not clear enough to find in this case (some of them were specified to some extent). In addition, in this fact-finding, the date, the place and progress of the meetings in which the agreement was concluded were not specified. In spite of this, fact-in-issue of implicit agreement among the parties was found based on the inferences from twenty seven collusive bidding from March 1981 to June 1988 as well as numerous communications among the members of *Kabutokai*. Based on this fact-finding, the court determined that the agreement substantially restricted the competition at the given industry and violated the Japanese Antimonopoly Law. Especially in bid rigging cases, this kind of fact-finding is effective way to find an agreement among parties because, as explained later in this article, a single bid rigging do not constitute a violation of the law since "substantial restrain of competition," one of the elements of the law, art. 2, para. 6., requires certain span of time and expanse of land. In order to judge bid riggings as a violation of the law, it is indispensable to find a principal agreement based on which members colluded for each bid rigging and therefore it would be appropriate to find a principal agreement from each bid rigging.

Further, the Supreme Court of Japan requires a concurring of intent among parties based on communication in order to determine certain business activities in issue as a violation of the Japanese Antimonopoly Law. This is, explained later in this article, clear from the languages of its judgment that it determined that when parties reached collusive agreements, at this point, they violated the Japanese Antimonopoly Law. *See e.g.*, Japanese Government v. Idemitu Co., 33 KEISHU 1287 (Sup. Ct. Feb. 24, 1984).

There is, however, an unsolved discussion as to what extent of concurring is necessary to find an agreement among partiers. In this regard, *see* Yuasakizaikohgyo, 1 SINKETUSHU 62 (FTC, Aug. 30, 1949). This is the case where the defendants bided approximately at the same price, however there were discovered no definite agreements as to the price. The referee said that judging from the fact that

the defendants bided approximately the same price, it could be found that, through the meeting among the defendants held twice before the bid and other communications, they concluded the implicit agreement on how much price they would bid. Further, the referee added that, as it was necessary to determine to what extent of concurrent was needed to find an agreement, it was not enough to find only the fact that the price they bided was the same but said that it was necessary to find that there were some kinds of communications among the defendants as to price and that each defendant acted the same way thinking that others would act likewise. Based on these facts-findings, the referee concluded that there was an agreement as to price among the defendants. Although it is construed that it is not necessary to find an exact agreement as to price, it is needed to find a communication among the parties as to price and concurrent action based upon them. The expression that that each defendant acted the same way thinking that other would act likewise could cover broad business activities. This is, however, the case where since the purpose, date, time, participants, and content of conversation of each meeting were all specified, the referee would be able to find an agreement as to price from these tangential facts easily or simply from direct evidence. However, it should be noted that there is an argument in Japan that since the recommendation procedure is not intended to find facts but to give simply an opportunity to redress an inappropriateness of a given business activity, it is not proper to examine recommendation cases in the context of finding an agreement among buyers from tangential facts and circumstantial evidence.

Hiroshimashisekiyushogyokumiai, 44 SHINKETUSHU 3 (FTC, June 24 1998) adopted the similar framework explained above in a cartel case and found an agreement on price from the content of meetings held among the parties, communications, the price raised after the meeting, date of price raise, and date, place, and participants of the each meeting. The referee in this case noted that communications among the parties involved in the cartel should be necessary to find an agreement on price. As explained above, in Japan, in order to find an agreement, at least it is necessary to find a communication as to price among parties and fact-finding practice at courts and the FTCJ have followed this principal so far. It should be noted, as briefly explained above, that the basic pattern of fact-finding at both courts and the FTCJ concerning an agreement have been that, in a industry where agreements on price had been concluded repeatedly, after meeting several times among competitors in a given industry and communicating price raises, one of the competitors proposed a price fixing agreement or how much to bid and other participants of meetings consented and followed them.

In addition to above cases, there are several recommendation cases at the FTCJ which found agreement among competitors using same method outlined above. *See e.g.*, Akitashichuoriyokumiai, 13 SINKETUSHU 55 (FTC, Aug. 11, 1965); Asahigarasukabusikigaisha, 22 SINKETUSHU 92 (FTC, Dec. 9, 1975). Overall trend of fact finding at the FTCJ is said to become more careful after the introduction of the Punitive Penalty (Surcharge) order in 1977. Under the Punitive Penalty (Surcharges) system, the FTCJ is compelled to order a larger amount of penalty compared to the normal administrative or criminal penalty when finding an agreement among competitors. Also, since its introduction the Punitive Penalty (Surcharges) system has been criticized as against the double jeopardy rule of the Japanese Constitution, art. 39. Taking into consideration of these factors, the FTCJ seemed to have adopted more careful approach in finding an agreement as to price raise from tangential facts and circumstantial evidence. *See e.g.*, Mitsubishibiltechnoservice, 41 SINKETUSHU 46 (FTC, July 28, 1994). In this case, six companies including Mitsubishi Building Maintenance Co. ("Mitsubishi") attended several meetings named "*Tohkakai*" to exchange information as to their business from August 31, 1982. The FTCJ issued its recommendation to the participants of the meeting after careful investigation on the case on the ground that they agreed to fix the price at that meeting on March 9, 1984. As six companies refused to accept the recommendation, the FTCJ commenced the formal hearing and rendered the judgment which said there were no agreements as to price among the parties. The referees in this case found that there were some communications as to the price among the parties at the meeting held on August 31, 1982. They said, however, that had six companies actually agreed on price raise at that meeting, Mitsuishi should have distributed documentations reflecting such a price raise before or after the meeting and informed five other companies how much to raise based on which they should have reviewed thoroughly. They found no

Therefore, this article examines cases in which buyers agree to lower the input purchased and does not review cases where no agreements among buyers can be found.

Part V of this article provides several factors to find an agreement to exercise market power under the Japanese Antimonopoly Law as a fact-finding matter because in the real antitrust practices in Japan it is often difficult to obtain direct evidence to prove buyers' agreements. Part V of this article tries to fill the gap between a theoretical analysis and the real antitrust practice in Japan.

II. Characteristics of B2B Transaction

B2B is the virtual market place on the web site that connects each business via internet.[23] There has been developed by software systems that allow business to purchase input from commercial suppliers using the high-speed internet communications.[24] Because, on the web site, it is easy for many sellers and purchasers to

---

evidence to prove these facts. In addition, they concluded that there was not enough time to examine the price raise considering the number of topics discussed at that meeting and total meeting time. What is notable in this case is that the referees of this case denied finding the agreement among the parties although they found several communications as to price at that meeting. This case was the first case in which the FTCJ initiated the hearing but referees did not find a violation of the Japanese Antimonopoly Law in twenty nine years since its establishment and demonstrated that the hearing proceeding at the FTCJ functioned. In addition, up until now, there have been no cases which the FTCJ initiated the hearing on the ground that an exchange of information that had not reached an agreement should be a violation of the law.

On the other hand, in the U.S, it has also been considered that a mere parallel conduct engaged in by competitors with knowledge of each other's action does not constitute an agreement within the context of the Sherman Act. *See e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954). It said, citing Interstate Circuit, Inc. v. United States, "[b]ut this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely." *Id.* at 541. *See also* William E. Kovacic, *The Identification and Proof of Horizontal Agreement Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 31-55 (1993). It points out that rather than deeming mere conscious parallelism an agreement, it is necessary to find certain additional feature of firms' behavior called "plus factor" supporting the inference of agreement.

[23] *Federal Trade Commission Staff Report*, *supra* note 2, at 1.

[24] *Id.*

join a transaction at the same time and to communicate each other, we can expect a substantial reduction of the costs concerning each transaction. In addition, as explained in this section, the characteristics of B2B make it possible to enhance efficiency, productivity and profitability. However these pro transactional natures of B2B, all of which are largely attained by efficient communication tools through the internet, could also cause anticompetitive effects on market places. In other words, the fact that buyers communicate easily through the internet means that they are able to conclude an anticompetitive agreement and to detect deviation from them easily. Because B2B could yield both procompetitive effects and anticompetitive effects, examining only one side of its characteristics is not appropriate when considering whether or not a certain business activity on B2B should be a violation of the antitrust law. It is, therefore, necessary to consider both sides of characters of B2B when examining specific business activity in the context of reviewing whether anticompetitive effects are inevitable outcomes to accomplish pro transactional effects on B2B. The overview of general characteristics of both procompetitive effects and anticompetitive effects of B2B are as follows:

(1) Procompetitive Effects of B2B

(A) Improvement of Quality of Goods

The B2B technology makes it possible to achieve a design coordination that could improve the quality of goods through communications between sellers and buyers, which is time consuming and hard to maintain at real markets.[25] The communication efficiencies on B2B could reduce the time and the labor associated with the coordination, although achieving it is still easier said than done even on B2B. The

[25] *Federal Trade Commission Staff Report*, *supra* note 2, at 12.

FTC, however, recognized its potential of cost saving and improvement of quality of goods.[26] This potential significance of B2B is worth to get attention.

(B) Communication Efficiencies

B2B enables sellers and buyers to communicate rapidly and inexpensively. This could allow suppliers and suppliers' suppliers to learn more quickly what buyers want and when they want, which reduces forecasting which has been proved almost always inaccurate, expensive and waste of time and labor.[27] When an upstream of businesses obtains a large order, the software used in B2B can calculate the necessary increase in input purchased, determine the necessary adjustment at various upstream level and transmit this information to relevant suppliers.[28] In addition to the fact that communication will be done more quickly, the potential of errors or delays is dramatically reduced.[29] These features are advanced by a secure plat form and common technological standard. The FTC has clearly mentioned this efficiency with its recognition that "the sharing of information among competitors may be pro-competitive and is often reasonably necessary to achieve the pro-competitive benefit of certain collaborations."[30]

---

[26] *See e.g.*, *Press Release Covisist*, *supra* note 4. It quoted the FTC Chairman Robert Pitofsky's comment that "As we learned at the FTC's workshop in June, B2B electronic marketplaces offer great promise as means through which significant cost savings can be achieved, business processes can be more efficiently organized, and competition may be enhanced. B2Bs have a great potential to benefit both businesses and consumers through increased productivity and lower prices."

[27] *Federal Trade Commission Staff Report*, *supra* note 2, at 1.

[28] *Id*.

[29] Gail F. Levine, *B2Bs, E-Commerce & The All- Or- Nothing Deal*, 28 RUT. COM. & TECH. L. J. 383, 391 (2002).

[30] The Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, 15 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (last visited Feb. 3, 2005) [hereinafter *Collaboration Guideline*]. *See also id*. at 27-28. According to this guidelines, in order for an efficiency attained through B2B to be cognizable, an efficiency claim must be substantive, which includes 1) the likelihood of an efficiency to be achieved, 2) the magnitude of an efficiency, 3) how it will be

(C) Reduced Administrative Costs

B2B can reduce administrative costs, such as the time and energy a business shall expend to process orders and to correct any mistakes in their processing.[31] In transaction at real market places, buyers must prepare orders in writing, over telephone or via email.[32] On the other hand, sellers must put that orders into their system so that they can progress them. Checking all the status until buyers receive the products is multistep, labor-intensive operations.[33] Communications required in each step would be time consuming as well as costly and increase the possibilities that any errors should happen.[34] The Automating process via online communications makes it possible for businesses to reduce these costs.

(D) Reduced Research Costs

Through B2B, it is possible to reduce research costs which business must bear in order to obtain input. Finding out suppliers which provide the very goods and services and comparing them would be time consuming and therefore costly processes. B2B can reduce these costs by "making it easier for buyers to comparison-shop, replacing, thumbing through bulky paper catalogs with quick and efficient mouse click searching."[35] In this way, B2B can "reduce the costs that buyers and sellers would otherwise expend to locate and negotiate with each other."[36] B2B makes it possible for sellers to enjoy "greater and cheaper access to more potential customers."[37] Due to this reduced research

---

achieved, and 4) how it will enhance the B2B's and its ability to compete. In addition, the efficiency must be B2B specific, which means that it cannot be obtained other than B2B. *Id*. at 27-28.

[31] Levine, *supra* note 29, at 391.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Federal Trade Commission Staff Report*, *supra* note 2, at 1.
[36] Levine, *supra* note 29, at 391.
[37] *Federal Trade Commission Staff Report*, *supra* note 2, at 1.

costs, more businesses can access new products, services, and markets for them never participated by thembefore with cheaper costs.

(2) Anticompetitive Effects of B2B

(A) Information Exchange

As explained before, B2B allows participants of markets to share information through the internet at an unprecedented rate. Although the FTC[38] and the Supreme Court in the U. S.[39] recognized procompetitive effects of information sharing, it could also raise an antitrust concern.[40]

On the other hand, although the FTCJ seems to recognize procompetitive aspects of information exchange, it says that whether an information exchange at B2B would be a violation of the Japanese Antimonopoly Law depends upon the structure, rules or whether information exchange might facilitate price coordination.[41]

The most obvious form of anticompetitive information exchange is sharing costs and price information.[42] In order to examine information exchange in B2B

[38] *Id*. at 6.
[39] *See e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 443 (1978). It mentioned procompetitive effects of information sharing in general that "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act." *Id*. at 443.
[40] *Collaboration Guideline*, *supra* note 30, at 13-14. It notes that "Competitor collaborations may involve agreements jointly to produce a product sold to others or used by the participants as an input. Such agreements are often procompetitive. Participants may combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce." *Id*. at 13-14.
[41] *Consultation Case Concerning B2B*, *supra* note 9. In this guidelines, the FTCJ says that since the useful information in making strategy of competition such as price, quantity and what like is likely to gather at an operating companies of B2B, when participants are able to access such information easily, they are likely to form cartel agreements. Also, it says that when operating companies should be capitalized by participants or their employees should be dispatched from them, a careful examination would be necessary because in these cases unlawful agreements might be facilitated.
[42] The Fair Trade Commission in Japan, *Jigyoshadantainokatudonikansurudokusennkinnshioujounosisin* [*The Guideline of the Japanese*

from the viewpoint of antitrust concerns, according to the FTC, the following factors should be noted:

(1) The structure of market that B2B provides goods and services (the greater the degree of concentration in the market, and the greater the share of the market controlled by the B2B information sharers, the greater the risk of harm to competition through information exchange);[43]

(2) Whether the information is shared among competitors;[44]

(3) Whether the information relates to more competitively sensitive areas, such as price, output, costs or strategic planning as to direct input;[45]

(4) Whether the information is current or historical;[46] and

(5) Whether the information is unique to the B2B or can be found elsewhere easily.[47]

The FTC also pointed out that, when a high barrier to enter B2B was created by policies to exclude competitors, the risk of anticompetitive practices such as collusion concerning prices through information exchange would increase.[48]

Antimonopoly Law Concerning Activities by the Body of Businesses], section 9 (1995), *available at* http://hrsk.jftc.go.jp/dk/View_HTML.asp (last visited Nov. 3, 2004). In Japan, there have been no cases and recommendations at the FTCJ which determined a certain information exchange itself as a violation of the Japanese Antimonopoly Law. It shall be noted, as explained earlier in this article, that even if competitors are only exchanging information, it could become illegal under the Japanese Antimonopoly Law as cartel practices given that the parties formed any implicit understanding or common intention as to price through information exchange and a reasonable inference could be made that the parties have reached a cartel agreement. When communications among parties included information as to price, such practices are likely to be a violation of the Japanese Antimonopoly Law, art.3. since it is regarded as an agreement in connection with price. On the contrary, should it be determined that communications having some relevance to price have not reached an agreement level, such a information exchange itself is not likely to be a violation of the law.

On the other hand, in the U.S. legality of information sharing is determined under rule of reason. *See e.g.*, *United States Gypsum Co.*, 438 U.S. at 443. It said that “we have held that such exchanges of information do not constitute a per se violation of the Sherman Act. ” *Id.* at 443.

[43] *Federal Trade Commission Staff Report*, *supra* note 2, at 7.

[44] *Id*. at 8.

[45] *Id*.

[46] *Id*. at 8-9.

[47] *Id*. at 9-10.

(B) Formation of Cartels

Since on B2B it is quite easy for buyers to communicate prices and quantities of goods and services, they are likely to form cartels either on a B2B market level or a final products market level. When products purchased through B2B are an indispensable factor in producing final products, buyers are more likely to form cartels in selling final products because their conspiracy to reduce quantities and raise prices of final products would be more successful.

(C) Exclusionary Practices

One of the anticompetitive effects caused by B2B would be that it could be used as a method to foreclose competitors from markets. The FTC had expressed this concern in its report that "there may be circumstances under which participant owners of the B2B could undermine competition by denying their competitors access to the B2B, or by otherwise disadvantaging those competitors in their use of the B2B." [49] Given that a certain materials should be necessary to produce final products and they are not obtainable other than markets on B2B,[50] it would be possible to foreclose competitors by

---

[48] *Id*. at 10.

[49] *Federal Trade Commission Staff Report*, *supra* note 2, at 16.

[50] In the U.S., it is recognized that when a participation in a certain market is indispensable in a given industry, an exclusion concern would be greater. *See e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293 (1985). In this case, the plaintiff claimed that its expulsion from a joint buying cooperative of one hundred office supply retailers constituted a per se illegal group boycott. The buying cooperative generated several efficiencies including economies of scale in purchasing and warehousing and ready access to inventory. The court said that "[u]nless the cooperative possesses market power or exclusive access to an element…essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted…(Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." *Id*. at 293. In addition, once courts found that participation in a certain market is essential, they have traditionally deemed a refusal to deal to be a per se illegal. *See e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). This is the case concerning the refusal of an industry wide standards-setting organization to provide its seal of approval to plaitiff's gal burner. The burner was not approved despite its apparent safety and efficiency. Without the seal of approval, the plaintiff was

denying the access to B2B. This being the case, it is obvious that a competitor will suffer from losses due to not being able to manufacture final products.

(3) Facilitation a Formation of Buyers' Anticompetitive Agreement

B2B could allow buyers to purchase jointly the inputs they need to manufacture final products based on agreements at markets of raw materials ("upstream market").[51] It is, however, important to distinguish the exercise of an illegal oligopsony power from a regular bargaining power, which is the result of procompetitive effects through B2B. To put it in another way, it should benoted not to decide a regular bargaining power as an illegal exercising of market power.

---

effectively excluded from the market. The court characterized the association's conduct as a group boycott and applied the per se rule. It says that "conspiratorial refusal "to provide gas for use in the plaintiff's Radiant Burner[s] [because they] are not approved by AGA" therefore falls within one of the "classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by both the common law and the statute." *Id*. at 659-660. Further, when the courts found that an access to certain facilities is essential, they have imposed controllers of such facilities a duty to deal. *See* United States v. Terminal R. Association, 224 U.S. 383 (1912). In this case, fourteen railroads jointly owned the Terminal Railroad Association. The association controlled the only means of access the Mississippi River to the city of St. Louise (two bridge and car ferry). No railroad could access St. Louise, then major railroad hub, from the east without using the Association's facilities. The cost for competitors to acquire similar means of access was prohibitive. Although the government sought dissolution of the Association, the court did not opt for such a severe remedy. Instead, the court required that the Association allow all other railroads to use the bridge and ferry. *Id*. at 411-412. *See also* Silver v. New York Stock Exchange, 373 U.S. 341 (1963). In this case, the New York Stock Exchange disapproved a broker-dealer's application for connection to a private wire system among stock exchange members. The wire permitted brokers to receive instantaneously available market information and to trade with other brokers in the market. The court concluded that an access to a private wire system was essential to compete effectively at the given market and that the concerted action by the Exchange and its members was group boycott. *Id*. at 346-348. It should be noted, however, that the Supreme Court in the U.S. came to adopt the rule of reason analysis, not the per se approach, in the case where exclusionary practices by parties had been alleged to be a violation of the antitrust law. *See e.g.*, FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986). This case involved an association of dentists who refused to supply patient x-rays to insurance companies seeking to evaluate benefit claims. Although ultimately finding this practice illegal under the rule of reason, the court did not adopt the per se approach. It said that "we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the per se rule…per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor -- a situation obviously not present here." *Id*. at 458.

[51] *Federal Trade Commission Staff Report*, *supra* note 2, at 1-2. *See also* Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U. L. REV. 331, 333-336 (1992).

Both types of behavior result in the purchasers' paying a lower price for products. Collusive buyers with the exercise of oligopsony power, however, achieve the same result by reducing their demands for goods by restricting their level of purchases to an extent sufficient to force sellers to reduce the price. The reduction in demands makes the sellers to reduce manufacturing of their products, diminishing quantity of their manufacturing. In turn, given that collusive buyers have market power in a market for final products ("downstream market"), they are likely to restrict the output of final products available for purchase by consumers, which lead to increase the retail price of the goods.

On the other hand, a regular buying power involves buyers' utilizing the particular strengths in its bargaining position to negotiate a better price with the sellers. Given that joint purchasers have not dominated a downstream market, a lowered price encourages the buyers to purchase the goods in greater quantity at an upstream market, thus increasing the total amount of products available for purchases by consumers at a downstream market, and therefore lowering the retail price.[52]

As briefly described above, the method to achieve lowered price at an upstream market and the effects on a downstream markets are particularly different between an illegalexercise of market power and a regular bargaining power. The effects on a downstream market attained through regular bargaining power are procompetitive, quite different from the exercise of oligopsony power. Therefore, even when the price of commodities at an upstream market seemed to be lowered below competitive level, it is necessary to examine what has caused such an effect so as not to determine a regular

---

[52] Garen Gotfredson, *Business-to-Business Internet Purchasing Exchanges: The Promises and Antitrust Risks of a New e-Commerce Platform*, 2 MIMM. INTELL. PROP. REV. 107, 118 (2001).

bargaining power as an illegal exercise of market power. In this sense, as explained later in this article, it is indispensable to review what is an illegal exercise of market power by purchasers.

To be sure, even with the web-based communications, it is true to say that a group buying could be still hard to coordinate. This is maybe the part of the reason why many B2Bs in Japan simply let their members place individual orders for their inputs. Compared to transactions in real market places with communications through telephone, however, it is also true to say that an easy communication through B2B may make it easier for buyers to arrive at purchasing agreements and detect deviation from them.[53] The cost of arriving at a common price agreement is principal cost of price fixing agreement[54] and it can be reduced through B2B.[55] In order to reach an agreement, it is required for buyers to negotiate prices, outputs, and other related matters. These negotiations would be made easier through web-based communications that enable to convey useful information among the parties quickly and cheaply.[56] B2B can allow this kind of information exchange and can facilitate greatly a formation of buyers' agreements

[53] *Federal Trade Commission Staff Report*, *supra* note 2, at 4. *See also* Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 295-325 (1987).

[54] *See generally* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988). It said that "Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier…Without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organize and hold together a retailer-level cartel." *Id*. at 727. *See also Collaboration Guideline*, *supra* note 30, at 22. It says "the exercise of monopsony power by a buying collaboration may be deterred or counteracted by the entry of new purchasers. To the extent that collaborators reduce their purchases, they may create an opportunity for new buyers to make purchases without forcing the price of the input above pre-relevant agreement levels." *Id*. at 22.

[55] Levine, *supra* note 29, at 391-394.

[56] Baker, *supra* note 12, at 44. It notes that "The rapid and inexpensive exchange of information among sellers may make it easier for sellers that want to coordinate to find a set of prices and output on which they can implicitly (explicitly) agree…Rapid information exchange can reduce coordination difficulties by permitting firms to engage in complex discussion more easily." *Id*. at 44.

to reduce the price. In addition, B2B can facilitate the maintenance of agreements[57] that basically depend upon member's adherence to lower inputs purchased by detecting easily cheating of members and by reducing the time to respond to it.[58] One of the chores of buyers' cartel members might be monitoring buyers' purchasing, making sure to see if one of the members cheat by buying too much.[59] B2B has made it so much easier that buyers' incentive to cheat can be diminished by rapid exchanging information through web-based communications.[60] B2B based on peer-to-peer system could allow for even more fluid exchange of information, increasing antitrust apprehensions for exchanging information in an illegal way.[61] In addition to above, compared to real market places, the number of purchasers in B2B is relatively small, which means that it is easier to unify them into an agreement.

To summarize, in B2B, buyers' anticompetitive agreements which could lead to the exercise of market power are more likely to be formed because of the communication efficiency among purchasers and relatively small number of participants in a given market of B2B. Here lies the real reason why the potential of B2B to aid buyers' agreement is worth paying attention.

(4) Summary of Analysis

As discussed above, the characteristics of B2B could make it possible to enhance efficiency, productivity and profitability as well as causing anticompetitive

[57] Levine, *supra* note 29, at 394-395
[58] *See* Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir. Pa. 1993). It said that "Petruzzi's IGA contends that the defendants created a cartel to ensure that prices for raw materials would be artificially low. Game theory teaches us that a cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great." *Id*. at 1233.
[59] Levine, *supra* note 29, at 392-395.
[60] *Federal Trade Commission Staff Report*, *supra* note 2, at 4.
[61] Levine, *supra* note 29, at 393.

effects on competitions, most of which are achieved through easier, cheaper, and more convenient communications through the internet. It can be said that the most distinct characteristics of B2B lies in this communication efficiency that could facilitate a conclusion of anticompetitive buyers' agreements.

It should be noted, however, as explained in this section, that buyers' anticompetitive agreements are not an inevitable outcome of efficiencies attained by B2B. To put it differently, without concluding buyers' anticompetitive agreements, it is possible to achieve only procompetitive effects of B2B outlined above. Suppliers and consumers could enjoy only benefits from B2B without suffering from anticompetitive effects which would be caused by buyers' anticompetitive agreements.

Therefore, when considering competitive effects by buyers' anticompetitive agreements, it is necessary to examine whether or not procompetitive effects on B2B could not be achieved absent them and what effects both suppliers and consumers might have only from them. To put it another way, when examining buyers' anticompetitive agreements on B2B, it is necessary to consider both anticompetitive and procompetitive effects only arising out of them.

For that purpose, Part III of this article discusses competitive effects of oligopsony from the viewpoint of economics in order to analyze how it should be treated under the Japanese Antimonopoly Law.

III. Analysis of Oligopsony

Even when purchasers buy certain materials from suppliers through B2B jointly, given that they lacked the power to control the price of these products at the

markets, they will pay for the products at the competitive level, thus yielding a maximized social welfare.[62]

The problem is not the joint purchasing activities themselves but the exercise of market power to establish the lowered price through joint purchasing, in other words, oligopsony.

Thus, in order to understand the anticompetitive effects of joint purchasing activities on B2B, it is necessary to analyze the real effects on both an upstream and a downstream market by the exercise of oligopsony power, that is to say, the power to control a price of products at a given market which could be realized [63] and sustained [64] under certain market conditions.

---

[62] Blair & Harrison, *supra* note 51, at 334.

[63] *Federal Trade Commission Staff Report*, *supra* note 2, at 14-15. *See also* The Federal Trade Commission Public Workshop, *Emerging Issues for Competition Policy in the World of E-Commerce (Thursday, June 29 2000) Volume 1*, (2000), *available at* http://www.ftc.gov/bc/b2b/b2btrans000630 (last visited Feb. 5, 2005) [hereinafter *Competition Policy in E-Commerce*]. In this report, Mr. Rick Warren-Boulton opined that "I agree with you. If you have a B2B where the purpose of the B2B is a bunch of people are buying office supplies and paper clips and things like this, this is really moot. The issue only really comes up when you have a small group of buyers who account for a very large share of the demand for a very specialized input where the suppliers have incurred some kind of sunk cost. The supply curve has to be upward sloping. There has to be some ability to reduce price by restricting purchases, and that's fairly limited, and a first screen obviously is that the buyers account for a very large share of the purchases of that input." *Id*. at 537. *See also* Jacobson & Dorman, *supra* note 14, at 157. According to this article, an upward sloping supply curve should be indispensable to exercise monopsony power. This means that buyers must increase the price they will pay for each additional product in order to induce suppliers to supply more of it. *See also* James Murphy Dowd, *Oligopsony: Antitrust Injury and Collusive Buyer Practice in Input Market*, 76 B. U. L. REV. 1075, 1084-1085 (1996). According to this article, in order to exercise oligopsony power, four factors must exist. The first, the firms must agree to act together. The second, the firms acting in concert must purchase a large portion of market supply relative to total market production. The third, the firms must have some mechanism to police their agreement and prevent cheating. The fourth, the firms must be capable of preventing both entry of new buyers into the market and sales by existing sellers to alternate purchasers outside the market. *Id*. at 1084-1085.

[64] *See* Dowd, *supra* note 63, 1089-1090. According to this article, the first, the goods offered in the market are perishable. The second, potential purchasers' start-up costs are relatively high when compared with other investment opportunities. The third, potential purchasers in a given industry must face an entry barrier to the market. Finally, producers find that sunk costs or transition costs present formidable barriers to exit from the market. For an examination of the conditions as they pertain to sellers, *see* George Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*,67 CORNELL L. REV. 439, 439-482 (1982).

Joint purchasers, after buying raw materials from suppliers, manufacture certain products and provide them with consumers at a downstream market. Therefore, both suppliers and consumers can be affected by the exercise of market power by purchasers whose antitrust apprehension is not mere hypothesis.[65] In order to analyze whether or not the exercise of market power by purchasers should be a violation of the Japanese Antimonopoly Law, it is very much important to examine what effects both suppliers and consumers would suffer due to the exercise of oligopsony power because there are no lodestars as to oligopsony in Japan in the context of judging antitrust violation.

Provided that there are no effects caused by oligopsony or effects caused by oligopsony were apparently permissible under the Japanese Antimonopoly Law, there would be no violation of the law. But, should there be the possibility to exceed the permissible range provided by the law, then it is necessary to examine exactly what competitive will happen and what standard will apply to examine it.

This article first analyzes the effects caused by oligopsony on suppliers at an upstream market and consumers at a downstream market.

Next, it examines whether or not procompetitive effects, such as enhancements of efficiency in producing final products, attained through joint purchasing, might affect the anticompetitive harm that have been caused by oligopsony. In other words, this article examines whether or not the procompetitive effects attained through joint purchasing are likely to offset the anticompetitive effects caused by oligopsony.

---

[65] *Federal Trade Commission Staff Report*, *supra* note 2, at 13-16. Levine, *supra* note 29, at 397.

In addition, this article examines the difference between oligopsony and an all-or-nothing deal,[66] in which buyers accomplish lowered price without decreasing their quantity input purchased. In an all-or-nothing deal, buyers would be able to achieve the best of both world, namely lowered prices and maintaining of quantity of input purchased. This might be the best result for buyers. It is necessary, however, to analyze what effects both suppliers and consumers might have in an all-or-nothing deal. Even if there are no effects on social welfare due to an all-or-nothing deal and its consequences are purely distributional, it is necessary to examine what competitive effects would happen due to the transfer of wealth, because, as this article shall demonstrate later, to describe it as mere "transfer" is an oversimplification. Should there be any effects on social welfare, it is necessary to examine how suppliers, consumers and a society would be affected. In addition, in both oligopsony and an all-or-nothing deal, it is necessary to examine whether or not it is essential to distinguish oligopsony from all-or-nothing deal and if so what standard to apply under the Japanese Antimonopoly Law.

Moreover, this article examines the difference between oligopsony and buyers' collusion to increase their input purchased in order to depress the price. Like an all-or-nothing deal, buyers accomplish lowered price without decreasing their quantity input purchased. It is necessary, however, to analyze what effects both suppliers and consumers might have in this kind of transaction to review whether or not this agreement would be permitted under the Japanese Antimonopoly Law.

(1) Suppliers' Harm due to Oligopsony

[66] ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY ANTITRUST LAW AND ECONOMICS 73 (Princeton University Press 1993).

In competitive markets, willing buyers interact with willing suppliers. It is assumed that no single firm or individual are able to control the price or quantity of available goods. Also, it is supposed that it is only one among many firms producing identical products and only one among many purchasers willing to buy specific products. Further, it is assumed that there are no significant inhibition on entry into and exit from the market.[67] In addition, competitive markets could benefit both suppliers with producer surplus and purchasers with consumer surplus. When operating at competitive equilibrium of supply and demand, social welfare could be maximized.[68]

On the other hand, joint purchasers, when they have market power at an upstream market, they could maximize their profits by manipulating to depress the quantity of their input purchased from suppliers and, thus, producing lower prices. Although lowered prices may seem at first sight consistent with principal purpose of antitrust law, [69] this is not always the case.[70]

The impact of oligopsony is best understood by examining monopsony, a market structure with single buyer, as oligopsony and monopsony are economically

---

[67] Blair & Harrison, *supra* note 51, at 334.

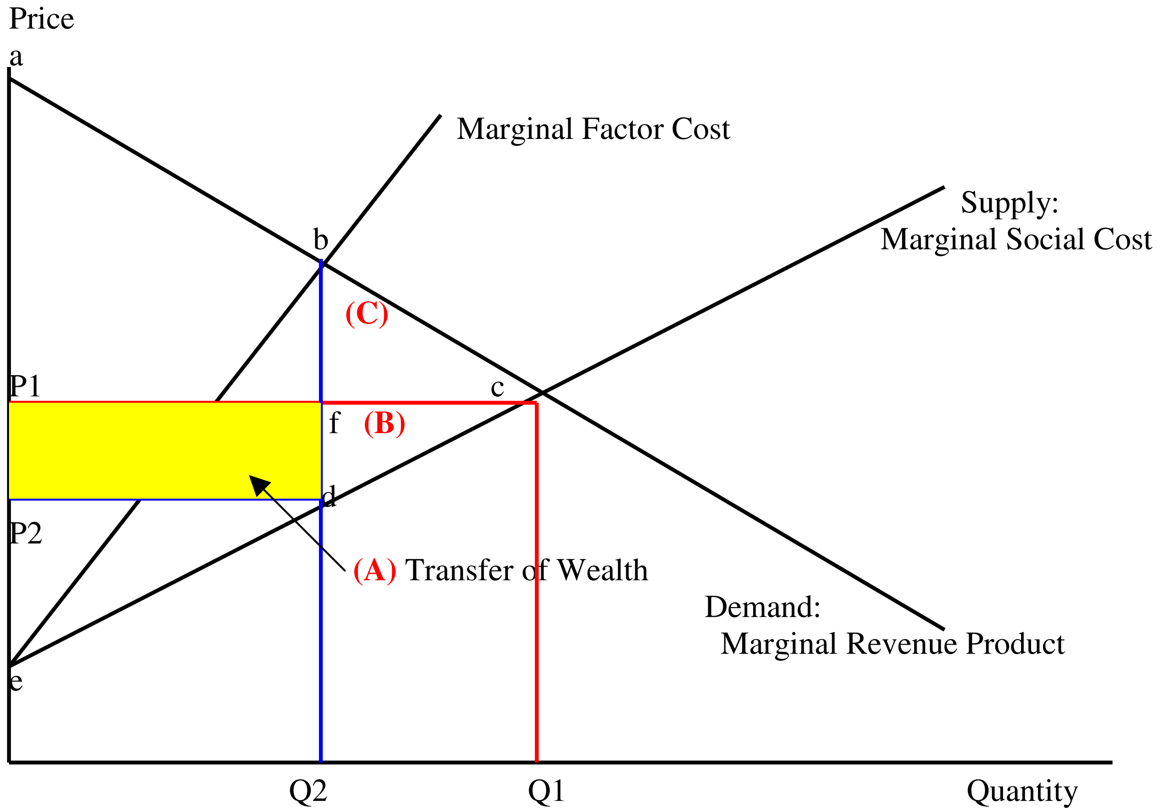
[68] *Id*.

[69] Courts in the U.S. seem to presume benefits to consumers from the lowered price realized through oligopsony. *See* Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316 (6th Cir. Tenn. 1989). This hypothesis is not always the case because a lowered price realized through the exercise of oligopsony power at an upstream market is not always pass down to consumers at a downstream market as explained later in this article. In most cases, the oligopsonist still faces competition at a downstream market. Therefore, the oligopsonistic buyers would maximize their profit by pricing their product at the competitive downstream market price. In addition, in an oligopsonistic market, since marginal factor cost increase as explained later in this article, oligopsonistic buyers are not likely to pass down their benefit they enjoy at an upstream market.

[70] Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL. L. REV. 297, 303-306 (1991).

equivalent in terms of their impact on price and output.[71] The consequences of monopsony (oligopsony) on social welfare can be understood with the aid of Figure 1.

[Figure 1] Welfare Loss due to Oligopsony



In a competitive market, a firm attempt to maximize the profits by setting output levels at the place where the firm's marginal cost equal to the obtainable price because at that equilibrium the firm could provide goods and services with minimum cost. If each of the firms in the competitive industry follows this decision rule, we will be able to obtain a market supply curve by adding up the quantities produced by each firm at any given price, which will be the sum of the quantity determined by marginal cost for each of them. Therefore, supply curve in a competitive market is represented as marginal cost for a society shown as marginal social cost curve in Figure 1.

---

[71] Blair & Harrison, *supra* note 51, at 334.

When firms act in concert to purchase the entire market supply of an input good, the firms' buying decisions reflect the marginal factor cost ("MFC") of that input.[72] The MFC is an additional cost which shall be borne by purchasers when buying one more unit. In a competitive market, a firm could obtain all necessary goods at the prevailing market price. Therefore, the MFC for each input is negligible. In an oligopsonized market, the colluding firms purchase close to the entire supply of goods at the given market. The MFC curve rises more rapidly than supply curve, because, in order to buy a greater volume of input, the oligopsonists must pay a higher price not only for an additional unit but also for all of the other units they have purchased in order to induce expansion in quantity supplied.[73] Therefore, as Figure 1 illustrates, in the oligopsonized market, the MFC curve should be steeper than supply curve.

Intermediate goods are valued for their contributions in producing the buyers' final products.[74] As a result, the demand by buyers for intermediate goods is determined bymultiplying the increase in output of final products resulting from the use of one more unit of the intermediate goods purchased from suppliers times the output price of buyer's final products. Therefore, the demand is called the value of marginal revenue product ("MRP") as shown in Figure 1.[75] In other words, the MRP is an additional revenue which purchasers obtain when buying additional more one unit.

---

[72] DON BELLANTE & MARK JACHSON, LABOR ECONOMICS: CHOICE IN LABOR MARKET 180-184 (McGraw-Hill 1979).

[73] Dowd, *supra* note 63, at 1086. If purchasers try to discriminate by paying higher price to only the added product, suppliers would quit producing. In this way, an arbitrage would destroy these efforts at price discrimination.

[74] Blair & Harrison, *supra* note 51, at 334.

[75] *Id*. Precisely speaking, an oligopsonist does not have a demand function because the oligopsonist determines the price and quantity simultaneously. The MRP curve, however, demonstrates the same information as the demand curve does, that is, the addition to total revenue that an increment in the input generates. To put it differently, assuming that all other goods to manufacture final products are constant, an oligopsonist continues to increase its use of a good until the MRP of the good equal to the

An oligopsonists have market power to establish the price because their purchases could influence the price they pay for the products. The more quantity an ologopsonist buys, the higher the price becomes. On the contrary, the less it buys, the lower the price becomes. An oligopsonists achieve a lowered price by less buying the quantity of products compared to the competitive market,[76] so that revenue that once flowed into sellers "now flow into the coffers of the oligopsonistic [buyers] in the form of reduced cost." [77] In addition, its buying decision will cause a social loss because an oligposonist does not purchase the quantity that a society needs.[78] Figure 1 demonstrates how the price and the quantity of an intermediate good would be decided and what competitive effects will happen.

In a competitive market, where both sellers and purchasers are assumed to have no market power to control the output price, the price is P1 and quantity is Q1, whose combination maximizes the social welfare, the sum of consumer and producer

---

price, because inasmuch as the cost of the final products are smaller than the MRP, the profit will increase. On the other hand, at any price, we may purchase the quantity for which marginal value equals the price. So, the demand curve is identical to the marginal value curve, which is calculated through dividing marginal utility by income. As a result of this, the MRP serves much the same function as the demand curve. In this regard, *See* DAVID D. FRIEDMAN, PRICE THEORY 85-90, 189-190 (2d ed. 1990).

[76] *See* ROGER D. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS 34-37 (Richard D. Irwin 1985). The competitive firms try to maximize profits by setting output levels at the place where the firm's marginal cost equal to the obtainable price. If competitive firms always produce the quantity so that the MC is equal to the P, then its supply curve, that is, the amount it produces as a function of price is equal to its MC curve. The MC first falls as the increasing the size of the firm produces advantages, realizing more efficient production on a large scale. The model for competitive firms assumes, however, that the MC then rises after the firm has taken the full advantage of large-scale production and further increases in size mean more and more levels of administration between the president and the factory floor, leading to less efficient production. Despite this, for simplification of the discussion, this article uses the straight Marginal Social Cost Curve in Figure 1. *See* FRIEDMAN, *supra* note 75, at 221.

[77] Dowd, *supra* note 63, at 1092.

[78] Blair & Harrison, *supra* note 51, at 334.

surplus.[79] In Figure 1, the consumer surplus is described in the area under the demand curve and above P1, which is triangle aP1c, while the producer surplus is the area above the supply curve and below P1, which is triangle eP1c.

On the other hand, an oligopsonist, when facing with positively sloping supply curve described in Figure 1, will discover that it can influence the price it has to pay for an intermediate good by adjusting the quantity that it buys.[80] In an oligopsonized market, an oligopsonist does not compete with each other in the intermediate good markets. As the result, they will buy where the increase in total cost resulting from the purchase of one more additional unit of input from supplier, the MFC, equals to demand, the MRP since profit maximization requires expanding quantity of input purchased until the MRP contributed by that expansion is equal to the MFC so that marginal impact on profit is zero.[81] In other words, because each of the firms compete in their downstream market, their demands for an input good will equal the marginal revenue produced by that input. Consequently, each firm will demand additional units of the input up to a point where marginal revenue product is equal to marginal factor cost [82] which is represented in Figure 1 as the intersection of the MFC curve with the MRP curve. As a result, quantity is reduced to Q2 and price becomes P2.[83]

An oligopsonic behavior causes two kinds of competitive effects, that is, the social welfare loss and the redistributive effects.

---

[79] *Id*. Consumer surplus in a given market is the difference between what consumers would willingly have paid for the quantity they consumed and the amount they actually paid for that quantity. On the other hand, a producer surplus is the amount by which a producer's price exceeds the competitive price.
[80] *Id*.
[81] BELLANTE & JACHSON, *supra* note 72, at 182.
[82] Dowd, *supra* note 63, at 1088.
[83] Blair & Harrison, *supra* note 15, at 1568.

The social welfare effects of oligopsony are analogous to those of oligopoly, that is, too few resources will be employed. At the point where supply and demand are equal, the total social welfare generated by the operation of the market will be optimal, whereas it is not privately optimal for an olipogosonist. In order to maximize the private welfare, an opigopsonist will purchase Q2 units of goods at price P2. As a result, the total social welfare will be reduced from the competitive potential by an area (B)+(C), that is, bdc. This is the potential welfare gain to the society that is unrealized. To put it another way, it is a decrease of social welfare that the society might have enjoyed but for oligopsony power and called the dead weight loss.[84] (B) of Figure 1 indicates a reduction of the revenue that suppliers might have enjoyed but for opigopsony and need to continue their business. Due to this reduction of revenue, suppliers might have to manufacture inferior products which they would never supply under competitive market places or close the factories which have been producing raw materials which should have been purchased by purchasers. (C) of Figure 1 shows a reduction of the total amount and variety of products of final product which consumers at a downstream market might have enjoyed absent oligopsony.[85]

The redistributive effects is that an oligopsonist appropriate revenue that once accrued to suppliers from the production and sale of their goods. (A) in Figure 1, the area P1fdP2, represents this effects of oligopsonic behavior, depicting a portion of what

[84] *See* Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructual Market Power*, 69 N. Y. U. L. REV. 1, 15 (1994). The author of this article discusses the dead weight loss in the context of monopoly. It says "the increased market power from the practice permits the parties to restrict output. Society thus loses the value of that lost output (less its cost of production) as consumers must turn to less preferred alternatives. This is the familiar dead-weight welfare loss of the monopoly model." *Id*. at 15. *See also* James D. Hurwitz, *Abuse of Governmental Prosecces, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L. J. 65, 69 (1985). It suggests that the dead weight loss arises from reduced output and the dissipation of additional resources to maintain ill-gained market power.

[85] Dowd, *supra* note 63, at 1088-1089.

was producer surplus in a competitive market that flows to the oligopsonist as consumer surplus.[86] In other words, (A) in Figure 1 demonstrates the depression of input good prices to the oligopsonist firms due to their exertion of market power. It is from this activity that most of the antitrust injury[87] experienced by suppliers arises.[88] The suppliers in a oligopsonized market are the best position to feel the effect of this anticompetitive behaviors.[89]

As outlined above, by the exercise of oligopsony power, both suppliers and a society could be harmed. This is the harm against which the antitrust laws should protect.

(2) Consumers' Harm due to Oligopsony

Next, this article examines what damages consumers at a downstream market would suffer due to oligopsony.

[86] Economically, this is transferring of wealth from suppliers to an oligopsonist by the exercise of oligopsony (monopsony) power and can be viewed that a society does not suffer from any loss. On the other hand, there is the view that regards this transfer of wealth as a social loss. *See* Law v. N. C. A. A., 134 F.3d 1010, 1022 (10th Cir. Kan. 1998). The transfer of wealth might have the suppliers lose their incentive to innovate production of raw materials by conducting research and interest to continue their business. Also, an oligopsonist would spend additional wealth gained through transfer in socially inefficient ways, maintaining its market power and sabotaging its rival's plan to enter the market. In this sense, transfer of wealth should be viewed as a social loss.

[87] In the U.S. an antitrust injury is defined an "injury of the type antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful". *See e.g.*,Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[88] In Japan, there are no profound discussions at to what is the antitrust damage because in Japan civil litigations seeking the compensation for damages incurred due to a violation of the Japanese Antimonopoly Law are usually filed as a part of general tort claims based on the Civil Law in Japan, art. 709. in spite of the absolute liability under art. 25. of the law. On the other hand, in the U.S. there are several discussions as to how to measure an antitrust damage. *See e.g.*, BLAIR & HARRISON, *supra* note 66, at 150. It says that "In comparison with the burden of proving the fact of damage, courts traditionally have applied a very relaxed standard to the level of certainty with which the amount of damages must be shown. The reasoning behind this policy is that proof would result in many wrongdoers escaping penalty. All antitrust harm ultimately manifests itself as a loss of profits and in theory, lost profit is the proper measure of damage." *Id*. at 150. Regard with the complexity of proving an antitrust damage, *see generally* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

[89] BLAIR & HARRISON, *supra* note 66, at 151-152.

When suppliers at an upstream market should suffer from harm due to oligopsony, intuitively, regardless of whether an oligopsonist has market power at a downstream market, we will consider one of two scenarios.

The first scenario is to consider that an oligopsonist is likely to collude at a downstream market and thereby cause anticompetitive harm to consumers and a society.

The second counterintuitive scenario is to consider that oligopsony at an upstream market will lower the costs for an oligopsonist and thereby benefit consumers at a downstream market through lowered price of the final goods and services.[90] However, even when an oligopsonist has market power at an upstream market, given that an oligopsonist lacked market power at a downstream market, they should be compelled to

[90] Some of lower court cases in the U.S. seem to be confused in this regard. *See* Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. Tenn. 1989). It said as follows; "Based on the record before us, this claim may well be incorrect. The practice at issue does not facially appear always or almost always to restrict competition, decrease output and raise prices. Rather it may simply lower prices paid by exhibitors to distributors and hence indirectly to producers in a market where the distributors and the producers have historically wielded great market power over film products at the expense of exhibitors. Exhibitors, as purchasers of films, may be justified in combating the market power of film suppliers by group action. Such action may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare." *Id*. at 316-317. Although it could be the case that the expense which consumers shall bear would be lowered though the group action taken by film exhibitors, it is not necessarily the case.

See also Addamax Corp. v. Open Software Found, 888 F. Supp. 274 (D. Mass. 1995). In this case, Addamax Corporation, a producer of security system for computer industry, filed the lawsuit against Hewlett-Packerd and Open Software Foundation ("OSF"), alleging their violation of the antitrust laws after the OFS selected to use Addamax's competitor's security system in its new operating system. *Id*. at 277. The OFS was consisted of many of the major competitors in the market for computer system. *Id*. The members competed each other in both the market for the input used for producing their computer system and in the market for the sale of their finished product. *Id*. Addamax alleged that the OSF was the illegal joint venture designed to influence the market for operating system technology. In ruling on Defendant's motion for summary judgment, the court noted that "Lower prices usually benefit consumers, and are not generally considered harmful to competition…For this reason, agreements to set prices at below-market rates do not ordinarily give rise to antitrust injury…But, when lower prices input prices do not produce lower prices to consumers, courts have found antitrust injury in the presence of agreements to lower prices. This occurs when the colluding buyers possess market power on a downstream market. Only with control of a downstream market can the monopsonist decrease output and raise prices." *Id*. at 280. However, the assumption that the agreement to lower the price at an upstream market always benefits consumers at a downstream market is not always true.

sell their products at the competitive price, which means that consumers are unlikely to benefit by oligopsony at an upstream market.

Provided that an oligopsonist has market power not only at an upstream market but also at a downstream market, consumers at a downstream market are likely to be harmed instead of being benefited. In order to analyze exactly what competitive effects would happen, however, an economical analysis is also indispensable.

This article examines what happens to consumers at a downstream market and society in both cases, a downstream market being competitive and dominated by an oligopsonist.

(A) Downstream Market-Competitive

Although it is counterintuitive to consider that the fact that an oligopsonist dominates an upstream market entails the conclusion that it also dominates a downstream market, it still could face the competition at a downstream market. Given the import goods similar to the final products provided by an oligopsonist and there are low barrier of entry, even an oligopsonist is forced to compete with them.

An oligopsonist reduces their amount of input purchased and drives down the price by the exercise of oligopsony power at an upstream market. Accordingly, the quantity of final products at a downstream market supplied by an oligopsonist would decrease. This reduction of supplies, however, does not affect a downstream market, because, in a competitive market, even when one of market participants reduces its supplies, other competitors substitute this reduction.

Therefore, inasmuch as a downstream market is competitive, even if an oligopsonist dominates an upstream market, consumers at a downstream market are not likely to suffer from any damages.[91]

(B) Downstream Market- Dominated by an Oligopsonist at an Upstream Market

As indicated earlier in this article, provided that an oligopsonist at an upstream market should dominate an upstream market, an oligopsonist is likely to collude even at a downstream market level and thereby cause anticompetitive harm.

---

[91] There could be a view that given that a downstream market was competitive, consumers will always benefit since an oligopsonist at an upstream market will pass savings it obtain from supplier to consumers. *See Allied Artists Pictures Corp.*, 885 F.2d at 316. An oligopsonist, however, will sell the final product at a competitive price determined under a competitive downstream market. It is necessary to recall the basic principal explained earlier in this article that an oligopsonist would try to adjust the quantity of input purchased until the marginal impact on the profit is zero, which lead to the conclusion that output price (P) times Marginal Physical Product ("MPP") is equal to the MFC, putting it another way, P*MPP=MFC. The MPP is the change in the quantity of total product resulting from a unit change in a variable input, keeping all other inputs unchanged and is found by dividing the change in total product by the change in the variable input. As explained earlier in this article, since the standard economic theory indicates that competitive firms produce at the point where output price would equal the marginal cost of production, by dividing both side of the aforementioned equation by MPP, we will obtain P=MC=MFC/MPP. As shown in Figure 1, since the MFC is lager in an oligopsonized market, the MC for an oligopsonist, that is, MFC/MPP is actually larger than the MC for a firm with no oligopsony power. Because the MC is what drives the firm's output decision, an oligopsonist actually will reduce its output below the level that a seller without oligopsony power will select. As the aforementioned equation indicates, there is a good reason to assume that, rather than passing its saving on consumers, an oligopsonist will increase the price of final products since the MC goes up. Inasmuch as a downstream market is competitive, the demand curve an oligopsonist will face is perfectly elastic, which means that the larger MC will cause the reduction of output quantity.

On the assumption that the industry has the perfectly elastic supply curve, which is realized in the industry in which the cost of an additional unit of production is independent of quantity, this output reduction at a competitive downstream market, however, will have no impact on the price determined by competitive market because the competitors of an oligopsonist will easily substitute the reduced quantity.

However, in the industry where the cost of producing more quantity of product is not constant but instead increasing, the supply curve of the industry is upward sloping. Under this situation, when an oligopsonist reduces its output, although the competitors would be able to substitute the reduced quantity, the total average cost incurred by them would increase, thereby making the industry supply curve shifting go upward. Therefore, under this situation, due to the output reduction by an oligopsonist, the market price will increase.

As appeared in this analysis, different from the counterintuitive scenario, the reduction in the input price is not passed on to consumers.

As detailed later in this article, in National Macaroni Manufacture Association v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965), what the macaroni factures attempted to do was to control the price paid for its primary inputs, that is, durum wheat by agreeing to change their recipe and to use a blend of fifty percent durum wheat and fifty percent of farina instead of using 100 percent durum wheat. Their agreement would thereby cause anticompetitive harm to a society and consumers at a downstream market. As the collusion at a downstream market in this case was used to make the collusion at an upstream market effective, what is notable is that the collusion at an upstream market is prone to cause the one at a downstream market.

This article would note that the competitive effects explained in this section could happen even when an oligopsonist does not completely dominate a downstream market but just posses market power. However, in order to simplify the analysis, this article would like to examine the situation where a downstream market is dominated by an oligopsonist hereinafter.

When an oligopsonist dominates not only an upstream market but also a downstream market with an entry barrier, even if an oligopsonist reduces the quantity of supplies at a downstream market, there are no competitors which substitute this reduction.

Therefore, so long as the proportion of a certain raw material of final products is constant, the quantity of supplies of final products would decrease automatically by the reduction of the quantity of input purchased by an oligopsonist, because the amount of final products would be determined by the quantity of a certain raw materials that an oligopsonist obtains from suppliers at an upstream market.

Even when the proportion of a certain raw material of final products is not constant, that is, there are substitutes for it, provided that an oligopsonist has market power at a downstream market, one of two anticompetitive effects would emerge.

This article first considers what competitive effect will happen if an oligopsonist decides not to maintain its production level.

Given that an oligopsonist manufactures the final goods, due to its market power at a downstream market, the price it is going to set is a function of the number of goods available for consumers. P represent for the price and G for the final goods.

$$P=P(G)$$

When an oligopsonist has market power at a downstream market, it will find that it is facing a negatively sloped demand curve, that is, the price of final products is a declining function of the quantity sold. That is,

$$dP(G)/dG<0$$

Also, on the assumption that an oligopsonist will produce its final products by raw material (R) and machine (M), its profit function is,

$$\text{Profit}=P(G)*G-w(R)R-pM$$

Where w(R) is the unit price of a raw material that an oligopsonist purchased at an upstream market, R is the quantity, p is the machine price.

In that case, an oligopsonist tries to expand its procurement of goods from suppliers at an upstream market at the point where the marginal impact on profit is zero. That is,

$$\text{Price} * \text{MPP}=\text{MFC}$$

Price is represented in

$$P(G)+ dPG(G)/dG$$

Therefore, the aforementioned equation is transformed into

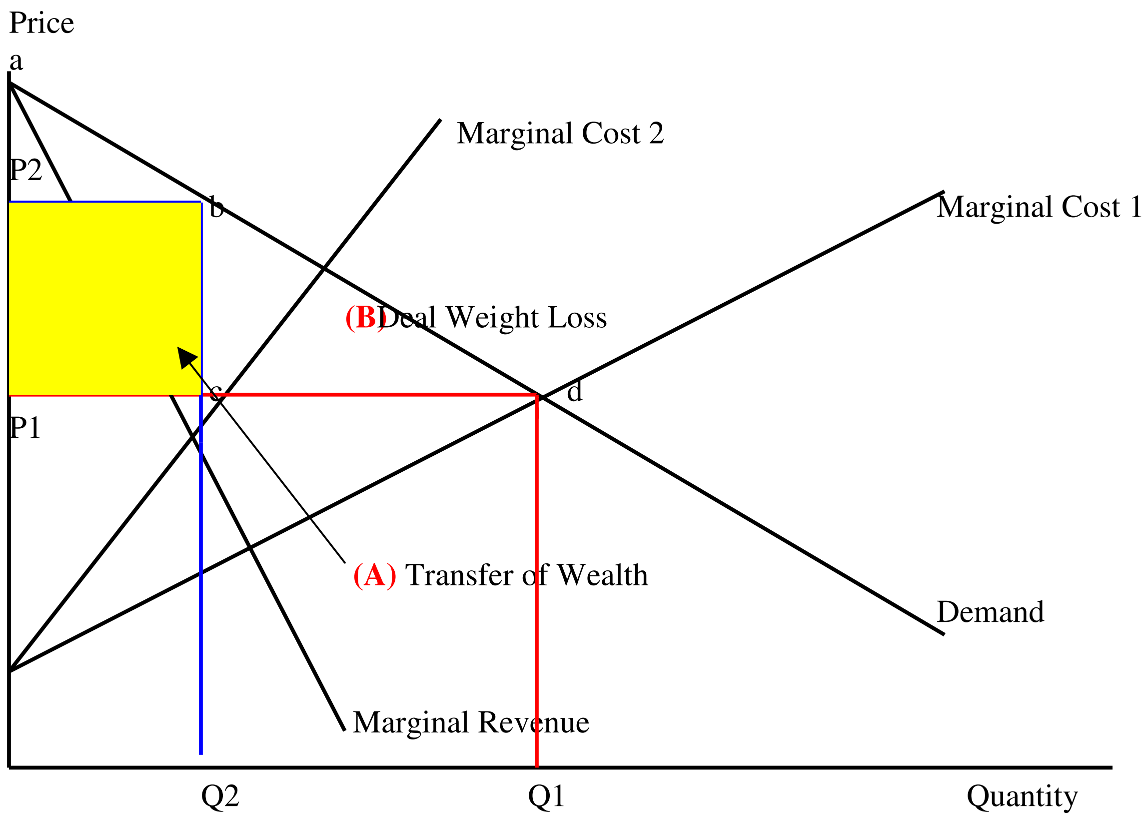
$$P(G)+dPG(G)/dG=MFC/MPP$$

or, in more familiar forms

$$MR=MFC/MPP$$

As clear from above, because the MR decline as the quantity increase, an increase in the MC will lead to a decrease of an oligopsonist's profit maximizing quantity since firms with market power try to maximize its private profit so that the MC is equal to the MR.

[Figure 2] Welfare Loss at a Downstream Market



Thus, in a downstream market where an oligpsonist has market power, meaning that the demand curve is downward sloping as explained earlier, a decrease in quantity will result in an increase in price.

These anticompetitive consequences on social welfare at a downstream market can be understood with the aid of Figure 2.

Figure 2 demonstrates the relationship between a price and a quantity at a downstream market dominated by an oligopsonist when an oligopsonist decides not to maintain the quantity of final products.

When an oligopsonist reduce their input purchased from suppliers at an upstream market, if it try to maximize their profit at a downstream market, they reduce their quantity of supplies of final products from Q1 to Q2, the intersection of the marginal revenue with supply (marginal cost)[92] and the price increase from P1 to P2 because at this point one further unit of production would generate greater expenses than income.[93]

The total social welfare will be reduced from the competitive potential by an area (B), that is, bdc. This is the potential welfare gain to the society that is unrealized. To put it another way, it is a decrease of social welfare that the society might have enjoyed but for the exercise of market power by an oligopsonist and called the dead weight loss.

The redistributive effects is that the consumer surplus having been enjoyed by consumers now transfers an oligopsonist in the form of the producer surplus. (A) in Figure 2, the area P1bcP2, represents this effects of oligopsonic behavior, depicting a portion of what was consumer surplus in a competitive market that flows to the

[92] E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE; CASES, MATERIAL, PROBLEM 55 (Lexis Nexis 5d ed. 2003) (1984).
[93] *Id*. at 604.

oligopsonist as producer surplus. The transferred wealth can be spent in a variety of ways. It might be spent in a research and development so that an oligopsonist may become more efficient than its rival at both an upstream market and a downstream market. On the other hand, an oligopsonist might spend it sabotaging its rival's plans or making false advertisement about its products to maintainits market power.

In short, (A) in Figure 2 does not merely represent the wealth transfer from consumers to an oligopsonist. To the extent that an oligopsonist has extra fund in order to acquire market power at a downstream market, even an oligopsonist would not benefit from (A) in Figure 2. If the transferred fund should be used in socially inefficient way, (A) in Figure 2 is also dead weight loss.

What competitive effects will happened if the proportion of a certain raw material of final products is not constant and an oligopsonist decides to maintain its production level?

This articles has already made an assumption that a dollar's worth of a raw material purchased at an upstream market is not the same compared to other input, to put it another way, the marginal products of input are not the proportional for their prices. Under this assumption, it is possible for an oligopsonist to alter the bundle of inputs in such a way as to substitute reduced input of a raw material purchased at an upstream market while maintaining the same level of output of final products so long as the bundle has not reached the level of least cost bundle, which is what a profit-maximizing firm will choose.[94]

[94] *See* FRIEDMAN, *supra* note 75, at 209. According to the equimarginal principle, if the firm minimizing its cost for a given quantity of output, the additional output produced by a dollar's worth of any input it uses is the same. Given that MPx is the marginal product of input x and MPy for y and P means price, it is possible to obtain:

However, once reaching the least cost bundle level, an oligopsonist can no longer substitute the reduced input for others to maintain production level. Despite this, in order to maintain the production level, an oligopsonist has no choice but to select the different quality of input for the substitution of reduced input, the price of which is the same or cheaper.

Under this situation, the social cost to produce the same quantity of final products is the same or less than the market not dominated by an oligopsonist.

But even when the new demand curve would be drawn to respond to that different quality of product, consumers as a downstream market will not be better off. This is because, although the demand curve for that different quality of products would be lower than the original demand curve since the marginal value for that product would reduce from the marginal value for the original product, consumer would suffer from the possibility of lowered quality of final products.

In addition, provided that an oligopsonist has to incur additional costs to transact with suppliers of different products for substitution, the MC of the final products will increase, resulting in increasing the price of final products. Although an oligopsonist never gets benefits because this is caused by inefficiencies in connection with its buying inputs, consumers at a downstream market would suffer from the damages due to the increase of prices and the decrease of quantity of final products.

Given that the new demand curve would not be formed for that different quality of product, an oligopsonist would have to decide to reduce its output of final products.

$$MPx/Px=MPy/Py$$

To summarize, in either case, the proportion of a certain raw material in the final products being constant or not, when an oligopsonist dominates not only an upstream market but also a downstream market, a society consumers at a downstream market would suffer from harm.

(3) Oligopsony and Procompetitive Effects due to Joint Purchasing

(A) Efficiency Obtained through Joint Purchasing

Not all joint purchasing are formed for exploiting buying power.[95] In fact, some of the joint purchasing does not result in exploiting buying power at all. In other words, it must be distinguished joint purchasing from an exertion of oligopsony power. Instead, some of the joint purchasing yields procompetitive efficiencies by doing business on a large scale. Further joint purchasers can reduce their costs concerning warehouses and storage by operating these functions jointly. This procompetitive effect attained by joint purchasing has been recognized by the Supreme Court in the U.S.[96]

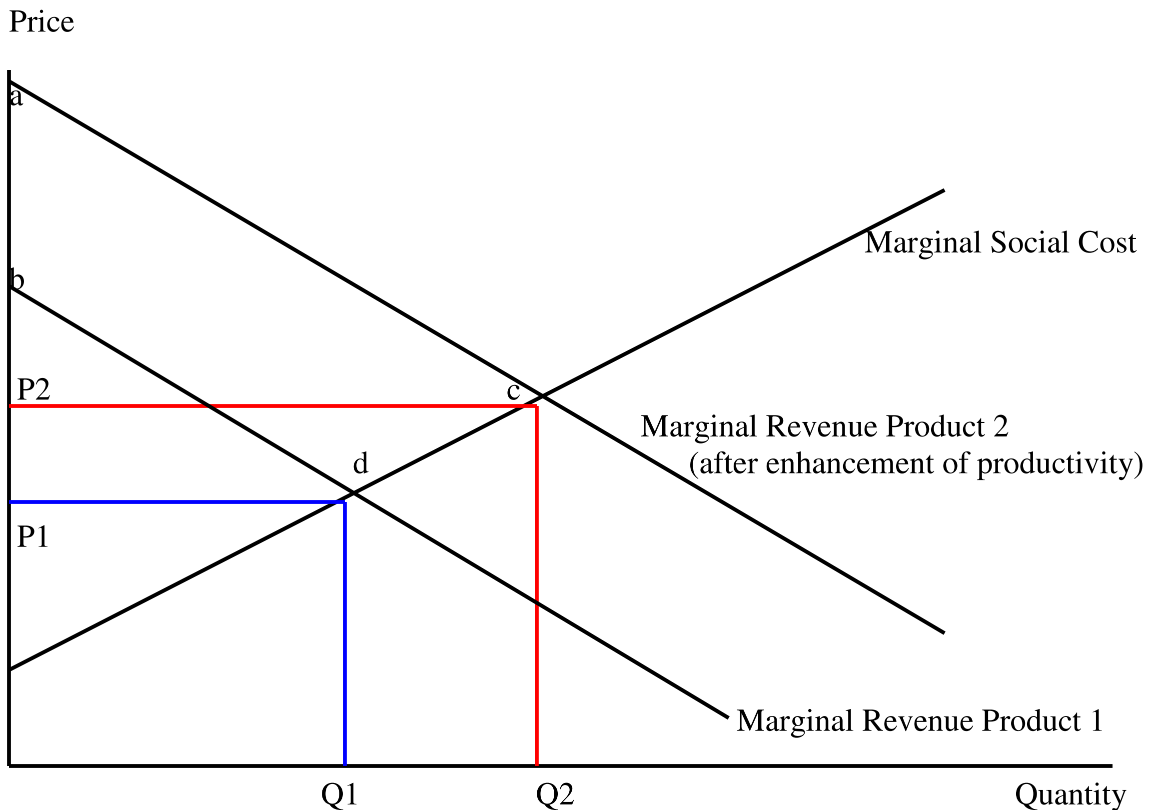
[95] Blair & Harrison, *supra* note 51, at 336.

[96] The efficiency attained through joint purchasing has been recognized in the Supreme Court judgment in the U.S. *See e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). It said as follows; "Wholesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and render markets more, rather than less, competitive…The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers." *Id*. at 295.

See also United States v. Topco Associates, Inc., 405 U.S. 596 (1972). In this case, a group of small and medium sized supermarket chains combined to procure for and distribute to its members food and nonfood items under Topco brand label in order to compete with the private brand of larger chains. One element of their scheme was designation of territories within which the various sellers of Topco brand would not compete each other. This market division was found to be a per se violation of the section 1 of the Scherman Act. *Id*. at 608. Another possible objection to the arrangement in this case could have been that it involved horizontal price fixing by buyers. In fact, horizontal price fixing was necessary in order for member to enjoy the large scale purchases. Thus, rather than exercising market power, the buyers should have simply combined their order in order to operate more efficiently. However it should be noted that some of the recent lower court cases demonstrated its skepticism

However, it should be noted that not all procompetitive effects accomplished by joint purchasing has an externality, that is, effects on net cost or benefit which a certain business activity imposes on market.[97] Even when economic action has been taken, some of them have only negligible effects on others through their effects on the prices of goods or services. To put it another way, even when joint purchasing yields procompetitive effects, what should be considered is those which have an externality, since other than that has no effects on the price and quantity at an upstream market.

[Figure 3] Improved Productivity due to Joint Purchasing



Suppose that due to the efficiency attained by joint purchasing activities, the quality of a products purchased from suppliers at an upstream market has been

---

about efficiency claim. *See* FTC v. H.J. Heinz Co., 345 U.S. App. D.C. 364 (2001). In this case, the court rejected an efficiencies defense to rebut the presumptively anticompetitive merger.

[97] *See* FRIEDMAN, *supra* note 75, at 517.

improved, a technological externality happens or the productive capacity of an oligopsonist to manufacture final products have been improved, to put in another way, an oligpsonist has become able to produce more quantity of final products from the same quantity of raw material.

Now, as explained earlier in this article, the MRP is

P*MPP

Also, MPP could be represented in

Increase of Total Quantity of Final Product/Increase of Total Quantity of Input Purchased

And the increase of total quantity of final product could be shown in

Efficiency*Production Capability*Capital Input[98]

Efficiency means how efficiently the firm could produce its final product, production capacity means the capability of the facility of the firm to produce its final product, and capital input means the capital spend to acquire necessary raw materials to produce its final products.

Therefore, on the assumption that the productive efficiency to produce final products is improved, the MRP shift upper right as shown in Figure 3 because joint purchasers could expand their revenue from selling final products at a downstream market by reducing the cost involved in manufacturing final products when a down stream market is competitive.

As Figure 3 demonstrates, when the productivity of an oligopsonist has been enhanced, both the producer and the consumer surplus will expand, making it possible for both suppliers and joint purchasers to be benefited. Area P1cdP2 indicates

[98] *See* FRIEDMAN, *supra* note 75, at 204.

the expanded producer surplus. Likewise, the consumer surplus for an oligopsonist expands from the area bP1d to the area acP2.

It should be noted, however, that procompetitive effects of joint purchasing is not an automatic result of the exercise of oligopsony power. The exercise of oligopsony power does not entail the procompetitive effects.[99] Even when the efficiency is attained, it might have been obtained absent the exercise of oligopsony power.[100] Therefore, it can be said that it is up to the oligopsonist to link the use the oligopsony power to the procompetitive effects.[101]

Also, even when joint purchasing activity by an oligopsonist yields procompetitive effects, as explained above, they do not always improve the productivity of final products. Absent the improvement of the productivity, even when some efficiencies are achieved, suppliers and a society are not likely to benefit from them.

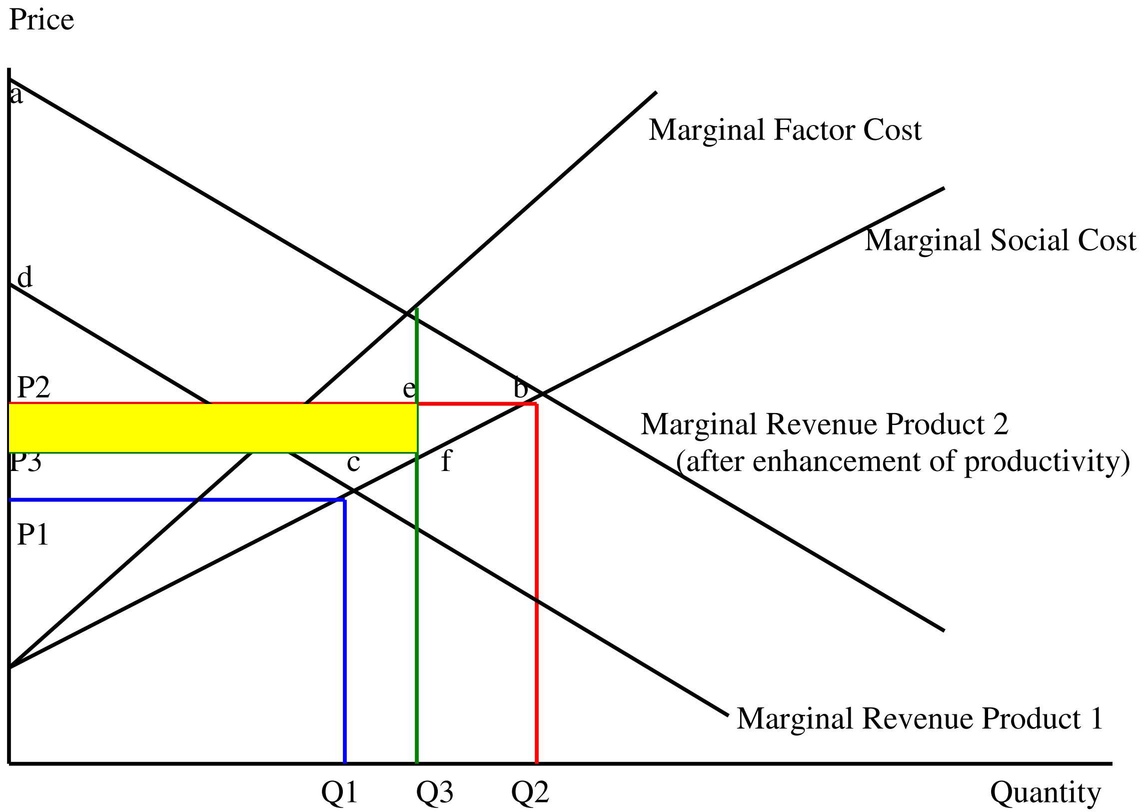
(B) Enhanced Efficiency and Oligopsony

Assume that joint purchasing yields procompetitive effects which entail the improvement of the productive capacity of final products. Then, there could be the conflict between enhanced productivity and an anticompetitive effect caused by oligopsony.

Although whether or not the society would benefit would depend upon the magnitude of the conflicting oligopsony power and efficiency effects,[102] there would emerge one of two situations, that is, anticompetitive effects exceeding procompetitive effects and anticompetitive exceeded by procompetitive effects.

[99] BLAIR & HARRISON, *supra* note 66, at 343.
[100] *Id*. at 340.
[101] *Id*.
[102] BLAIR & HARRISON, *supra* note 66, at 96.

[Figure 4] Enhanced Productivity and Oligopsony



When the anticompetitive effects swamp the productive efficiency, the result is that both the social loss and the allocative efficiencies will emerge, whereby both suppliers and a society will be harmed.[103]

[103] In this regard, there are indication that whether or not the exercise of oligopsony power should be prohibited or permitted under the situation where anticompetitive effects should swamp the productive efficiency should be determined through a comparison between the social loss due to oligopsony, to put it another way, the dead weight loss, and the expansion of consumer surplus by joint purchasing activity. *See* BLAIR & HARRISON, *supra* note 66, at 98.

It is not appropriate, however, to admit the conclusion that an oligopsonist will be better off at the sacrifice of suppliers and a society. Even when the expansion of consumer surplus is larger than the dead weight loss due to oligopsony, admitting the aforementioned indication is equal to permitting that an oligopsonist could be benefited at the sacrifice of suppliers and a society. Also, the aforementioned indication ignores the transfer of wealth from suppliers to an oligopsonist, in other words, the allocative inefficiencies. Even when the expanded consumer surplus is larger than the dead weight loss, the allocative inefficiencies would cause social harm as explained earlier in this article.

Therefore, even when the exercise of market power will yield the enhancement of productivity, inasmuch as anticompetitive effects excel productive efficiencies, it is appropriate to construe that both suppliers and a society will be harmed.

On the other hand, when the enhanced productivity swamps an anticompetitive effect, the result will be the increase of quantity at higher price, that is, a positive welfare effects as shown in Figure 4.

Prior to joint purchasing activity, the market equilibrium occurred at the intersection of the MRP1 and the MSC (Supply). The price is P1 with quantity of Q1.

As a result of an enhanced productivity, the MRP curve moves from MRP1 to MRP2. At the same time, a quantity would expand from Q1 to Q3 and accordingly a price would become higher from P1 to P3. Oligopsony power is displayed by the hither MFC curve. As a result of joint purchasing activity, the producer surplus expands by the area P1cfP3 and the consumer surplus expands from P1cd to P2ba.

However, should an oligopsonist not exert market power, since the quantity should have been determined from the intersection between the MSC curve and the MRP2, a quantity should have been Q2 at the price of P2.

The outcome with Q3 and P3 is still superior in terms of social welfare when compared to Q1 and P1.

However, O3 and P3 outcome cannot equate to the outcome where an oligopsonist does not exert market power.[104] The total social benefit enjoyed may be even greater by prohibiting the use of oligopspny power, which can be said a potential loss to the society.

Also, due to the exercise of market power, the producer surplus that should have been enjoyed by suppliers absent the exercise of market power now transfers to an oligopsonist in the form of consumer surplus. This transfer of wealth is represented in the area P2efP3 in Figure 4. Because there is no guarantee that the transferred wealth

[104] BLAIR & HARRISON, *supra* note 66, at 97.

will be used socially benefited way, this allocative inefficiency is also the potential loss to the society.

In addition to the aforementioned short term anticompetitive effects, although it is difficult to predict precisely, the long term anticompetitive effects would also emerge.

Suppliers might lose their incentive to innovate a quality of their products in the long run, since the procompetitive efficiency is accomplished by suppliers' dealing with an oligopsonist. Also, suppliers might lower the quality of their products in order to expand their profit, because their profits will be artificially depressed by an oligopsonist.

In addition, as suppliers' profits are reduced, their incentive to manufacture would also diminish and they would curtail their supply in the future.[105] This reduction in supply entails adverse consequences for consumer welfare in the future.

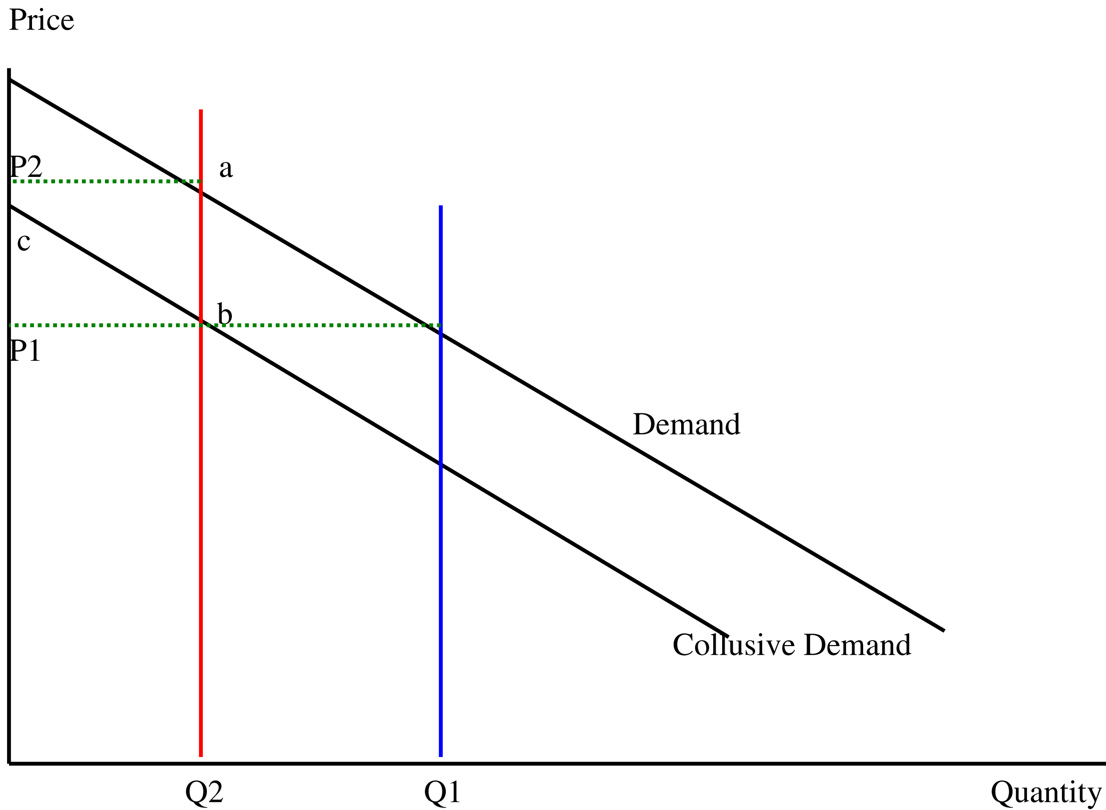
If the price offered from an oligopsonist is set below average total cost, some of suppliers may leave the market in the long run and the lower price would discourage new suppliers entry into the market. Under the real world, suppliers' leaving from the market is not so likely because the interest of an oligosonosits are not served to set the price so low that there is a long run exit of suppliers because this exit would alter the balance of bargaining in favor of the remaining suppliers. But once it did happen, competitive effects on social welfare would not be negligible.

In relation to the long term anticompetitive effects, the National Macaroni Manufacture Association v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965) is worth getting attention.

[105] Blair & Harrison, *supra* note 70, at 316. *See also* FRIEDMAN, *supra* note 75, at 118-120.It is discussing how supply changes.

In this case, the macaroni factures attempted to control the price paid for its primary inputs, that is, durum wheat. During growing season, the maximum quantity supplied by farmers of durum wheat could not respond to changes in quantity, meaning that its supply was inelastic.

[Figure 5] Inelastic Supply and Oligopsony



High-quality macaroni requires the use of 100 percent durum wheat, which is easier for the manufactures to work with and yields a macaroni product that has the most desirable cooking properties. In a normal situation, a crop damage of wheat causes a shortage of durum wheat, which leads to rise of its price. In this case, however, the manufactures of macaroni agreed to change their recipe and use a blend of fifty percent durum wheat and fifty percent of farina. This change in recipe worsened the

quality of final product and artificially depressed the demand for durum wheat, thereby lowered the price.

In the absence of supply disruptions, the intersection of demand and supply, which occurred at a price of P1 and a quantity of Q1 in Figure 5, determines the free market equilibrium price and quantity of durum wheat. Due to major crop damage, which forced to curtail the supply of durum wheat, for the growing season in question, the maximum supply reduced to Q2 demonstrated in Figure 5. Absent collusion by the macaroni manufactures, competition among them should have driven the price up to P2.

The court in this case said as follows:

> The Supreme Court has held that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices…The combination found in the instant case is illegal per se…We hold that under the record as a whole there is substantial support for the findings of Commission that the course of industry action entered into by petitioners, in combination, to unlawfully fix prices constituted a per se violation of Section 5 of the Federal Trade Commission Act. *Id.* at 427.

When suppliers of durum wheat bumper crops, the supply may be so great that the price will fall and the resulting profit are low. The antitrust law does not permit suppliers to collude in order to pop up their prices and expand profits in the presence of bumper crop. The court in National Macaroni Manufacture Association v. Federal Trade Commission dealt with the flip side of the case and decided even when shortage of supply due to crop failure boosted price, buyers must not collude to reduce those prices.

It should be noted that in a case where the supply of drum wheat is inelastic, that is, the supply is fixed and reductions in the quantity are not possible in the short run and the collusion by buyers will have little impact on quantity at the upstream market in the short run, a social loss would emerge, which is demonstrated by the area P2abc of Figure 5.

The area P2abc, which should have been enjoyed by suppliers but for collusion by buyers, has completely lost from a society. Also, the area P1bc in Figure 5 shows the transfer of wealth from suppliers to buyers. As explained earlier in this article, this allocative efficiency could be a social loss.[106]

Consumersat a downstream market could be harmed even in the short run. In this case, the macaroni manufactures lowed the quality of their product in order to reduce the price of their input at the upstream market, although the lowered quality is not the logical consequence of their collusion.

The macaroni manufactures might argue that the diminution of the quality of macaroni was caused by the shortage of durum wheat not by the exercise of oligopsony power.

But the shortage of durum wheat does not necessarily entail the lowered quality of macaroni. Some of the manufactures would choose to maintain the quality of macaroni, while others might decide to lower the quality of macaroni. In this situation, consumers will be able to enjoy the variety of choices of macaroni, that is, some are the

[106] In this regard, *see* Mountain States Tel. & Tel. Co. v. FCC, 291 U.S. App. D.C. 207, 939 F.2d 1035, 1043 (1991). The court said that "the only legitimate goal of antitrust is the maximization of consumer welfare…there may be exceptions to the general rule; for example, a supplier's suit alleging that a carrier has somehow unlawfully exercised monopsony power complains only of a wealth transfer from the supplier to the carrier." *Id*. at 1043. From this languages, it can be said that the court in this case think that distributional significance on competition is the exception to find antitrust damage.

same quality with higher price and others are the lowered quality with higher, same or lower price.

On the other hand, when the macaroni manufactures agree to lower the quality of macaroni uniformly, the choices available to consumers will reduce. Also, the standardization of buying of durum wheat would be a step toward production level uniformity and consequently output price uniformity.

In addition, the suppliers of durum wheat may lose the incentive to durum wheat in the long run and curtail their supply in the future, as their profits are reduced by collusion, whereby consumers at a downstream market and a society will be harmed and a social welfare will be decreased. This long term effects are also what the antitrust law should prevent.

To summarize, it should be recognized that even in a case where supply is fix and reductions in quantity are not possible in the short run, an oligopsonic behavior would harm consumers and a society by reducing the suppliers' profit both in the short run and the long run.

How should we consider when enhancements of productive capacity would be never attained absent the exercise of market power by an oligopsonist? The key difference from the situation where enhancements of productive efficiencies are separatable from oligopsony is that, under this situation, we cannot require an oligopsonist so that it will yield only procompetitive effects.

Under this hypothesis, there would be no short term anticompetitive effects, that is, social welfare loss and allocative inefficiencies, because we cannot

assume the quantity would be determined from the intersection between the MSC curve and the MRP2 with quantity of Q2 at the price of P2 in Figure 4.

However, despite the difficulty to predict, the aforementioned long term anticompetitive effects would emerge even in this hypothesis.

To summarize, although joint purchasing activity may yield some kind of procompetitive effects, what we should take into consideration is the effects which entail the enhancement of the productive capacity of final products. And regardless of whether or not this effects is never attained absent oligopsony, at least the long term anticompetitive effects will almost always happen at an upstream market.

(C) Enhanced Efficiency and Oligopsony Effects on Consumers

When a downstream market is competitive, even when the anticompetitive effects swamp the procompetitive effects, the quantity input purchased is reduced by an oligopsonist at an upstream market and an oligopsonist diminish its supply of final products, this reduction does not affect a downstream market, because, in a competitive market, even when one of market participants reduces its supplies, other competitors substitute this reduction.

Therefore, inasmuch as a downstream market is competitive, even if the anticompetitive effects swamp the procompetitive effects, consumers at a downstream market are not likely to suffer from any damages.

When an oligopsonist dominates a downstream market, consumers could suffer from losses due to the decrease of a quantity of input purchased at an upstream market in the form of reduced quantity of final products at higher price or lowered quality and a society will be harmed, given that the anticompetitive effects swamp the productive

efficiencies. In this case, both consumers at a downstream market and a society will suffer from losses.

On the other hand, regardless of whether or not an oligopsonist dominates a downstream market, when the productive efficiencies swamp the anticompetitive effects, this procompetitive effects could be pass on consumers.

As explained before, an oligopsonist tries to expand its procurement of goods from suppliers at an upstream market at the point where the marginal impact on profit is zero.

Price * MPP=MRP=MFC

The above equations leads to

MR=MFC/MPP=MC

This means that when the MRP expands due to the productive efficiency, the MR and the MC would decline. Although the exercise of oligopsony power entails the hither MFC, when the productive efficiencies swamp the anticompetitive effects, there could be the situation where the expansion of MPP is larger than the increase of MFC. The MR declines as output expands, leading to the outcome that the lower MC and the MR could result in an increase in an oligopsonist's profit maximizing output at a lower price. In this case, consumers could be better off due to the procompetitive effects in spite of the anticompetitive effect due to oligopsony.

Therefore, regardless of whether or not an oligopsonist dominates a downstream market, when productive efficiencies swamp the anticompetitive effect at an upstream market, consumers and a society could be better of f at least in the short term.

However, when the long term anticompetitive effects should happen at an upstream market, that is, sellers' leaving from the market, it could lead to the decrease of the quantity of the products supplied to an oligopsonist, leading the increase of its total coststo produce the fin al products. In that case, consumers could be harmed due to the decrease of the quantity and the increase of the price of final products.

(4) Difference Between Oligopsony and All-or-Nothing Deal[107]

As explained above, in order to obtain the lower prices, an oligopsonist must reduce the quantity of input purchased. It would be more desirablefrom an oligopsonist' s point of view if it could achieve the lowered prices without reducing the quantity purchased. In an all- or-nothing deal, the collusive buyers realize the reduced price by not buying less. In other words, the collusive buyers do not agree to reduce the number of product they are going to buy from suppliers. Instead, the collusive buyers agree to buy no fewer than competitive quantity but aggregate their purchasing and award a single supplier a contract for their pooled purchases, in order to realize a lowered price, [108] because ordinarily, an all-or-nothing deal is not possible unless the collusive buyers could push suppliers onto their all-or-nothing supply curve.

The all-or-nothing supply curve reveals the answer to the question of what is the maximum quantity suppliers will make available at each price when the alternative

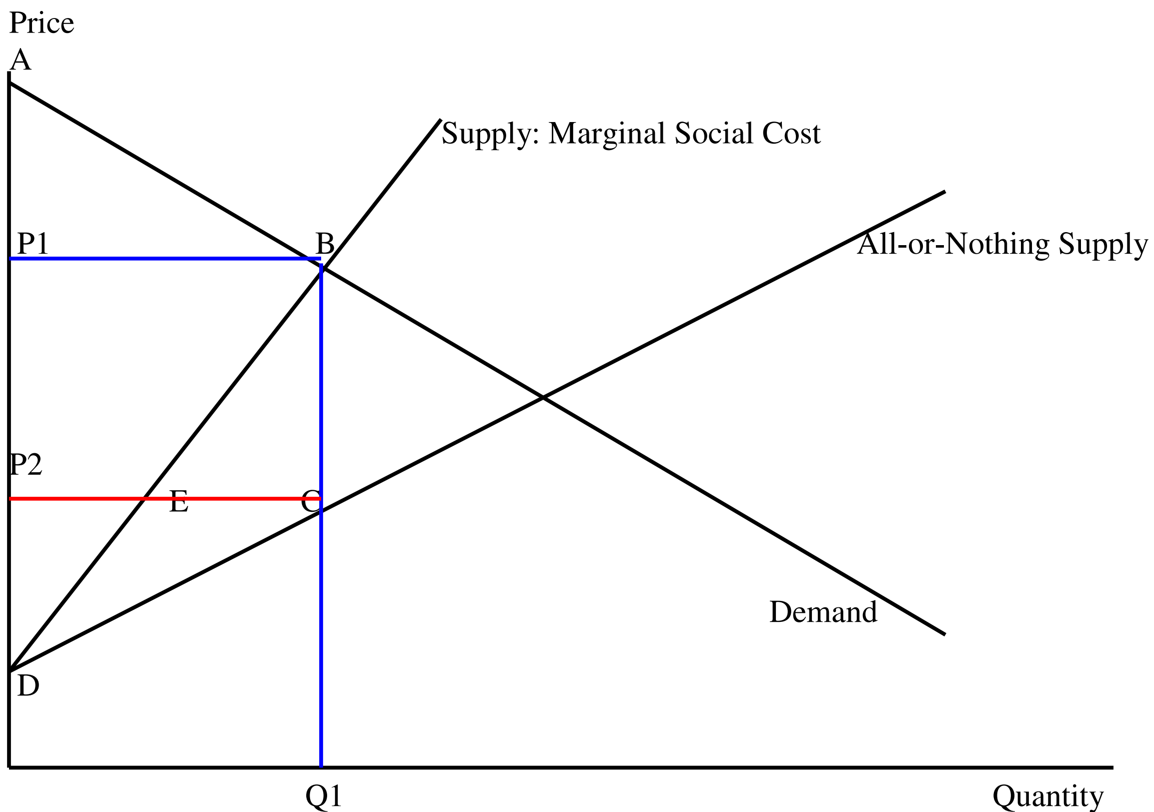
[107] It has been pointed out that the powerful communication capacity of B2B can make it easier for buyers to formulate and execute an all-or-nothing deal. *See* Levine, *supra* note 29, at 404. *See also* Sam Kinney, *An Overview of B2B and Purchasing Technology,* (2000), *available at* http://www.ftc.gov/bc/b2b/comments/freemarketsinc.pdf (last visited Feb. 5, 2005). It mentions concerning the internet auctions that "Unlike a traditional negotiation, though, an Internet auction can achieve a high level of interactivity in a short period of time. It is not unusual to see more than 50 bids and counter-bids within the span of an hour. This is far more interaction than a face-to-face negotiation could obtain." *Id*. at 34. In addition, it says that an internet auction can be over in just a few hours, rather than the days and even weeks it can take to conduct face-to-face or phone-and fax-negotiation. *Id*. at 40. This feature makes it possible for buyers to process more work in less time.

[108] BLAIR & HARRISON, *supra* note 66, at 73.

is to sell nothing at all.[109] By framing the question in this way, the collusive buyers seek to extract all of the producer surplus, which makes the all-or-nothing supply curve lies below the standard supply curve.[110] Knowledge of the all-or-nothing supply curve enables the collusive buyers to exploit its power by extracting the producer surplus.

Due to the term of this all-or-nothing deal, buying one more unit costs the collusive buyers nothing more than the cost of that additional unit. This is one of the major differences from oligopsony in which in order to buy one more additional unit, the collusive buyers are obliged to pay not only the price of that additional unit but also the cost of increasing the price of every unit of input they have already paid.[111]

[Figure 6] Oligopsony and All-or-Nothing Deal



[109] *Id.*

[110] *Id. See also* MILTON FRIEDMAN, PRICE THEORY 16 (Chicago: Aldine Publishing Co. 1976).

[111] Levine, *supra* note 29, at 404.

As shown in Figure 6, the interaction of the normal supply curve with the demand curve determines an equilibrium price and the quantity of competitive market with Q1 at the price of P1.

In an all-or-nothing deal, the collusive buyers exert their market power to push the suppliers off the traditional supply curve and onto the all-or-nothing supply curve at the quantity of Q1, which is the privately optimal quantity for the collusive buyers.[112] The price actually paid falls from P1 to P2 without any reduction in the quantity transacted.[113]

The economic effects of an all-or-nothing deal are also different from that of oligopsony.

At an upstream market, with regard to the allocative inefficiency, like oligopsony, the producer surplus is transferred to the collusive buyers.[114]

In Figure 6, under the competitive market, the consumer surplus is the area AP1B with the producer surplus of the area P1BD. After imposing all-or-nothing conditions on the suppliers, the collusive buyers increase their consumer surplus by the area P1BCP2. The producer surplus diminishes from the area DBP1 to the area CDP2. The area P1BEP2 is the transferred wealth from suppliers to the collusive buyers. Although through an all-or-nothing deal, the producer surplus becomes the area P2CD, the difference between the area DCE and the area P1BEP2 represent loss to suppliers.

---

[112] BLAIR & HARRISON, *supra* note 66, at 73.
[113] *Id*.
[114] *See* BLAIR & HARRISON, *supra* note 66, at 74. It should be noted that the allocative efficiency could cause social harm. *See also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). It points out that "in the interest of consumer welfare, the antitrust laws should be concerned only with improving allocative efficiency." *Id*. at 87-88.

With regard to a social welfare at an upstream market, however, an all-or-nothing deal is a little bit different from oligopsony.

Contrary to oligopsony in which in order to buy one more additional unit, the collusive buyers are obliged to pay not only the price of that additional unit but also the cost of increasing the price of every unit of input they have already paid, in an all-or-nothing deal, the collusive buyers have to paynothing more than the cost of that additional unit in order to buy one more unit.

Further, when suppliers are charging the price above their marginal cost level, like a monopolist, setting the price artificially high above the MC level, an all-or-nothing deal could allow the collusive buyers to force the suppliers' price down to the marginal cost level by forcing suppliers onto their all-or-nothing supply curve. This reduces the collusive buyers' marginal cost, which is quite opposite from oligopsony because oligopsonists reduce their purchase price but increase their marginal cost.[115] Given that sufficient inputs are actually available for each buyer, it would be possible for the collusive buyers in an all-or-nothing deal to purchase more input at lower cost.[116]

On the other hand, at a downstream market, the differences of economic impact are significant.

Regardless of whether or not the collusive buyers have market power at a downstream market, consumers could benefit more than they would have if the collusive buyers have never colluded and had paid at suppliers' price of above the marginal cost.[117]

---

[115] Levine, *supra* note 29, at 404.
[116] *Id*.
[117] Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust*, 36 ANTITRUST BULL. 1, 20 (1991). It says that an all-or-nothing deal could "lead to an increase in the input quantity, a drop in the output price and a rise in the output quantity-effects that are clearly procompetitive." *Id*. at 20.

This is because in an all-or-nothing deal the collusive buyers' marginal cost have been lowered and they have incentive to pass such savings to consumers.[118] This happens regardless of whether or not the collusive buyers posses market power at a downstream market because, in any case, the collusive buyers' reduced MC could affect their prices to consumers.

Therefore, it can be said that, at least in the short term, an all-or-nothing deal could make it possible for the collusive buyers to continue the same production level at a lower price for consumers at a downstream market.[119]

In addition, in an all-or-nothing deal, different from oligopsony, in spite of the allocative efficiency which could cause a social harm, regardless of collusive buyers' market power at a downstream market, consumer could benefit from the reduced consumer prices.[120]

With regard to the long term anticompetitive effects, like oligopsony, an all-or-nothing deal could cause a social harm.[121]

Suppliers may leave the market when their income from oligopsonist remain below average total cost.[122] The long term results harm the oligopsonist through

[118] *Competition Policy in E-Commerce*, *supra* note 63, at 529. Mr. Rick Warren Boulton opined that "the big difference is the way a monopsonist reduces the prices he pays is by buying less because he drives the prices down by restricting his purchases, and you have the opposite effect if you have a better procurement or a better bargaining. What you do is you buy more because you get a lower price, so that one of the first obvious differences between monopsony and better bargaining is with monopsony output goes down, and prices to consumers go up, and with better bargaining prices go down, output goes up, and prices to consumers go down." *Id*. at 529. From this opinion, it can be said that Mr. Rick Warren Boulton thought that in an all-or-nothing deal consumers are likely to benefit regardless of the market power of collusive buyers at a downstream market.

[119] BLAIR & HARRISON, *supra* note 66, at 74-75.

[120] Levine, *supra* note 29, at 405.

[121] *See* James C. Lanik, *Stopping the Tailspin: Use of Oligopolistic and Oligopsonistic Power to Produce Profits in the Airline Industry*, 22 TRANSP. L. J. 510, 529 (1995). *See also* BLAIR & HARRISON, *supra* note 66, at 74.

the exit of suppliers, the exodus ceases to serve the benefit of oligopsonists.[123] As the number of suppliers falls, a bargaining power shift to those who remains the market,[124]

---

[122] *See* Lanik, *supra* note 121, at 529. *See also* Kartell v. Blue Shield, 749 F.2d 922, 923-924 (1st Cir. Mass. 1984). In this case, a group of physicians challenged the pricing policies of Blue Shield, which offered reimbursement on a take-it-or-leave-it basis. Plaintiffs contended that the rates were set so low that it would discourage an entry into the physician services market. The argument, if accurate as empirical matter, could support the possibility of the long run anticompetitive effects due to all-or-nothing deal.

It should be noted, however, suppliers would be able to stay in a market even if they are compelled to sell below the average total cost level in the short term. In that sense, suppliers' leaving from the market would happen in the long term. The good example of the situation where supplier could provide their goods below the average total cost level in the short term is the industry with unexploited scale economics, where there is an excess capacity. Economies of scale are said to be exist when a firm is producing on the negatively sloped portion of its average total cost curve. *See* FREDERICK M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 81-102 (Chicago: Rand McNally, 1980). Suppose that a firm could produce Q1 quantity of goods at an average total cost of A1 and Q2 at A2 (Q1 is larger than Q2 and the average total cost curve is declining at both Q1 and Q2.) and that a large buyer account for Q1-Q2 units of the total output sold. If a large buyers leave from the market, suppliers will lose whatever profit they had been earning on that buyer's purchase. In addition, suppliers will lose their profit they had been earning on sales to their other customers. In the event that a large buyers leave the market, the quantity provided by suppliers will fall to Q2 and the average total cost will rise A2. As a result, the total cost of serving the customers that remain at the market will rise by (A2-A1)*Q2. By taking advantage of this situation, a large buyers may threaten suppliers to withdraw its business unless suppliers agree to the price equal to the average total cost, that is, A1, or even below that level. This would mean no profits on the sales to the large buyer, but suppliers would preserve all of the profits on the sales to other customers. In the limit, the large buyer could require that suppliers agree to a price below cost such that the losses incurred by suppliers would be to the gains which suppliers enjoy by dealing with the large buyers. Although the buyer's behavior seems abusive, it is socially desirable because an excess capacity means that too many resources had been used the production, in spite of the fact that the section 2(f) of the Robinson-Patman Act seems to be against this behavior. It says that "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." When an excess capacity will be eliminated and a large buyer come to dominate the market, dealing with it below the average total cost means that supplier would gain nothing but only suffer from a substantial losses. At this point, the demand from a large buyer would make suppliers leave from the market.

[123] Lanik, *supra* note 121, at 529.

[124] Blair & Harrison, *supra* note 70, at 319. This situation could lead to something like a bilateral monopoly, which poses a different set of problem. The issue to be examined in its most prestine form is whether collusion among buyers would be justified when they are faced by a monopolist on the selling side of the market. Alternatively, the same issue should arise in the context of a collusive monopoly facing monopsonist. In theory, a full-blown version of such a defense would permit collusion designed to equal but not exceed the power of parties on the opposite side of the market even when that power fell short of monopolistic or monopsonistic levels. *See e.g.*, Richard Friedman, *Antitrust Analysis and Bilateral Monopoly*, 1986 WIS. L. REV. 873, 891-916 (1986). From the stand point of social welfare, the structural condition of a bilateral monopoly is preferable to either a monopoly seller dealing with competitive buyers or a monopsony dealing with competitive sellers. Should rival buyers take part in forces in response to a monopoly or rival sellers collaborate in response to a monopsony, the quantity sold to consumers at a downstream market increases, which

which might lead to the total output of the product at a higher price at an upstream market.[125]

In a nutshell, in the long term, the society could be harmed through an all-or-nothing deal.

As explained above, the difference from oligopsony is that there is no social harm in the form of typical dead weight loss in an all-or-nothing deal.

At least one of the scholars seems to consider that this difference justifies the different standard to be applied to an all-or-nothing deal.[126]

---

would benefit consumers and be consistent with the principal purpose of the antitrust law. *See* Blair & Harrison, *supra* note 66, at 121.

Suppose that one unit of an intermediate good (X) is transformed into one unit of final good (Q). The demand for the final good at a downstream market is downward sloping and the demand for the intermediate good at an upstream market is derived from the demand from the final product market, that is a downstream market. Assuming that the cost of transforming one unit of X into Q should be constant, which is (Ct), we shall represent the average net revenue as a function of the quantity of X employed. To put it another way, the average revenue can be shown that the demand for the final product at a downstream market (Dq) minus Ct, which is respresented in Dq-Ct. With the monopolist in the sale of Q, the hypothetical derived demand for X is the curve marginal to Dq-Ct (Dx). In other words, Dx is the net marginal revenue product of input X. In addition, suppose that MRx is the curve marginal to Dx and represents the marginal revenue associated with selling this intermediate good to a final producer, that MCx is the marginal cost which would be the supply curve given that supplier of X were to behave as a pure competitior, that AC denotes the upstream market's monopolist's average cost of producing input X, and that MCFx would be the marginal factor cost of the input whose intersection of the demand curve would determine the quantity of the intermediated good which monopsonist purchases from competitive suppliers at an upstream market.

For the vertically integrated firm at an upstream market, the profit maximizing quantity would be determined through the intersection of MCx with MRPx. In this case, the sum of producer and consumer surplus is maximized at that quantity. In the absence of vertical integration, that is, in a case of a bilateral monopoly, the quantity determined through this intersection will maximize the joint profit. *Id*. at 116. It should be noted that the price is not a rationing device under condition of a bilateral monopoly. Instead, the price of an intermediate good should be determined through the negotiation between the two parties, which would be repeated, protracted and costly process. In other words, the process of discovering and agreeing to joint profit maximizational quantity and price through negotiation could mean that substantial transactional costs are incurred. Moreover, the outcome of the negotiation between the two monopolist is hard to predict. In addition, it should be taken the possibility into consideration that given that joint purchasers should be allowed to collude at an upstream market they are more likely to collude in their selling the final product to consumers at a downstream market. *Id.* at 123-124.

[125] BLAIR & HARRISON, *supra* note 66, at 75.

[126] Levine, *supra* note 29, at 405.

However, as analyzed above, even in an all-or-nothing deal, an allocative inefficiency will happen at an upstream market, which would cause harm to suppliers and a society. Also, one of the apprehensions about monopsony (oligopsony) is that it might cause sellers' leaving from the market in the long run. This is a part of the reason why monopsony (oligopsony) should be prevented to protect the competitive markets. In terms of this effect, there are no differences between oligopsony and an all-or-nothing deal.

Therefore, there are no needs to use the different standard to review its illegality.[127]

(5) Difference Between Oligopsony and Collusion to Reduce the Price by Increasing the Quantity of Input Purchased

As explained above, an oligopsonist achieves the lowered price by reducing their quantity of input purchased and collusive buyers in an all- or-nothing deal realize the reduced price by awarding single suppliers a contract for their pooled purchase with buying no fewer than competitive quantity.

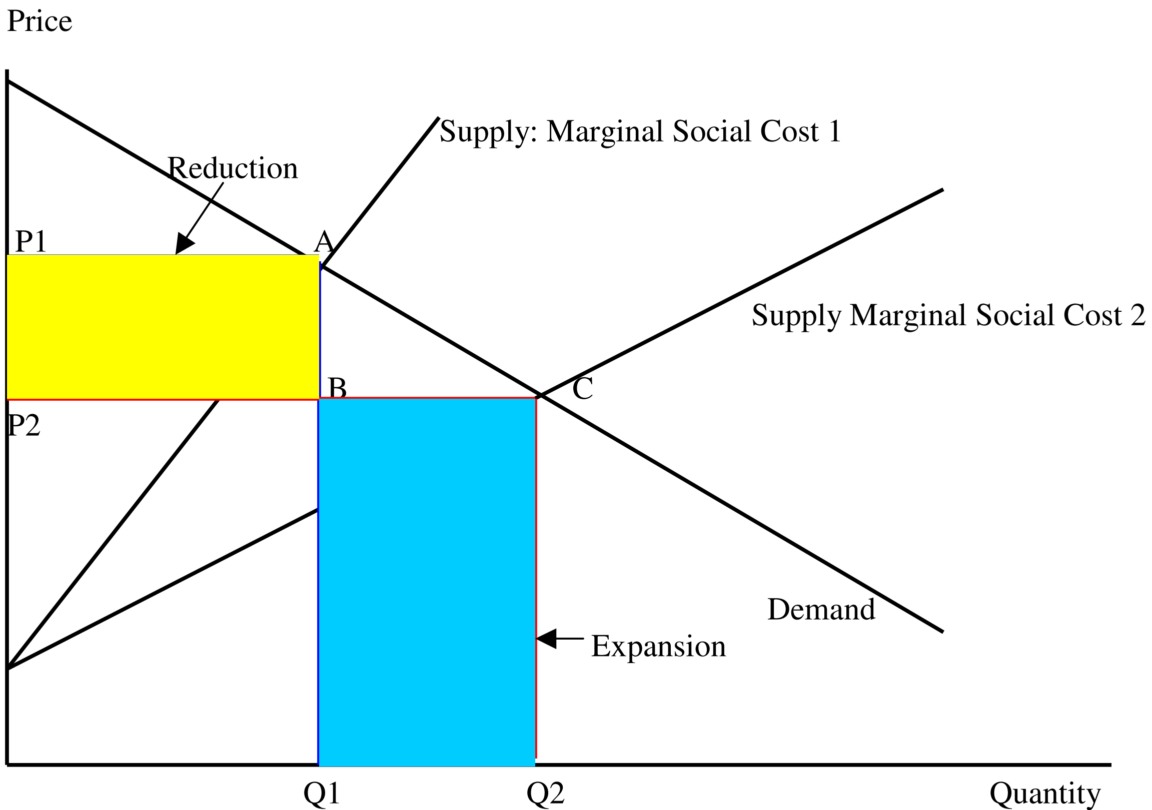
On the other hand, the collusive buyers might try to achieve the lowered price by buying more than before. Same as in an oligopsony case and in an all-or-nothing deal case, the collusive buyers exercise their market power but do not reduce their input purchased to achieve lowered price.

[127] Even the courts dealing with an all-or-nothing deal that understand maximizing a consumer welfare to be the goal of the antitrust law do not distinguish an ologopsony from an all-or-nothing deal. *See e.g.,* Ins. Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, 84 (3d Cir. Pa. 1973). From this judgment, it can be said that this court did not find it necessary to apply the different standard to apply to an all-or-nothing deal.

This attempt would be successful when an externality accomplished through joint purchasing lead to the lower MC for suppliers due to the reduced transactional cost or an enhanced productive capacity of suppliers' products.

As shown in Figure 7, the market equilibrium in a competitive market occurs at the intersection of Supply 1 with demand curve, at the price of P1 and the quantity of Q1.

[Figure 7]Collusion to Increase the Quantity of Input Purchased

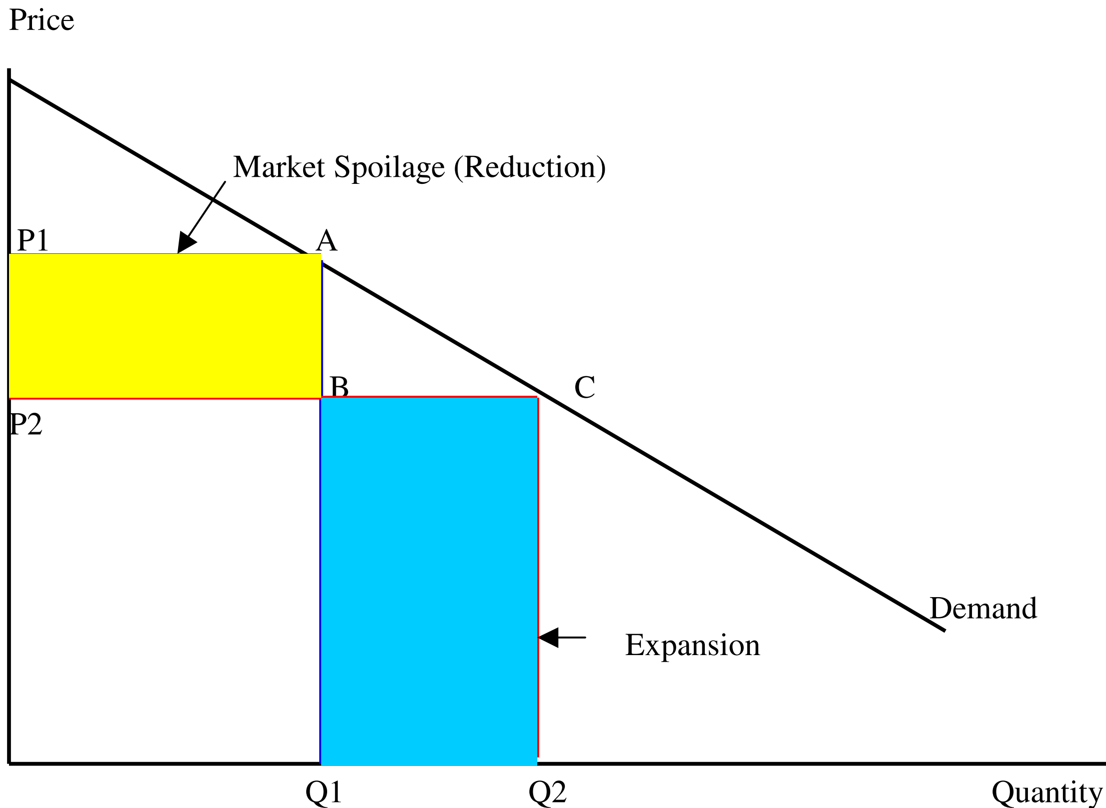


When the collusive buyers exercise their market power to reduce the price by increasing their quantity of input purchased from Q1 to Q2, given that the MC of suppliers is reduced through their joint purchasing and that causes the supply curve to shift from Supply 1 to Supply 2, the collusive buyers' attempt would be successful and cause the market equilibrium occurred at the price of P2 and the quantity of Q2.

This result is due to the efficiency attained by joint purchasing activity, the MC of collusive buyers does not go up. Thus, under this situation, not only at an upstream market level but also at a downstream market level, no social harm will be caused. When the expansion shown in the area BQ1Q2c in Figure 7 is larger than the reduction shown in the areaP1ABP2 in Figure 7, a society and suppliers at an upstream market will be better off rather than being harmed. Also, because the MC of the collusive buyers could be reduced due to being able to purchase more quantity with lower price, they would have an incentive to pass such a saving to consumers at a downstream market.

Also, the long term anticompetitive effects are not likely to occur because the expansion is accomplished by the lowered MC of suppliers.

[Figure 8] The Market Spoilage and the Expansion



Will the attempt by collusive buyers be successful even when an externality accomplished through joint purchasing does not lead to the lower MC for suppliers or no externality will occur?

It seems realistic to suppose that when the gains obtained through the expansion shown by the areaBQ1Q2C in Figure 8 is smaller than the reduction shown by the area P1ABP2 in Figure 8, collusive buyers' attempt would be never successful. When it is not successful, there will be no anticompetitive effects due to their attempt. But this is not always the case.

Suppose that there are several suppliers at an upstream market.

Under this circumstance, the market spoilage due to the expansion shall be borne by suppliers in proportion to their market share. On the other hand, suppliers will be able to enjoy the whole expansion whose magnitude bears no relation to market share.[128] Because small suppliers bear the very little market spoilage effects, they are likely to have an incentive to obtain the expansion effects. Given that this is the case, the attempt by the collusive buyers would be successful. On the contrary, given that suppliers have to bear a large portion of market spoilage effects, they have little incentive to cut their price to enjoy the expansion, which means that the attempt by collusive buyers will not be successful and cause no anticompetitive effects.

What anticompetitive effects will be caused when small suppliers reduce their price?

Because small suppliers' price reduction have only a small impact on the market price, it is not so obvious to conclude that a social welfare loss will almost always

[128] *See* CHARLES J. GOETZ, LAW AND ECONOMICS CASES AND MATERIALS 411-413 (West Publishing Co. 1984).

happen like a typical oligopsony case. Also, they do not have to provide their products at the price below the average total cost level, their leaving from the market is not likely to occur.

To summarize, the difference between oligopsony and the collusion to decrease the price by increasing their quantity of the input purchased is that the anticompetitive effects are not likely to happen through the collusion or that at least it is not so obvious to conclude that the anticompetitive effects will almost always happen like a typical oligopsony case.

Therefore, there is a possibility for different standard to be applied in this kind of collusion.

(6) Summary of Analysis

(A) The Typical Oligopsony Case

When joint purchasers have oligopsony power at an upstream market and exercise it, the social welfare losses and allocative efficiencies will happen, whereby both suppliers and a society will be harmed.

With regard to a downstream market, inasmuch as it is competitive, even when anticompetitive effects would occur due to oligopsony, consumers would not suffer from any damages.

When a downstream market is dominated by an oligopsonist, however, a social welfare loss will happen and consumers will suffer from damages due to the increased price and the decreased quantity of final products or being supplied with different quality of final products from the ones provided absent oligopsony.

(B) Oligopsony with Procompetitive effects

Although joint purchasing could yield procompetitive effects, in the context of measuring competitive effects on an upstream market, only those effects which could enhance the productive capacities of final products should be considered.

With regard to an upstream market, inasmuch as the enhancement of productive efficiencies should be attained absent oligopsony, by the exercise of oligopsony power, even when procompetitive effects should swamp the anticompetitive effects, a social welfare loss, allocative inefficiency and the long term anticompetitive effects will happen.

In addition, even when the enhancement of productive efficiencies is not obtainable absent oligopsony and procompetitive effects should swamp the anticompetitive effects, by the exercise of oligopsony power, allocative inefficiency and the long term anticompetitive effects will happen.

With regard to a downstream market, inasmuch as it is competitive, even when anticompetitive effects should swamp procompetitive effects at an upstream market, consumers and a society at a downstream market are not likely to suffer from any harm.

Inasmuch as an oligopsonist dominates a downstream market, both consumers and a society will be harmed when the anticompetitive effects excel the productive efficiencies at an upstream market.

However, when the productive efficiencies swamp the anticompetitive effect at an upstream market, regardless of whether or not oligopsonist dominate a downstream market, at least in the short term, consumers and a society could be better off.

(C) All-or-Nothing Deal

In an all-or-nothing deal, although the typical dead weight loss wil not be caused, an allocative inefficiency will happen at an upstream market, which would cause harm to suppliers and a society.

Also, one of the apprehensions about monopsony (oligopsony) is that it might cause sellers' leaving from the market in the long run. In terms of this effect, there are no differences between oligopsony and an all-or-nothing deal, that is, in an all-or-nothing deal, the long term anticompetitive effects will emerge.

Therefore, there are no needs to use the different standard to review its illegality.

(D) Collusion to Reduce the Price by Increasing the Quantity of Input Purchased

Different from oligopsony, the collusion to decrease the price by increasing their quantity of the input purchased is not likely to cause anticompetitive effects or at least it is not so obvious to conclude that the anticompetitive effects will almost always happen like a typical oligopsony case.

Therefore, there is a possibility for different standard to be applied in this kind of collusion.

IV. Analysis of Buyers' Anticompetitive Agreements

As explained later in this article, under the Japanese Antimonopoly Law, art. 2, para. 6. requires that, even when input of purchased has been reduced, absent agreements among joint purchasers, their business activities would not be a violation of the Japanese Antimonopoly Law. Therefore, this article examines the case in which quantities of input purchased has been lowered through buyers' agreements.[129] As

[129] The FTCJ says that given that there are appropriate precautions we can reduce the possibilities of formation of price fix agreements among buyers. It adds that it is necessary to establish a measure

discussed in Part III of this article, since buyers' anticompetitive agreements could cause competitive harm to suppliers, consumers and society, it is necessary to examine under what standard both courts and antitrust agencies should deal with them. In Part IV, this article analyzes legal responses to buyers' anticompetitive agreements in the U.S. as well as in Japan.

(1) Legal Responses to Buyers' Anticompetitive Agreements in the U.S.

In the U.S., courts generally use one of two frameworks to examine if the given business practice should be a violation of the section 1 of Scharman Act,[130] which makes all agreements of unreasonably restrain of trade unlawful. Two frameworks adopted by courts are the per se analysis and the rule of reason. The distinction between the per se analysis and the rule of reason is critical because traditionally the outcome of a case has turned on the approach chosen by the court. Generally, an application of the rule of reason means a decision for the defendant, and an application of the per se analysis, a victory for the plaintiff.[131]

The per se analysis is the method which determines certain concerted conduct deemed per se illegal. Such practices, 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

---

to protect confidential information so that participants of B2B may not access the sensitive information concerning competitions on a given B2B market, such as price and quantity, and that given that participants dispatch its manager or employee to administrative companies of B2B market place, careful examinations should be necessary because under this circumstance buyers are likely to have an incentive to form a cartel agreement. *See Consultation Case Concerning B2B*, *supra* note 9.

[130] 15 U.S.C.S. (2004).

[131] *See e.g.*, Donald L. Beschle, *"What, Never? Well, Hardly Never": Strict Antitrust Scrutiny As An Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 501-502 (1987); Joe Sims, *Developments in Agreements Among Competitors*, 58 ANTITRUST L. J. 433, 435 (1989).

have caused or business excuse for their use."[132] Such practice are justified when the challenged practices "facially appeared to be one that would always or almost always tend to restrict competition and decrease output…[not the] one designed to increase economic efficiency and render markets more, rather than less, competitive."[133] Although an application of the per se rule saves limited resources at courts, it impedes more elaborate examination on each case.

On the other hand, the rule of reason is the analysis which requires the inquiry into whether an action constitutes an unreasonable restraint of trade, unless the challenged action falls into the category of 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.[134] In the rule of reason, the collaboration's procompetitive benefit is considered against its anticompetitive harm to determine its overall effect on the competition.[135] If it is determined that a certain agreement evidences a likely competitive harm by its very nature or an anticompetitive harm has already occurred,[136] there are no need to make further analysis into the nature of the agreement unless it would be verified that

---

[132] *See* Pacific Stationery & Printing Co., 472 U.S. at 289.

[133] *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9-10 (1979). *See also* National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692 (1978). It said that "[t]here are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id*. at 692.

[134] *Pacific Stationery & Printing Co.*, 472 U.S. at 289.

[135] *Collaboration Guideline*, *supra* note 30, at 10.

[136] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986).

procompetitive effects do exist which could offset such an anticompetitive harm.[137] In spite of the anticompetitive harm to be occurred in the future, provided that such harm have not yet happened or are not explicit by its nature of the agreement, elaborate examinations will be required.[138] Such examinations include studying any factors which might cause or diminish anticompetitive harm, the total market share of the collaborators, the incentive of the collaborators to compete each other[139] and whether or not the entry barrier exist.[140] If the detailed market analysis failed to make anticompetitive effects of certain agreements clear, no further examination is necessary. Given that anticompetitive effects are found, an analysis is undertaken to determine whether or not the agreement is necessary to achieve procompetitive benefits that could offset anticompetitive harm.[141] Although an application of the rule of reason makes it possible more detailed review of each case, it is also likely to lead to longer, more complicated trials and more ambiguous outcomes. The classic formulation of the rule of reason includes a long list of factors that might reveal the purpose or effects of agreement, but it assigns no priority or weight to any particular factor.[142] Even the recent Supreme Court cases failed to refine this open ended formula.[143] Both parties may be more inclined to prolong litigation because of the rule of reason's uncertain outcome.[144] The increased use of the rule of reason is also said

[137] *Id*. at 460-461.
[138] *Collaboration Guideline*, *supra* note 30, at 11.
[139] *Id*.
[140] *Id*. at 22.
[141] *See id.* at 12.
[142] *See* Board of Trade v. United States, 246 U.S. 231, 238 (1918). It considered such factors as circumstances particular to the defendant's business, conditions before and after the restraint, the nature and purpose of the restraint, and the competitive effects of the restraint.
[143] Continental T. V. v. GTE Sylvania, 433 U.S. 36 (1977). The court cited Justice Brandies' formulation of "Board of Trade v. United States" without indicating the weight to be afforded certain factors.
[144] *See* Maxwell M. Blecher, *The "New Antitrust" As Seen by a Plaintiff's Lawyer*, 54 ANTITRUST L. J. 43, 45 (1985).

to lead to the federal court's increased receptivity to economic arguments in antitrust cases. Beginning in the late 1970s, the federal courts began to emphasize the economic over the populist goals of antitrust. Several courts concluded that the antitrust enforcement should be aimed at guaranteeing consumer welfare through lowered prices and enhanced output rather than at such populist goals as the protection of small dealer or fairness of the competitive process by relying on the academic writing of commentators.[145]

Horizontal price fixing agreements are concerted action generally treated under the per se rule.[146] The Supreme Court stated that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[147]

In addition, the Supreme Court held that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these"[148] and that "[i]t is clear that the agreement is the sort of combination condemned by the Act...even though the price-fixing was…by purchasers."[149] Examining the languages adopted by the

[145] *See* Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. Ill. 1982).

[146] *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979); Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958); National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411, 436 (1990). The court in Lawyers Association case said that "a horizontal price-fixing arrangement -- a type of conspiracy that has been consistently analyzed as a per se violation for many decades." *Id*. at 436.

[147] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

[148] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

[149] *Id*. at 235. *See also* All Care Nursing Services Inc. v. High Tech Staffing Services Inc., 135 F.3d 740, 747 (11th Cir. Fla. 1998). It said that "price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is also undisputed." *Id*. at 747. *See also* Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001). It stated that "a horizontal conspiracy among buyers to stifle

Supreme Court, it can be said that it adopted the per se rule in price fixing agreement among buyers.

In this regard, in Vogel v. American Soc. of Appraisers, 744 F.2d 598 (7th Cir. 1984), the court stated as follows:[150]

> There are two exceptions to the principle that the only horizontal price "tampering" that is illegal per se is the type calculated to raise the market price above the competitive level. First, buyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se…Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charing of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint.
> *Id*. at 601.

Languages used above suggest that the antitrust legality of buyer's agreement should be exaimed under the per se rule. [151]

---

competition is as unlawful as one among sellers." *Id*. at 201. *See also* United States v. Olympia Provision & Banking Co., 282 F. Supp. 819 (S. D. N. Y. 1968). In this case, the court adopted the per se rule to review uniform medium discounts that frankfurter distributors conspired to secure from frankfurter manufacturers and noted that distributors' price fixing agreement also invoked conspiracy with manufactures to raise consumer prices.

[150] *See also American Crystal Sugar Co.*, 334 U.S. 219. In this case, there were only three sugar refiners in northern California which agreed to pay uniform price to sugar beet. This agreement effectively reduced the prices paid to sugar beet suppliers below the competitive level which might have prevailed given that there were no agreement. The court said as follows;

"It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers. And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act. For monopolization of local business, when achieved by restraining interstate commerce, is condemned by the Act." *Id*. at 235-236.

See also United States v. Portac, 869 F. 2d 1288, 1291 (9th Cir. 1989). In this case, the court affirmed that a conspiracy among buyers to rig bidding for lumber violate section 1 of Sherman Act by applying the per se rule. *Id*. at 1291.

[151] However it has been pointed out that courts in the U.S. have not distinguished monopsony (oligopsony) agreements from all-or-nothing deal agreements in terms of the standard to apply. *See* Levine, *supra* note 29, at 421. In this regard, *see* Anderson v. Shipowners Association, 272 U.S. 359, 361-362 (1926). In this case, shipowners fixed seamen's wages and required seamen who wanted to work to register, receive a number and to wait his turn. When a seaman's turn came up, he must take the employment offered or none. Although this was a typical all-or-nothing deal case, the court in this case did not distinguish it from monopsony (oligopsony). *Id*. at 361-362.

However, there are some cases where a literally horizontal price fixing agreement was not examined under the per se rule. The Supreme Court stated that “in characterizing this conduct under the per se rule…our inquiry must focus on whether the effect and...purpose of the practice are to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or…almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive”[152] and that “[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act…Mergers among competitors eliminate competition…but they are not per se illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful…where the agreement on price is necessary to…market the product at all.”[153] Further the Supreme Court noted in the case where restriction on ability to compete in terms of price had been focused on that “despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints”[154] and that “analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint.”[155]

---

[152] *Columbia Broadcasting System, Inc.*, 441 U.S. at 19-20.
[153] *Id*. at 23.
[154] National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 103 (1984).
[155] *Id*. at 103.

In addition, some lower courts adopted the rule of reason to review a buyers' price fixing agreement in special circumstances. The Tenth Circuit Court adopted the rule of the reason test in its review of buyers' agreement, in spite of the fact that the agreement was " the type of naked horizontal agreement among competitive purchasers to fix prices usually found to be illegal per se."[156] Also, it said that "because horizontal agreements are necessary for sports competition, all horizontal agreement among NCAA members, even those as egregious as price-fixing agreement, should be subject to a rule of reason analysis."[157] Further, the Second Circuit Court determined that buyers' price-fixing agreement should be examined under the rule of reason not the per se rule.[158] In Fraser v. Major League Soccer, L.L.C., 7 F. Supp. 2d 73 (D. Mass. 1998), the court determined that "agreements of this sort impose unreasonable restraints on competition, and therefore, again as a general matter, they are subject to per se condemnation…significant exception to this general proposition has been recognized where the horizontal agreement has the characteristics of a joint venture and where it has as its purpose and effect an efficient or procompetitive outcome. In such cases, horizontal arrangements have been analyzed under a rule of reason."[159]

---

[156] Law v. NCAA, 134 F.3d 1010, 1017 (10th Cir. Kan. 1998).

[157] *Id*. at 1018-1019.

[158] Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc., 675 F.2d 502, 506 (2d Cir. Conn. 1982).

[159] *Id*. at 77. *See also* Westchester Radiological Associates P.C. v. Empire Blue Cross & Blue Shield, Inc., 707 F. Supp. 708, 710 (S.D.N.Y. 1989). It said that "if the alleged restraint may be necessary to achieve a pro-competitive result, a court should test the restraint by the rule of reason. The restraint here is not clearly anticompetitive, and may be necessary to achieve a pro-competitive result." *Id*. at 710. *See also* City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1405(9th Cir. Cal. 1989). It said that "[o]n their face, the three-cut exchanges cannot be held to have a single purpose of stifling competition. As explained below, the exchanges have other justifiable purposes, and so should be scrutinized under the Rule of Reason." *Id*. at 1405. *See also* Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. Wash. 1983). In this case, the defendants refused to make a timber deal or transaction of logs marketed by independent loggers as a part of the scheme to reduce their cost of timber acquisition. It is argued by the defendants that coordinated action is the only way to

As described above, it can be said that principally the courts in the U.S. have applied the per se rule to buyers' price fixing agreement[160] and given special circumstances, exceptionally it adopted the rule of reason instead.[161]

---

preserve the Alaskan logging industry in the face of government regulation. The court professed to apply the rule of reason standard to this monopsonistic behavior. *Id*. at 1296. *See also* In re Beef Industry Antitrust Litigation, 907 F.2d 510 (5th Cir. Tex. 1990). This case involved a lawsuit by various sellers of beef against beef packers, beef retailers, and the publisher of a commodities price reporting services. The court said that "an oligopsonist that is satisfied with its market share could form an alliance with other oligopsonists in the relevant market and attempt to depress prices and increase profits." *Id*. at 515. The court acknowledge that evidence that beef cattle price had remained stable at low level supported the cattle producer's allegation that the packers were conspiring to depress prices and retain market share. *Id*. at 516. In addition, the court focused on whether the cattle producers' evidence of pricing collusion and information exchange was conclusively indicative of agreement. *Id*. at 516. As explained above, the court in this case did not adopt the per se rule. The court ultimately rejected the plaintiff's claims. However, this may have had more to do with the plaintiff's litigation strategy than with the defendant's behavior. The court suggested that the plaintiff's theory was tenuous because the plaintiffs presented claims against only two of the four dominant packers in the relevant beef market. *Id*. at 516. The court described how collusion between only two major participants in a market dominated by four firms would actually lead to a decline in the market share of the colluding parties. *Id*. at 516. Although the court's analysis is correct as far as it goes, the court failed to recognize the potential for parallel action among all four packers. The agreement mechanism claimed by the plaintiffs was information sharing through prices published in a national journal. *Id*. at 512. This would indicate that the plaintiffs in Beef Industry Antitrust Litigation case lost their case not for lack of antitrust injury but for poor litigation strategy. Regard with this case, *see* Dowd, *supra* note 63, at 1004-1110. It analyzed this case to support its conclusion that quick look approach should be applied to oligopsony case.

[160] Some of the scholars are opposing to the idea that principally the per se rule should be applied to buyers' price fixing agreement. *See* Blair & Harrison, *supra* note 51, at 331. Further it explained that "[p]ricing agreements among buyers should be regarded as per se unlawful unless the buyers are able to offer colorable arguments that: (1) The horizontal agreement is necessary to achieve some productive efficiency; (2) A price agreement is required to achieve the claimed efficiency; and (3) the exertion of monopsonistic buying power to force prices below market levels is required to achieve the procompetitive efficiencies." *Id*. at 342.

[161] *See* United States v. Capitol Service, Inc., 756 F.2d 502 (7th Cir. Wis. 1985). In this case, the court said as follows; "In NCAA, the Court also applied the Rule of Reason to a horizontal agreement. The Court noted, however, the unique circumstances which called for the application of the Rule of Reason rather than the per se rule…What is critical is that this case involves an industry [college football] in which horizontal restraints on competition are essential if the product is to be available at all. Neither of the characteristics unique to blanket licenses or to college football are present in split agreements. Split agreements do not create a new product and horizontal agreements are not essential to the existence of the movie industry." *Id*. at 506.

According to BLAIR & HARRISON, *supra* note 66, at 99-103, the ancillary restraints doctrine should be applied to the efficiency producing buying agreements. It says that "Application of that doctrine suggests that the pricing practices of the cooperative should be treated as per se unlawful unless the buyers are able to offer colorable argument that (1) the horizontal argument is necessary to achieve some productive efficiency, that (2) a price agreement is required to achieve claimed efficiency and that (3) the exertion of monopsonistic buying power to force prices below market level is required to achieve the procompetitive efficiency." *Id*. 102-103.

(2) Legal Responses to Buyers' Anticompetitive Agreements in Japan

(A) Court Cases and Recommendations at the FTCJ

The buyers' agreements to drive down the price though B2B, as far as the Japanese Antimonopoly Law is concerned, would be a violation of the prohibition on an unreasonable restraint of trade.[162] Although there are several

---

[162] Art. 2 para. 6. When the FTCJ found a violation, according to the law, art. 7. para. 1, it may order the entrepreneur concerned to cease and desist from such acts, to transfer a part of his business, or to take any other measures necessary to eliminate such acts in violation of the said provisions. In addition, the para. 2. says that the FTCJ "may, when it finds it particularly necessary, even when an act in violation of the provisions of article 3 [prohibition of private monopolization or unreasonable restraint of trade] has already ceased to exist, order the entrepreneurs concerned, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, to take measures to publicize that the said act has been discontinued and order any other measures necessary to ensure elimination of the said act: Provided, That the foregoing shall not apply to cases where one year has elapsed since the date of discontinuation of the said act without recommendation being given to the entrepreneur concerned or without the hearing procedures being initiated with respect to the said act." Further, when the FTCJ find a violation of the law, it is obliged to denounce it to the Prosecutor's Office. The law, art. 73. says that the Fair Trade Commission shall, when it considers that a crime violating the provisions of this Act exists, file an accusation with the Public Prosecutor General and that the Public Prosecutor General shall, when he has taken measures not to prosecute in a case which is the subject of an accusation under the provisions of the preceding subsection, without delay, submit to the Prime Minister through the Minister of Justice a written report stating the said fact and reasons thereof. The criminal sanction on a price fixing agreement is codified in the Japanese Antimonopoly Law, art. 89, which says that any person committing one of the following offenses shall be punished by penal servitude for not more than three years or by a fine of not more than five million yen: (i) Any person who, in violation of the provisions of article 3 [prohibition of private monopolization or unreasonable restraint of trade], effected private monopolization or unreasonable restraint of trade; (ii) Any person who, in violation of the provisions of article 8(1) [prohibited acts of a trade association] (i), effected substantial restraint of competition in any particular field of trade. Moreover, the law, art. 95. stipulates that when a representative of a juridical person, or an agent, an employee or any other person in the service of juridical person or of an individual has, with regard to the business or property of the said juridical person or individual, committed a violation as provided for in each of the following paragraphs, the said juridical person or the said individual shall be punished by such fine as provided for in the said paragraphs in addition to the punishment of the offender and that, with regard to the article 89 [penalties against private monopolization or unreasonable restraint of trade, or substantial restraint of competition by a trade association], fine of not more than 100 million yen. Until 1991, there were only few cases which the FTCJ denounced to the Prosecutor's Office. After the meeting between the government of the U.S. and that of Japan, the criminal accusations from the FTCJ has increased, which has been said to be at the rate of one cases in two year. Until now, in most of criminal cases, the defendants were convicted with suspention of execution and there are no cases with sentence of inprisonment without suspention of execution. *See* Noriyuki Nishida, *Dokusenkinshihohniokeru Keijibatuno Kyokanituite* [*The Strengthening of the Criminal Sanction to a Violation of the Japanese Antimonopoly Law*], 13 KEIZAIGAKKAI ANNUAL REPORT 71, 73-75 (1992). In addition, the FTCJ had adopted the strict principle of territorial jurisdiction in applying the law, art. 2, para. 6. *See* Nihonyuhsen, 19 SINKETUSHU 57 (FTC, Aug. 18, 1972). In this case, the FTCJ said that the Japanese Antimonopoly Law should not apply to the agreements concluded outside

of Japanese jurisdiction. It should be noted, however, that the referee at this hearing expressed its view that, concerning agreements concluded in Japan, inasmuch as the service of delivery is completed to the place of business or office, the law should apply to foreign corporations involved in such agreements but that the service of delivery to agencies and outlets of such foreign corporations located in Japan should not be admitted because agencies and outlets are not the place of business or office. Provided that the referee added that given that the FTCJ proved that the agencies or outlets of foreign corporations in question were invested with receiving delivery of the notification by their head office or that the delivery had been ratified, the delivery to the agencies or outlets should become effective. In this regard, the Supreme Court in Japan said in the case not concerning antitrust in relation to the interpretation of the place of business or office that the outlet of Malaysia Airline located in Tokyo could be the place of business or office and that the service of delivery to such a place was valid under the Code of Civil Procedure. *See* Malaysia Airline System Berhad v. Goto, 35 MINSHU 1284 (Sup. Ct. Oct. 16, 1981). (Although the disposition of this particular case has been basically supported in Japan, the reasoning of the Supreme Court judgment was severely criticized. *See* Hideyuki Kobayashi, *Kokusaisaibannkankatu to Malaysia Koku Jikenhanketu* [*International Judicial Jurisdiction and the Malaysia Airline Decision*], 26 HOUGAKU SEMINER 20, 24 (1982). Most of the criticism focused on the Supreme Court's holding that the logical reason might lead to confer Japanese judicial jurisdiction over the defendant when any cause of jurisdiction stipulated in the Code of Civil Procedure. *See* Morio Takeshita, *Note*, 637 KINYU SHOJI HANREI 49, 53 (1982). *See also* Takao Sawaki, *Saiban Kankatuken Saiko* [*Judicial Jurisdiction Revisited*], 9 KOKUSAI SHOJI HOMU 611, 612-614 (1981). Responding to overwhelming criticisms, lower courts in the post Malaysia Airline era have modified the Supreme Court's standard by allowing an exception to its literal application. *See* Mukoda v. Boeing, Co., 1196 HANREIJIHOU 87 (Tokyo Dis. Ct. Jun. 20, 1986). Regard with evaluation concerning the creation of exception of the Supreme Court judgment, *see* Hideyuki Kobayashi, *Kokusai Sosho Kyogo* [*International Parallel Litigation*], 525 NBL 34, 35 (1993); Koichi Inoue, *Kokusaiteki Nijusosho wo Meguru Saikinno Dohkoh* [*Trend of Recent Case Law Concerning International Duplicative Litigation*], 21 KOKUSAISHOJIHOMU 403, 405 (1993).) Based on this judgment, it had been said that there were possibilities that the FTCJ would change its interpretation of the place of business and office to construe that the service of delivery to agencies or outlets of foreign corporations located in Japan is valid under the Japanese Antimonopoly Law. In fact, the FTCJ implied in its public deliverances that there would be the possibility for the Japanese Antimonopoly Law to be applied to the foreign corporation involved in a cartel aiming at market within Japanese jurisdiction but that in order to do so the amendment of the law should be more appropriate. Following the Supreme Court judgment and the public reliverance above, in 2002, the Japanese Antimonopoly Law was amended so that the FTCJ may use the service of delivery by notification, which was codified in art. 69-4. In spite of the fact that the FTCJ has not changed the strict principle of territorial jurisdiction entirely and there have been no cases where the Japanese Antimonopoly Law was applied to parties located outside of Japanese jurisdiction, based on this amendment, given that business activities were construed to have been made in Japanese jurisdiction, it would be greater possibility that the Antimonopoly Law should apply to foreign corporations. With regard to the responsibility for restitution, art. 25. of the law says that any entrepreneur whose act has infringed in violation of art. 3, 6 or 19 of the law and any trade association whose act has infringed in violation of art. 8(1) shall be liable to indemnify the person injured no entrepreneur and trade association may be exempted from the liability as prescribed in the preceding subsection by proving non-existence of willfulness or negligence on his part on the condition that the recommendation, consent or final decision at the FTCJ has become final and conclusive. As clear from the language above, art. 25. of the law shifts the burden of proof to the defendant's side to verify non-existence of willfulness or negligence, quite contrary to the general tort claim under the Civil Code of Japan, art. 709. Most of the civil cases seeking the compensation for the damage, however, have been filed not under art. 25. of the law but as general tort claim. *See* Masahiro Murakami, *Dokusenkinshihou Ihannituiteno Tokubetuno Songaibaishoseidonoigi* [*The Significance of the Special Restitution System Concerning Violation of the Antimonopoly Law*], 959 HANREITIMES 4, 4-8 (1998). There have been

recommendations at the FTCJ which dealt with joint purchasing,[163] there have been no cases at courts nor recommendations at the FTCJ which treated buyers' anticompetitive agreements.

Therefore, as shown later, it is necessary to examine the general interpretation of specific article concerning the prohibition on an unreasonable restrain on trade in the Japanese Antimonopoly Law.

(B) Guidelines by the FTCJ

Although a guideline by the FTCJ has no binding power over courts and is just a precept which the FTCJ uses to demonstrates its antitrust policy, it has been used in practice as important materials in antitrust cases at Japanese courts. In addition, since there have been no cases in Japan which dealt with neither B2B nor buyers' anticompetitive agreements, in order to grapes the tendency at both courts and the FTCJ, it would be quite important to examine guidelines by the FTCJ.

The descriptions in the guidelines named Antitrust Guideline Concerning Business Activities by a Body of Businesses in 1995 is the first time that

---

produced several explanations on the castration of art. 25, one of which is that since after the decision at the FTCJ the prima facie inference can be drawn from it and there are no special effects in the law concerning a lawsuit under art. 25 such as the tremble damage, there is no incentive for anyone to use art. 25. Further, in Japan, the number of the civil litigation seeking the reimbursement is not large despite art. 248 of the Code of Civil Procedure, which eased the difficulty of proving the amount of damage in tort claim. This trend demonstrates that still the verification of the damage is the big hurdle for the plaintiff.

[163] *See e.g.*, Himejisikankogyo, *available at* http://sink.jtfc.go.jp/pdfdocs/H120510H2J025.pdf (FTC, May 10, 2000) (last visited Feb. 5, 2005). In this case, plumbers formed the association to administer their businesses and negotiate their purchase of raw materials from suppliers. In order to implement its policy, the association forced suppliers not to sell raw materials directly to associates. The FTCJ determined that such an arrangement was a violation of article 19 of the Japanese Antimonopoly Law because the association purchase the raw materials on the condition that suppliers accept the unfair policy which bind their business activities unfair way. The FTCJ focused on the anticompetitive conditions imposed on the suppliers by the association and no consideration has been done on the joint purchasing activities themselves.

the FTCJ publicized its view about joint purchasing.[164] It said "for example, in joint selling of commodities or services, purchasing, and joint manufacturing, an antitrust apprehension will be caused, since the price and quantity of products and services would be determined through mutual understanding among businesses and businesses are likely to have an incentive to form cartels" and that "on the other hand, other kind of joint businesses, such as joint study and utilization of transportation are not likely to raise antitrust illegalities because these kind of business activities themselves have no effect on price and quantity. Provided that participants of these joint businesses, however, should be made carefully so as not to restrain free competition as a result of their communications through business." [165]

The FTCJ developed this basic framework and presented its policy in the guidelines named Consultation Case Concerning B2B on November 8, 2000.[166] In this guideline, the FTCJ pointed out that several antitrust concerns: First, in B2B transaction there might be an unreasonable restriction on trade; Second, participants of the market tend to restrict competitions through easy web-based communications among sellers or buyers; Third, given that participants are obliged to buy anything on B2B such a conduct might be a violation of the Japanese Antimonopoly Law as an unreasonable restrain of trade; and Fourth, given that a procurement of raw materials on the B2B market places should be indispensable for participants, a foreclosure from the markets might be a violation of the Japanese Antimonopoly

[164] The Fair Trade Commission in Japan, *Jigyoshadandaikatudonikannsurudokusenkinshihojonosisin* [*The Antitrust Guideline Concerning Business Activities by a Body of Businesses*], Section 2-11 (1995), *available at* http://hrsk.jftc.go.jp/dk/View_SVG.asp?page=249 (last visited Dec. 12, 2004).
[165] *Id.*
[166] *Consultation Case Concerning B2B*, *supra* note 9.

Law.[167] Especially, it should be noted that the FTCJ examined competitive effects on markets of both raw materials and final products, namely an upstream market and a downstream market,[168] which was the first time for the FTCJ to examine the two kinds of market places. Further, the FTCJ pointed out that given that certain raw materials have a large proportion in final products, joint purchasers which bought such raw materials are likely to collude and lower the input purchased.[169] As to downstream markets, the FTCJ said that provided that joint purchasers have market power at downstream markets and certain raw materials purchased by joint purchasers should be indispensable elements of final products, the price of final products is likely to be the same among joint purchasers.[170]

The FTCJ adopted the same way of analysis, namely analyzing both an upstream market and downstream market, in the guidelines issued in March 27, 2001.[171] In this guideline, the FTCJ commented on the consulted case where several competitors jointly purchased raw materials from several suppliers at real marketplaces. In this case, the FTCJ found the following facts: 1. The purpose of the joint purchasing is to cope with the serious depression by decreasing the procuring cost of raw materials and advancing compatibility of their components; 2. The components they are going to purchase jointly was not developed by them but by specialized manufacturers; 3. The negotiation is to be done with several

---

[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] The Fair Trade Commission in Japan, *Jigyoshakatudonikansurudodanjireishuu* [*Consultation Cases Concerning Business Activities*], 30-32 (2001), *available at* http://www.jftc.go.jp/pressrelease/01.march/010327.pdf (last visited Nov. 7, 2004) [hereinafter *Consultation of Business Activities*].

manufacturers after examining several estimates and reviewing the price, competency of the manufacturers, and quality of the products; 4. The proportion of the dealing by suppliers with their joint purchasers is less than 1%; 5. The proportion of the components purchased in final products is from 7% to 8%; and 6. When other competitor might want to participate in joint purchasing, there are no restrictions on it.[172] Based on aforementioned fact-finding, the FTCJ expressed its view: 1. Generally speaking, when joint purchasers have large shares at downstream markets and the proportion of the raw materials in the final products is large, or when the proportion of their purchasing of raw materials in the total demand for them is large, there would be an antitrust apprehension; 2. In this case, there would be no antitrust violation as far as the downstream market is concerned, because the proportion of the components purchased at the upstream market in final products is only from 7% to 8%, they will produce and advertise their final products separately at the downstream market, and there are several competitors which has large market share in the downstream market but have not participated in the joint purchasing; 3. In this case, there would be no antitrust violation as far as the upstream market is concerned, because the raw materials are multipurpose products and the suppliers' dependence on joint purchasers is not so high.[173] The FTCJ concluded that there are no antitrust problems in this consultation case.[174]

The FTCJ adopted the same framework explained above, that is, analyzing both an upstream market and a downstream market, in the guidelines

[172] *Consultation of Business Activities*, *supra* note 171, at 30-31.
[173] *Id*. at 31-32.
[174] *Id*. at 32.

issued on July 5, 2001.[175] It can be said that this way of examination has been well-established way of analysis at the FTCJ.

(3) Interpretation of the Japanese Antimonopoly Law

As explained earlier in this article, buyer's agreements to drive down the purchasing price though B2B would be a violation of the prohibition on unreasonable restraint of trade under the Japanese Antimonopoly Law. The Japanese Antimonopoly Law, art. 3. says that no entrepreneur shall effect private monopolization or unreasonable restraint of trade. With regard to "unreasonable restraint of trade," the law, art. 2, para. 6. clarifies its definition and says that it shall mean "such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." In Japan, the condition of "in any particular filed of trade" is always construed in connection with the condition of "substantial restrain of competition" and has no independent significance.[176] Therefore, in order to determine certain business activities as "unreasonable restrain of trade", principally three conditions, namely, (1) substantial restraint of competition in any particular field of trade, (2) mutually restrict or conduct their business, and (3) against public interest must be met. This article reviews these three

[175] The Fair Trade Commission in Japan, *Risaikurutounikakarukyodonotorikunikansurudokusennkinnsihouounosisinn* [*Antitrust Guideline Concerning Joint Activities on Re-use of Resource*], Section1-1 (2001), *available at* http://hrsk.jftc.go.jp/dk/View_HTML.asp (last visited Feb. 5, 2005).

[176] MASAHIRO MURAKAMI, DOKUSENKINSHIHOH [THE JAPANESE ANTIMONOPOLY LAW] 69 (Hirobundou 2000) (1996).

conditions separately. First, this article provides the general interpretation of "substantial restrain of competition in any particular field of trade" of the Japanese Antimonopoly Law, art. 2, para. 6.

(A) The Interpretation of "Substantial Restrain of Competition in Any Particular Field of Trade"

Generally, "substantial restraint of competition" means that a competitive function at a given market is substantially restrained or that an important function of a given market is lost.[177] More precisely, the Tokyo High Court[178] made the definition of a

---

[177] *Id.*

[178] Tohoh Co. v. Fair Trade Commission, 4 MINSHU 497 (Tokyo Hi. Ct. Sep. 19, 1951). Although Tohoh Co. ("Tohoh") appealed to the Supreme Court of Japan, seeking the reverse and the entering into new judgment, the judgment at the Tokyo High Court was affirmed. *See* Tohoh Co. v. Fair Trade Commission, 8 MINSHU 950 (Sup. Ct. May 25, 1954). A gist of the fact of this case is as follows: Tohoh concluded the lease agreement with Subaru Co. ("Subaru") to lent the two theaters located at Yurakucho, Thiyodaku in Tokyo on January 26, 1950. The FTCJ decided that the concluding of the lease agreement would cause a substantial restraint of trade because through the agreement Tohoh would have come to operate eight theaters out of ten located at Yurakucho and Marunouchi area. The total seating capacity of the ten theaters was 10,787. On the other hand, the eight theaters operated by Tohoh already had had the fixed number of seating capacity with 9,742 and this was 90.4% of total numbers in that area. As Tohoh refused to accept the recommendation from the FTCJ, it initiated the hearing and rendered the judgment. Tohoh filed the litigation seeking the withdrawal of the judgment by the FTCJ at the Tokyo High Court on the ground that its order lacked sufficient evidence to prove that competition of that area would be substantially restrained. The Tokyo High Court, however, dismissed the Tohoh's claim. Since the FTCJ intervened this case at the time when the lease agreement between two parties was concluded and before the actual lease had begun, the elimination orders pursuant to art. 7. of the law was issued in the form of the prohibition of leasing two theaters from Subaru to Tohoh, having connection with management of two theaters, and doing any kinds of business activities having same effects of the lease agreement. Although the Tokyo High Court determined that through the lease agreement in question Tohoh would come to dominate the given market, the market share of Tohoh would increase only 7.7% even when the lease agreement was consummated. Therefore, it would be appropriate to regard this case not as trying to obtain the dominant position in the market through the agreement but as strengthening its position as the market leader already established before consummation.

In general, when the FTCJ considered that an antitrust violation should have happened, it appoints the auditors to make them investigate the cases, from which provided that it considered a violation did occurred it may issues the recommendation to the parities involved in order to eliminate the illegality and to prevent a recidivism from happening. Given that the parties accepted the recommendation from the FTCJ, it renders the judgment the content of which is the same of the recommendation and is equivalent to the consent order in the U.S. Provided that the parties refused to accept the recommendation, the FTCJ initiates the hearing, in which proceeding the adversary system is adopted in order ultimately to hand down the judgment.

(1) substantial restraint of competition in any particular field of trade clear and said as follows:

> A substantial restraint of competition stipulated in the Japanese Antimonopoly Law, art. 15, para. 1. does not mean each action conducted by a certain business as the plaintiff argued, but means the situation where in fact the competition on a certain market has been reduced substantially and a business or abody of business has a power to control a market by changing a price, quality and quantity of goods and so on, at its will or is about to have such a power…Although a number of seats increased through the transaction by the plaintiff was small, considering the location of both theaters, their high reputation, and the fact that they have been used to show a lot of foreign movies, when the plaintiff comes to have a substantial control over two theaters, in addition to the fact that the plaintiff has a majority of number of seat in the given area, it can be found that the plaintiff has a great influence in deciding a price and number of movies shown at the given area. Therefore, we conclude that the competition in the aforementioned market place would be substantially restrained by the lease agreement between the plaintiff and Subaru. The argument by the plaintiff that there is insufficient evidence to support the fact that competition would be substantially restrained on the ground that the increased

---

In the aforementioned case, as Tohoh did not accepted the recommendation, the FTCJ initiated the hearing and rendered the judgment. When discontent with the judgment, the relevant parties are able to file the litigation at the Tokyo High Court, the exclusive jurisdiction of this kind of case, in seeking the revocation of the judgment obtained at the FTCJ. At the Tokyo High Court, parties may plead to the court for offer to introduce new evidence relevant to the case, provided, that any such offer to introduce new evidence relating to the facts found by the FTCJ shall have the reason which come under either where the FTCJ failed to adopt the evidence without good cause, or where it was impossible to adduce evidence at hearing proceedings of the FTCJ, and there was no gross negligence on the part of the party in failing to adduce such evidence. Following these procedures, Tohoh, after obtaining the judgment at the FTCJ, brought the litigation at the Tokyo High Court, the outcome of which is briefed above. It should be noted that in Japan the administrative guidance by the FTCJ, which is used to terminate the case in question after commencing the investigation by having the parties correct their business activities voluntarily without issuing an order or initiating a hearing, is the different administrative measures from the recommendation. On one hand, using of this measure should be upheld in the case where the determination as to whether the business activities in question would be a violation of the law is not easy because it can be assumed that in the case like this the recognition of illegality of their activities by the parties is not strong and therefore the free competition is not likely to be affected by them. On the other hand, in Japan, the administrative guidance has been used so frequently that it has been criticized as the castration of the Japanese Antimonopoly Law, because the FTCJ has settled the case by using the administrative guidance even when it found a violation of the law. As this tendency has been said to be in connection with the careful application of the law by the FTCJ, since threshold to use this measure is not so clear, it is necessary to make its usage of the measure transparent.

number of seats through the transaction was small is not persuasive.
Tohoh Co. v. Fair Trade Commission, 4 MINSHU 497 (Tokyo Hi. Ct. Sep. 19, 1951).

It should be noted that even though this Tokyo High Court case was not in connection with interpretation of art.2, para. 6. of the law, since the same languages used with regards to the "substantial restrain of competition in any particular field of trade," it has been construed in Japan that the definition established through the Tokyo High Court judgment shall apply to the interpretation of art.2, para. 6. of the law.

From this judgment, however, it is not clear what is the "situation where in fact competition on a certain market has been reduced substantially and a body of business has a power to control a market by changing a price, quality and quantity of goods and so on, at its will or is about to have such a power."[179]

Due to that unclearness, the commentators and scholars have been trying to clarify the meaning of aforementioned languages and pointed out that this condition should be interpreted by taking consideration into other factors, such as market share of relevant parties, several factors concerning suppliers and purchasers, whether or not there are substitutes, the difficulties of new entry.[180] In addition, it has been indicated that the condition of "any particular field of trade" should be construed the place where the transaction of goods and services between suppliers and purchasers is conducted, economically speaking, the same meaning as "market place."[181] Further, it has been noticed that, in interpreting this condition, it should be taken into consideration such factors as objects of transactions, geographical area of transactions, steps of transactions,

---

[179] *Fair Trade Commission*, 4 MINSHU 497.
[180] *See e.g.*, MURAKAMI, *supra* note 176, at 70.
[181] *Id*.

counter parties of transactions, nature of business activities in question, and a form of transactions.[182]

The Supreme Court of Japan, as explained in detail later in this article, adopted the idea that, in price fixing cases, when an agreement as to fixing price among the parties should be found, except for the case where parties apparently have no power to implement their agreement to restrain competition, the condition of "substantial restraint of competition in any particular field of trade" would be almost automatically met and the burden of proof shifts the defendant's side to demonstrate that they were unable to affect the competition.[183] In other words, when a price fixing agreement among parties should be found, the condition of "any particular field of trade" is automatically determined as commodities or services and geographical area purported in the price fixing agreement in question and the condition of "substantial restraint of competition" is also automatically satisfied by assuming that the agreement contained such an anticompetitive effect in it.[184] To put it another way, in the price fixing cases, when a price fixing agreement among parties should be found, this condition is automatically to be fulfilled without an elaborate examination about it.

Based on above, it has been evaluated that the Supreme Court of Japan adopted the principal similar to the per se rule [185] and detailed examination of this condition would not be necessary in the price fixing cases.

(B) The Interpretation of "Mutually Restrict or Conduct Their Business"

---

[182] *Id*.
[183] *Id*. at 131-132.
[184] *Id*. at 70.
[185] *Id*.

The Supreme Court of Japan[186] clarified the meaning of (2) mutually restrict or conduct their business and said as follows:

> The defendants concluded the agreements that they would raise the price of the oil simultaneously, with strong intent to implement it and anticipating that other participants of the agreement would follow the execution. Therefore, it is explicit that the agreement has an effect to restrict their business once they concluded it. Their agreement satisfied the condition of "mutually restrict or conduct their business" in the Japanese Antimonopoly Law, art. 2, para. 6. and constituted unreasonable restraint of trade stipulated art. 3. of the law. The fact that there were no sanctions which guaranteed the implementation of the agreements does not affect the conclusion of this judgment.

[186] *See* Japanese Government v. Idemitu Co., 33 KEISHU 1287 (Sup. Ct. Feb. 24, 1984). A gist of the fact of this case is as follows: After the price increase of crude oil by the OPEC in late 1970, it was feared in Japan that the price of commodities which used oil and were made of oil would increase dramatically. In fact, in the late 1973, the social disorder happened because of the sharp increase of the price of merchandises relating to oil. In 1971, the Ministry of Industry issued positively a lot of administrative guidance which required the compliance of wholesalers of oil industries to the direction by the Ministry that wholesalers should bear 10 cents per barrel of the oil when the price should be raised by the OPEC at that time. In addition, the Ministry of Industry required wholesalers of oil to let it know when they would raise the price of oil and sometimes intervened how much to raise the price as well as demonstrating the ideal plan for their raising price. After 1971, with the direction by the Ministry of Industry, the wholesalers raised the price of oil several times. Neither the FTCJ nor the Prosecutor's Office raised the antitrust concerns about these practices. In 1973, before the consultation with the Ministry of Industry, the person in charge of each wholesalers of oil companies met each other frequently to discuss and agreed when and how much to raise the price. Following these meeting, after obtaining permission from the Ministry of Industry, the wholesalers did in fact raise the price five times. At that time, the Ministry of Industry directed wholesalers positively so that they might not raise the price sorely on the account of the fact that the new pact had been concluded among the nation of the OPEC and requested to report the Ministry prior to their price raise in order for the Ministry to review their plan. In this regard, the Supreme Court said that since the parties involved agreed not only how much price raise they were going to report to the Ministry but also on the premise that the Ministry would admit their proposal of price raise actually how much to raise the price of oil, which was well beyond the scope of the administrative guidance ordered by the Ministry and should well deserve accusation although it found that judging from the situation at that time it might not so unreasonable for them to expect that the Ministry would admit, even if with some modification, their proposal of price raise.

In this case, the defendants argued that their agreement and subsequent price raises would not constitute a violation of the Japanese Antimonopoly Law because what they did was just following the direction by the Ministry of Industry and they had obtained the permission from it before their price raise. This case includes a lot of factual disputes as well as legal issues. The Tokyo High Court held that all the defendants were guilty by rejecting all the argument raised by them. On appealing, the Supreme Court rendered the judgment that 20 out of 23 of the defendants were guilty by rejecting the argument raised by them.

Japanese Government v. Idemitsu Co., 33 KEISHU 1287 (Sup. Ct. Feb. 24, 1984).

The Supreme Court adopted the view that a strong binding power was not required to meet the condition of "mutually restrict their business" and that when a price fixing agreement should be concluded this condition would be automatically met. This reasoning is said to be the ground that the Supreme Court of Japan adopted the principal similar to the per se rule.[187]

(C) The Interpretation of "Against Public Interest"

The Supreme Court of Japan defined the meaning of (3) against public interest and said as follows:

> Judging from the purpose, the keystone and the progress of its revision of the Japanese Antimonopoly Law, "against public interest" stipulated in the law, art. 2, para. 6. in principal an establishment of free competition which the law seeks to accomplish. However, even if a certain action should be judged as against public interest formally, such an action should not be judged as "against public interest" when it is not practically against the ultimate purpose of the law stipulated in art. 1, which says that the law "aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general," after comparing the principal purpose of the law with interests protected by such a business activity…when businesses agreed to restrict each other's business activities by determining the prices through mutual consultation, when the competition in the given market place has been restrained substantially against public interest by their agreement, such a business activity would become immediately a violation of the law and there are no need to examine an actual implementation of the agreement by the parties.

[187] MURAKAMI, *supra* note 176, at 126-127.

Japanese Government v. Idemitsu Co., 33 KEISHU 1287 (Sup. Ct. Feb. 24, 1984).[188]

The Supreme Court judgment above has three significances to antitrust practices in Japan.

First, the Supreme Court demonstrated its view that the public interest in the Japanese Antimonopoly Law, art. 2, para. 6. meant to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general, which is stipulated in the law, art. 1. Before this judgment, principally there were two views concerning the definition of the public interest. First view was to regard the public interest as an economic order based on the free competition and assumed that, by promoting it, the purpose of the law stipulated in art. 1 would be realized.[189] The FTCJ had adopted the first view before the Supreme Court judgment.[190] According to the first view, a restraint of competition would be against the public interest without exception.

[188] After the Supreme Court judgment of Feb. 24, 1984, the Tokyo high Court adopted almost the same definition of "against public interest." *See* Japanese Government v. Mitsuitoatsukagaku Co., 46 KOKEISHU 108 (Tokyo Hi. Ct. May 5, 1993). A gist of the fact of this case is as follows: The Japanese stretch film industry had increase its sales favorably until around 1988 because of their superior characteristic as a rapping material of fresh foods. In spite of the fact that manufactures of this kind of products devised to differentiate its product from competitors', their competition of the products tended to become a price competition because there are almost no differences in terms of out looking and performance. Therefore, the price of the products was going down constantly. In 1988, new company participated in the market of stretch film industry. Further, in 1989, one of the competitors started operating new factory established at northern Japan to increase their amount of producing and decrease costs. In addition, since the demand of stretch film had not increased as before because of the advent of substitutable products, the price of the product decreased more. Therefore, some of the companies in the industry were in red ink. Under this circumstance, the top shared company in the industry conspired with the third shared company to raise the price. Later, the second shared company took part in the cartel. The FTCJ accused this cartel on the ground that it would be a violation of the Japanese Antimonopoly Law. After the judgment at the FTCJ which found their cartel, the defendants filed the litigation at the Tokyo High Court seeking the nullification of the judgment not favorable for them. After the trial, the Tokyo High Court rendered the judgment finding the cartel among them with rejecting all the argument raised by them.

[189] *See e.g.*, YOSHIO KANAZAWA, KEIZAIHOH [LAW OF ECONOMY] 159 (Yuhikaku 1980).

[190] *See* Nodashouyu Co., 4 SHINKETSUSHU 1 (FTC, Arp. 4, 1952). *See also* Nodashoyu Co. v. Fair Trade Commission, 8 GYOSAISHU 2300 (Tokyo Hi. Ct. Dec. 25, 1958).

The second view was to regard it as to promote the general interest of the public in addition to realizing the free competition.[191] The second view could lead to greater possibility for a restraint of trade to be justified on the account that it was not against the public interest.[192] Judging from the languages of the law, art. 1, it is clear that the law assumes that its purpose would be realized by a sound economic order based on the free competition, the basic policy of the law. Therefore, the first view is more in line with the inherent intention of the law.

However, as the Supreme Court judgment suggested, the assumption carrying out the policy strongly always contributes the purpose of the law does not always true because the hypothesis has not been verified yet after alm ost fifty years has past since its enactment. As these backgrounds might have affected, it can be evaluated that the Supreme Court adopted the middle course between the first and the second view [193] because it admitted the possibility for a cartel to be justified, whereas it denied the general interest of the public should be included in the concept of the "public interest."

The second significance is that the Supreme Court admitted that although the law purported to realize the public interest, there was a room that the public interest would be realized by admitting cartels, which means that, even when a price fixing agreement should be concluded, such an agreement could be justified as not against public interest.[194] When emphasizing the rationale of the judgment which says that after

---

[191] *See e.g.*, YOSHIHIKO RYOKAKU, KYOSOUTO DOKUSENNO HANASHI [THE TALK ABOUOT COMPETITION AND MONOPOLY] 170 (Soukeisha, 1978).

[192] *Id*. at 168-171.

[193] MURAKAMI, *supra* note 176, at 66-67.

[194] With regard to the relationship between the administrative order issued by the Ministry of Industry and the price fixing agreement, *see Idemitsu Co.*, 33 KEISHU 1287. The gist of the Supreme Court judgment is as follows: When taking consideration into the necessity to cope with the dynamic situation flexibly, there are no reason why the administrative direction having no ground in the law of oil business should be determined as illegal inasmuch as such a way of administrative direction is

comparing an economic order based on the free competition with the interest protected by the business activity in question, given that the latter swamped the former, it is not "against the public interest," the possibility for a price fixing agreement to be justified would be greater.

However, this judgment admitted that principally that the "against public interest" was the same meaning of against an economic order based on the free competition and that a price fixing agreement to be justified as not against public interest was an exception.[195] Therefore, the cases where a price fixing agreement would be justified under the rational of the Supreme Court judgment should be very limited.[196] This deliberation would be supported by the fact that the price fixing agreement in the aforementioned Supreme Court case in which the price raises were implemented in accordance with the direction by the Ministry was not admitted to be justified.[197]

There could be an argument against the rational of the Supreme Court judgment that it hindered the stability of the law and it might lead to the arbitrary

---

within the common idea of the society, and it may not interfere with the ultimate purpose of the law when there is a strong necessity for the direction to be issued. Although a price fixing agreement among the parties seemed to be a violation of the law facially, when such an agreement was concluded by following and cooperating a legitimate administrative direction, an agreement would be justified. Based on above, although the Supreme Court admitted the legitimacy of the administrative direction, it denied that the cartel in this case would be justified with the reasoning that "it is clear that their price raise was not made by cooperating the direction by the Ministry because they agreed not only how much to raise but also raising the price of oil from tomorrow on the premise that they would obtain the permission from the Ministry about their price raise."

[195] *Id.*

[196] *See e.g.*, KENZO SANEKATA, JOHKAI DOKUSENKINSHIHOH [THE INTERPRETATION OF THE JAPANESE ANTIMONOPOLY LAW] 37 (Kobundo 1997).

[197] MURAKAMI, *supra* note 176, at 66-67. *See also* KAN IJUH, DOKUSENKINSHIHOH NO TEBIKI [THE GUIDANCE OF THE JAPANESE ANTIMONOPOLY LAW] 33 (Tokyokeizaishinpousha 1982). According to this article, the practice at the FTCJ has been consistently that the fact that a certain business activity was the result of following the direction by the Ministry does not always justify it. Basically the policy taken by the FTCJ is correct because whether or not a certain business activity meets the requirement of a justifiable cause is case-by-case judgment and traditionally the courts in Japan tend not to admit the satisfaction of the requirement of a justifiable cause easily.

application of the law because the Supreme Court did not clarify under what cases and conditions an price fixing agreement would be justified.

However, even when adopting the standpoint of the Supreme Court judgment, there would be no changes at all in that a price fixing agreement in principal is illegal under the law because the justification is only an exception to be permitted in a limited and exceptional case. In addition, the parities which are going to form a cartel are always compelled to do so at the risk of violating the law, which sometimes triggers the commencement of derivative actions[198] given that the parties are corporation, and the punishments with criminal sanction as well as the Punitive Penalty (Surcharges). Since it is clear that the party shall bear huge risk in forming a cartel, the party could easily anticipate whether or not they should form it by taking into consideration of the huge legal risk arising out of it. Further, as twenty years has past since the Supreme Court judgment was rendered, there have been no situations in which the law has been applied arbitrary nor implementation of the law was impaired due to the vagueness of the languages in the judgment. Therefore, the standpoint adopted in the judgment should be upheld.[199]

The third significance is that the Supreme Court made it clear that, in a price fixing case, when the court find an agreement among the parties to fix a price, such

[198] Since the 1993 Amendment to the Commercial Code of Japan (Law No. 62 of 1993), which significantly lowered the court-filing fee for the shareholders derivative suit (now JPY 8,200), the derivative suit has become very popular in Japan and management's attention to the likelihood of being sued via this form of suit has significantly increased. According to the survey by the *Shoji Homu*, being a prominent Japanese law review magazine, it is reported that the overall number of derivative actions in Japan increased at approximately 5-10% annually after 1993 to 1999. Particularly, the Osaka District Court's 2000 judgment in the Daiwa Bank case, which held 12 directors of the Bank liable in amounts in the order of between US$70 million to US$775 million per person, created a significant sensation, and is said to have contributed to the December 2001 Amendment to the Code that created a limitation on a director's liability as discussed.

[199] MURAKAMI, *supra* note 176, at 67.

an agreement would automatically satisfy all the constituent elements of the law and be presumed to be illegal without reviewing the real effects of an agreement on the competition and examining whether or not it is against public interest. In this regard, it can also be said that, as to a price fixing case, the Supreme Court adopted the principal similar to the per se rule.[200]

In relation to above, the Supreme Court also clarified that the fact that a price fixing agreement among the parties was not against the public interest was a justifiable cause with which defendants shall bear the burden of proof. In other words, when an agreement to fix the price should be found, it is presumed that such an agreement meets the condition of (1) substantial restraint of competition in any given field of trade, (2) mutually restrict or conduct their business, and (3) against public interest, which means that the agreement is presumed to be illegal and the burden of proof to verify that the agreement will not cause a substantial restrain of competition or promote public interests shifts the defendant's side as a justifiable cause.

This interpretation of the Supreme Court judgment is also evidenced by the rationale that the Supreme Court determined that a price fixing agreement would be a violation of the Japanese Antimonopoly Law at the time when such an agreement has been concluded.[201]

---

[200] *Id*. at 127.

[201] Before the aforementioned Supreme Court judgment, there were several views as to which point a price fixing agreement would be a violation of the Japanese Antimonopoly Law. The first view was that a price fixing agreement would be a violation of the law at the time when an agreement was concluded, which was adopted by the Supreme Court Judgment and the subsequent Tokyo High Court judgment. The second view was to regard the commencement of the agreement as a violation of the law. The third view was to regard the real implementation of the agreement as a violation of the law. The most important ground of the second and third view is the language of the Japanese Antimonopoly Law, art. 2, para. 6, which says "causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade" not "trying to cause a substantial restrain of competition." To be sure, it is consistent to interpret the law like the second and third view with its

The distribution of the burden of proof articulated in the Supreme Court judgment should be basically upheld because it is consistent with the traditional interpretation of articles of the law which stipulate the criminal or administrative penalty that always requires to review the three aspects of law, that is, a fulfillment of a constituent element, an existence of a justifiable cause and a cause of non-culpability separately in this order. Also the traditional interpretation grants a strong presumption of illegality should all constituent element be fulfilled.

After this Supreme Court judgment, the Tokyo High Court clarified the aforementioned principal much more and said that in a price fixing case when an agreement as to fixing price among the parties should be found, the condition of (1) substantially restrain on competition in any given field of trade, (2) mutually restrict or conduct their business, and (3) against public interest would be almost automatically met and that the agreement should be a violation of the law at the time of its conclusion.[202]

---

language. In addition, before the Supreme Court judgment, the FTCJ had rendered the judgment in which not only a conclusion of the agreement but also an implementation of it had been written. Further, a real implementation of an agreement had been focused on at the real practice at the FTCJ. On the other hand, the first view has advocated that it was unrealistic to consider that the FTCJ could not do anything even when it could find a price fixing agreement before its commencement. It is not appropriate to construe, however, that this is the decisive ground for the Supreme Court to adopt the first view because practically it has been quite rare for the FTCJ to expose a price fixing agreement before its commencement. Even when it did expose, it can be said that in most cases the reason why the FTCJ did not issue the elimination order did not lie in the fact that it adopted the first view but in the fact that parties of the agreement complied with an informal direction by the FTCJ and issuing the formal order was no longer necessary. The most important ground for the Supreme Court to adopt the first view is the basic concept that the effective regulation on a cartel is one of the most important subjects of the Japanese Antimonopoly Law. Practically speaking, when adopting the second and third view, the FTCJ shall bear the heavy burden of proof to demonstrate an actual commencement and implementation of the agreement, which is no doubt time consuming and has the possibilities to lesson the effectiveness of the law to promote the free competition in the national economy. Considering illegality of a price fixing agreement, it is appropriate to adopt the first view which enable the FTCJ to expose a cartel without reviewing a real implementation of an agreement. *See* MURAKAMI, *supra* note 176, at 128.

[202] *See Mitsuitoatsukagaku Co.*, 46 KOKEISHU 108.

This interpretation is the logical consequence of the conclusion that presumes illegality when a price fixing agreement should be found.

(D) The Application of the General Interpretation to Buyers' Anticompetitive Agreements

All the interpretations analyzed above were established concerning sellers' price fixing agreements. Therefore, it is necessary to examine whether or not the interpretations established through sellers' price fixing cases would also be applied to buyers' cartel cases or any modification should be necessary only because the parties which collude to manipulate the price are not sellers but buyers.

In this regard, the Japanese Antimonopoly Law, art.1. says as follows:

> This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

From the languages above, it is clear that the principal purpose of the Japanese Antimonopoly Law is to "promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general."[203] For that purpose, it does not distinguish between sellers and buyers which unreasonably restrain the competition. In other words, inasmuch as the free competition is restrained, it

[203] SANEKATA, *supra* note 196, at 10.

does not matter under the Japanese Antimonopoly Law whether sellers or buyers restrain the free competition.

As the court in National Macaroni Manufacture Association v. Federal Trade Commission pointed out, the reason why the illegality of price fixing agreements does not depend on a showing of its unreasonableness is that it is contrary to the policy of competition.[204] There is no difference between buyers' cartel agreements and sellers' ones in that it does cause anticompetitive effects on the free competition. It is consistent to the principal purpose of the Japanese Antimonopoly Law to construe that the interpretation established through sellers' price fixing cases should be applied to buyers' cartel cases.

In addition, as explained earlier in this article, even when joint purchasing would yield procompetitive effects or transactions should be concluded in the form of all-or-nothing deal, there would be almost always anticompetitive effects either in the short term, in the long term or both. To put it another way, when buyers collude to manipulate the price, the collusion will almost always cause anticompetitive harm at an upstream market, a downstream market or both.

Moreover, the reason why the Japanese Antimonopoly Law is concerned with excessive aggregation of market power is to prevent misallocation of competitive efficiencies. As discussed earlier in this article, when collusive buyers exercise their market power, even in a joint purchasing with procompetitive effects model or an all-or-

[204] *See National Macaroni Manufacture Association*, 345 F.2d at 427. This interpretation is consistent with the basic principal of the antitrust law to protect the free competition. *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. N.Y. 1945). It said that "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id*. at 429.

nothing deal, misallocation of competitive efficiencies will almost always happen. Just as sellers' cartel cases, inasmuch as the Japanese Antimonopoly Law is concerned, it is necessary to prevent these inefficiencies.

Therefore, there is the good foundation to apply the interpretation established through sellers' price fixing case to buyers' collusion to manipulate the price.

As explained above, when agreements to lower the input purchased among buyers or to transact in an all-or-nothing deal should be found, the agreement would be presumed to be the substantial restrain of competition against the public interest and thus a violation of the Japanese Antimonopoly Law, art. 3. unless buyers could overturn the presumption drawn from the fulfillment of every constituent element of the law, art. 2, para. 6. by proving that they lacked market power to affect the competition or their agreement has procompetitive effects which could offset the anticompetitive effects caused by it.[205]

---

[205] In Japan, there are no cases in which the courts adopt the argument although the court in *Idemitsu Co.*, 33 KEISHU 1287 admitted the possibility for a price cartel to be justified given that it should be proved that it is not against the public interest.

In the U.S., this kind of argument is sometimes raised from purchases. *See* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. Cal. 2000). In this case, against the complaint that the defendants, cheese makers agreed to depress the price they had to pay for California milk, the plaintiffs, under the state competition law, the defendants argued that the plaintiffs lacked a cognizable antitrust injury since the agreement would benefit consumers by forcing milk producers to sell at more competitive price. *Id*. at 988. *See also* Live Poultry Dealers' Protective Ass'n v. United States, 4 F.2d 840 (2d Cir. N.Y. 1924). The defendants in this case argued that their agreements caused no antitrust harm as it would benefit to consumers. The court in this case, however, after examining the argument from the defendant, stated "The defendants raise two chief objections: First, that the commerce is not interstate; and, second, that the agreement is not an unreasonable restraint of trade…it is somewhat surprising at this day to hear it suggested that a frank agreement to fix prices and prevent competition as regards them among one-half the buyers in a given market may be defended, on the notion that the results are economically desirable. We should have supposed that, if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market." *Id*. at 982-983.

See also Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194 (W.D.N.Y. 1995). The court in this case adopted the argument from the defendants and said "Kamine's allegations, however, fail to indicate a truly anticompetitive effect as a result of RG&E's

As explained earlier in this article, however, it is not clear that agreement among buyers to increase their quantity of input purchased to manipulate the price would almost always cause anticompetitive effects and thus presumed to be against the principal purpose of the Japanese Antimonopoly Law. Thus, inasmuch as this kind of agreement is concerned, some modifications should be necessary in applying the rationale established through sellers' price fixing cases.

(E) Analysis of Arguments and Proof Structure under the Japanese Antimonopoly Law

(a) The Typical Oligopsony Case

When collusive buyers have oligopsony power at an upstream market and exercise it, this business activity would be presumed to be illegal and meet all the conditions of the Japanese Antimonopoly Law, art. 2, para. 6. automatically, given that an agreement among collusive buyers should be found and proved.

This conclusion is supported by the analysis that, as detailed earlier in this article, in this case suppliers at an upstream market will suffer from damages due to the change in quantity of an input purchased and price.[206] In addition, the analysis that when

actions. The chief danger associated with monopsony power--market power on the buying side of the market--occurs when a company has significant market power both "upstream" and "downstream," meaning that the company can control the level of demand for the product that it buys and the level of supply for the product that it sells to its own buyers. Such a market position allows the company to demand a low price from its suppliers while simultaneously raising the prices it charges its buyers. The problem with this type of monopsony power, then, is that ultimately it can injure consumers by forcing up the price of the end product. Where the risk of that happening is slight or nonexistent, however, monopsony power per se does not create an antitrust concern…There is little evidence here that RG&E's alleged use of its monopsony power poses a threat of increased consumer prices. In fact, the evidence suggests the opposite--that paying the price under the PPA, which Kamine demands, will drive up the cost to the ratepayer. Furthermore, although RG&E does possess both upstream and downstream power in the energy market, its position is not analogous to that of a manufacturer of goods that can simply reduce its output in order to increase its price. As a state-regulated utility, RG&E cannot unilaterally reduce its output of electric power to the point where consumers are willing to pay an exorbitant price. If anything, if RG&E's own cost of power drops, it would have greater difficulty justifying approval of a rate increase." *Id.* at 1203-1204.

[206] In Japan, there is an argument that suppliers' damage should not be taken into consideration when examining a violation of the Japanese Antimonopoly Law. *See* SANEKATA, supra note 196, at

a downstream market is dominated by collusive buyers, consumers would suffer from the loss due to the increase of price, the decreased quantity of supply, and the worsened quality of final goods is the ground of this conclusion.

Collusive buyers could make a counter argument to overturn the presumption.

One of the possible arguments would be that they have no market power[207] to control the price and quantity at an upstream market. With regard to market power, there are no detailed examinations in Japan. The only indication, which is concerning sellers' price fixing and merger cases, is that market share is the proxy to measure market power.[208] Also in the U.S., the courts sometimes use market share to analyze the market

---

12. The ground of this argument might be the fact that the Japanese Antimonopoly Law, art. 1. says "This act…aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general" and does not mention anything about business' income.

Also, in the U.S., there is a similar argument. *See Kraft Foods, Inc.*, 232 F.3d at 988. In this case, the defendants argued that their collusion to drive down the purchase price would cause no harm to consumers because they can reduce the cost to manufacture cheese by obtaining cheaper milk. *Id*. at 988. As the court in this case said, however, supplies' damage should also be included as the antitrust damage under the Japanese Antimonopoly Law in the context of measuring the antitrust illegality because the main purpose of the antitrust law lies in the protection of the free competition, which has a great impact on the welfare and income of the people.

See also Marius Schwartz, *Buyer Power Concerns and the Aetnea-Prudential Merger, addressed at 5 th Annual Health Care Antitrust Forum (Oct. 20, 1999)*, (1999), *available at* http://www.usdoj.gov/atr/public/speeches/3924.htm (last visited Feb. 6, 2005). He mentioned that "[s]hould antitrust be concerned with monopsony mergers which reduce welfare but do not harm consumers? An objection I've heard is that "antitrust protects consumers not competitors." In my view, however, this phrase should not be read literally as saying that only consumers matter. It is a metaphor for saying that antitrust is concerned not with individual competitors but with the competitive process. So if a merger increases market power and thereby harms the firm's trading partners -- customers *or* suppliers -- by more than it benefits the firm, antitrust concern is warranted. Insisting on consumer harm is overly narrow."

[207] *See Collaboration Guideline*, *supra* note 30, at 11. It defines the market power to buyers and says "Market power to a buyer is the ability profitably to depress the price paid for a product below the competitive level for a significant period of time and thereby depress output." *Id*. at 11.

[208] MURAKAMI, *supra* note 176, at 134.

power.[209] Further, the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") have established the safety zone in relation to market share which describe situations in which a collaboration agreement will be presumed to be lawful. Namely, it says that a collaboration will generally not be challenged when the market share of the collaboration and its members equal no more than twenty percent of the market in which competition may be affected.[210] It also notes, however, that this safety zone does not apply to agreements which are the per se illegal, or that would be challenged even without undertaking of a detailed market analysis.[211] Although the principal adopted in the Supreme Court in Japan is slightly different from the per se rule, the both principal are same in that they presume illegality when price fixing agreements should be found. Based on this indication, even if collusive buyers proved that their market share is less than twenty percent in a given market, their argument is not likely to prevail.

Another way to demonstrate that they lack market power is buying power index ("BPI").[212]

This is represented in a following equation.

BPI=1/epsilon [213]

The epsilon means the elasticity of supply.[214] The elasticity of supply is the measure of the responsiveness of quantity supplied to change in price. It varies with

[209] *See* SULLIVAN & HOVENKAMP, supra note 92, at 624. *See also* Thomas J. Horton & Dr. Stefan Schmitz, *The Lessons of Covisnt: Regulating B2Bs Under European and American Competition Laws*, 47 WAYNE L. REV. 1231, 1249 (2001). It says that the most important factor to determine market power is market share. On the other hand, there is an indication that too much reliance on market share to measure market power is not appropriate. *See also* BLAIR & HARRISON, *supra* note 66, at 58.

[210] *Collaboration Guideline*, *supra* note 30, at 26.

[211] *Id*.

[212] *See* BLAIR & HARRISON, *supra* note 66, at 48.

[213] *See* Blair & Harrison, *supra* note 51, at 351.

the ability of marginal suppliers to put their resources to alternative uses, either producing other products or services. Suppliers with highly specialized and immobile equipment might be vulnerable to exploitation by collusive buyers because they have no alternative but to continue supplying their products as long as they can recover their initial investment.[215]

As the elasticity increases, the collusive buyers' market power declines. In the event that the supply curve would be flat and the supply elasticity would be infinite, the BPI will be zero, which means no buying power exists in the given market place.[216]

As suggested above, when examining the elasticity of supply, the ease of exit from the market should be taken into consideration. The easier exit is the more elastic the supply response would be.[217] In so doing, it would be necessary to consider such factors as, how long it takes to convert a plant to new uses,[218] whether or not a production technology is available or subject to patent control,[219] whether or not a converted facility would be sunk,[220] whether or not brand preferences must be established,[221] and whether or not a firm must go into the new industry on a relatively large scale.[222]

Also, a higher elasticity of demand, the willingness of other buyers in the market to increase their purchases if prices should fall, means lower buying power and

---

[214] *Id.*
[215] *See* Clark C. Havighurst, *Antitrust Issues in the Joint Purchasing of Health Care*, 1995 UTAH L. REV. 409, 433 (1995).
[216] *See* Blair & Harrison, *supra* note 51, at 351.
[217] BLAIR & HARRISON, *supra* note 66, at 60.
[218] *Id.*
[219] *Id.*
[220] Steven Salop, *Measuring the Ease of Entry*, 31 ANTITRUST BULL. 551. 562 (1986).
[221] *Id.* at 560.
[222] *Id.* at 560-561.

this would be reflected in the calculation of the BPI.[223] In other words, given that other buyers would increase their consumption substantially at moderately lower prices, suppliers could resist most of the concessions demanded by collusive bueyrs.[224] As a result, the overall output in an upstream market would not reduce appreciably, which means that given that they try to exercise their market power, it would be difficult for them to affect the quantity and price. In this case, the BPI would be low. Should other purchasers be not able to substitute reduced demand easily, decrease of price would not lead to increase of purchases. In this case, the elasticity of demand would be low, which will, in turn, indicate that the BPI would be high.[225]

Although it is not easy to measure the elasticity of neither supply nor demand curve in a real case,[226] given that they could demonstrate that the elasticity is high enough to assume that they lacked the market power, their counter argument might prevail in overturning the presumption of illegality.

Collusive buyers cannot overturn the presumption by their argument that their joint purchasing yields procompetitive effects at other market because harm to competition in one market is difficult to be justified by benefits of concerted action in another.[227]

Therefore, even if they raised this argument, it is not likely to prevail.

(b) Oligopsony with Procompetitive effects

---

[223] *See* Blair & Harrison, *supra* note 51, at 361.
[224] *See* Havighurst, *supra* note 215, at 433.
[225] *Id*.
[226] *Id*.
[227] *See* United States v. Philadelphia National Bank, 374 U.S. 321, 370 (1963). In this case, the court rejected the idea that anticompetitive effects in one market could be justified by procompetitive consequences in another. *Id*. at 370

When collusive buyers have oligopsony power at an upstream market and exercise it, this business activity would be presumed to be illegal and meet all the conditions of the Japanese Antimonopoly Law, art. 2, para. 6. automatically, even when joint purchasing could enhance the productive capacity of final products, given that an agreement among collusive buyers should be found and proved. This conclusion is supported by the analysis that, even when the procompetitive efficiency which would be never attained absent oligopsony swamped the anticompetitive effects, suppliers and societies could be harmed by this joint buying effort.

Collusive buyers could make a counter argument to overturn the presumption of illegality.

One of the possible arguments would be that they lacked market power as explained before in this article.

Another argument would be that procompetitive effects swamped the anticompetitive effects and suppliers and societies would benefit rather than being harmed.

As analyzed before, however, provided that procompetitive effects should be obtainable absent the exercise of oliposony power, same as the oligopsony with no procompetitive effects, a society and suppliers at an upstream market would be caused by social welfare losses, allocative inefficiencies and the long term anticompetitive effects. Based upon this analysis, even if collusive buyers raised this argument, it is not likely to prevail at Japanese courts.

In addition, at least one of the scholars commented that, where the exertion of market power to lower the price is indispensable to accomplish the

procompetitive effects,[228] the buyers' agreement is necessary to achieve some productive efficiency,[229] or the agreement is required to achieve the claimed efficiency, [230] the different standard should be applied when reviewing the illegality of joint purchasing. This scholar seems to consider that when procompetitive effects are not obtainable absent oligopsony, instead of applying the standard to review the illegality of oligopsony, the different standard shall be used. However, as analyzed before, only procompetitive effects to be considered in reviewing illegality of joint purchasing is what could enhance the productive capacity of final products. In addition, even when the enhancement of productive capacity which would have been never attained absent oligopsony excel anticompetitive effects, suppliers and societies would suffer damages in the long run. Unless collusive buyers could establish the argument that the allocative inefficiency and the long term anticompetitive effects should not be taken into account when examining whether or not joint purchasing meet the condition of the Japanese Antimonopoly Law, art. 2, para. 6, collusive buyers shall bear the heavyburden of proof that the procompetitive effects, that is, the enhancement of productive capacity due to oligopsony exceeded the allocative inefficiency and the long term anticompetitive effects.

In this regard, although there are no examinations in Japan under the law, there are no reasons to distinguish the short term anticompetitive effects on asocial welfare from the allocative inefficiency and the long term anticompetitive effects under the law. This is because the principal purpose of the Japanese Antimonopoly Law is to "promote the democratic and wholesome development of the national economy as well as

[228] BLAIR & HARRISON, *supra* note 66, at 102-103. It discusses this condition in the context of application of the ancillary restraint doctrine to the cooperative buying effort.
[229] *Id.*
[230] *Id.*

to assure the interests of consumers in general"[231] and to accomplish this purpose there are no needs to differentiate these anticompetitive effects. Based upon this analysis, even if collusive buyers raised this argument, it is not likely to prevail at Japanese courts.

On the other hand, as a factual matter, there could be the case where the quality of final product is improved through buyers' agreement. Since a quality improvement has no connection with price or quantity, there could be the case where this procompetitive effects, that is, the improvement of quality, swamped all the anticompetitive effects caused by oligopsony. In this case, given that collusive buyers could prove that the procompetitive effects due to the improved quality of final products swamped the anticompetitive effects, which is quite difficult in practice, their counter argument should prevail.

Given that courts rejected the aforementioned counter arguments, collusive buyers could raise an argument as a cause of non imputability that they are inculpable since they believed that their joint purchasing would never cause anticompetitive effects or that the procompetitive effects would always swamp the anticompetitive effects.[232]

There are, however, no Supreme Court judgements which admitted this argument. Therefore, this counter argument is not likely to prevail.

(c) All-or-Nothing Deal

[231] SANEKATA, *supra* note 196, at 10.
[232] *See* Idemitsu v. Fair Trade Commission, 33 KOUKEISHU 497 (Tokyo Hi. Ct. Sep. 26, 1980). In this case, the Tokyo High Court decided that the chairman of the oil union which cooperated the administrative directions by the Ministry of Industry were inculpable because they lacked the recognition of the illegality of their price coordination. The Ministry of Industry had admitted and welcomed the price coordination as a well-organized production for a long period of time. In addition, the FTCJ had not initiated any proceedings in spite of the fact that they had recognized that the oil manufacturing corporations had regulated their pricing. Based on these facts, the court decided that it was too much severe to conclude that the defendants should bear the responsibility for their compliance with the directions by the Ministry.

When collusive buyers exercise their market power at an upstream market, such a business activity would be presumed to be illegal and meet all the conditions of the Japanese Antimonopoly Law, art. 2, para. 6. automatically, even when no short term anticompetitive effects on social welfare should be caused due to their joint purchasing, given that an agreement among purchasers should be found and proved. This conclusion is supported by the analysis that, even when the procompetitive efficiency should be accomplished in the short term, suppliers and a society would be harmed by this joint buying effort in the long run by the allocative efficiencies, suppliers' leaving from the market or suppliers' losing incentive to innovate.

In this regard, the district court in Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180 (D. Conn. 2001) dealt with the case where the buyers agreed to depress the unit price of patent artificially without decreasing their quantity of input purchased. The case involved the holder of a patent for a technology that the manufactures of the television are required to include in their products.[233] The patent holder alleged that television manufactures colluded to lower the price for the royalty of the patent that they had to use than they would have to pay otherwise.[234] Based on the facts briefly outlined above, the court said "Sony and the counterclaim defendants, however, are not alleged to have reduced input prices simply by buying fewer licenses; to the contrary, they seek a lower per unit price for those licenses, presumably to allow them to continue manufacturing a large number of television sets with the required technology. Nothing in the counterclaims alleged here indicate that Sony and the counterclaim

[233] *Id*. at 181-182.
[234] *Id*.

defendants are producing fewer television sets, or that their conspiracy was to do so."[235] In addition, the court pointed out that, even if consumers at a downstream market would benefit, the patent holders are likely to lose their incentive to innovate because of the decrease of price, which would be a social loss.[236]

Collusive buyers could make a counter argument to overturn the presumption.

One of the possible arguments would be that they lacked a market power as explained before in this article.

Another argument would be that procompetitive effects swamped the anticompetitive effects and suppliers and societies would be benefited rather than harmed. As explained before, different from oligopsony, in an all-or-nothing deal, consumers could benefit by the reduced consumer prices. Although collusive buyers shall bear the burden of proof that the benefit enjoyed by consumers at a downstream market is larger than the anticompetitive effects, given that they would succeed in their verification, their counter argument should prevail.

Given that courts rejected all the counter arguments explained above, collusive buyers could raise an argument as a cause of non imputability that they are inculpable since they believed that their joint purchasing would never cause any

[235] *Id*. at 185.
[236] *Id*. at 186. The court also pointed out as follows: "While Sony's argument does point out some flaws in the economic underpinnings of Soundview's claims, the Court does not accept entirely Sony's argument that the scheme alleged in the counterclaims could have no anticompetitive effects. As outlined by Professor Blair, monopsonistic pricing conspiracies can have distributional injuries, such as where a group of buyers gets together and agrees on an all-or-nothing pricing scheme (as is alleged here), as contrasted with the Areeda & Turner theory about reducing the quantity of raw materials purchased in order to lower production costs. The all-or-nothing price set by these colluding purchasers can depress the price below the optimal price that would obtain if usual market forces of supply and demand were at work. The price to consumers does not decrease, but there may be social welfare consequences in the long run, because suppliers will leave the industry (or, as Soundview has it, will cease to innovate and invent)." *Id*. at 186.

anticompetitive effects or that the procompetitive effects would always swamp the anticompetitive effects.

This counter argument, however, is not likely to prevail as explained earlier in this article.

(d) Collusion to Reduce the Price by Increasing the Quantity of Input Purchased

It is necessary to review whether the constituent element of the Japanese Antimonopoly Law, art. 2, para. 6. would be automatically satisfied and an antitrust illegality would be presumed when agreement by collusive buyers should be found in the case where collusive buyers agree to reduce the price by increasing their quantity of input purchased artificially.

The principal purpose of the Japanese Antimonopoly Law is to "promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general"[237] and why the law purports to protect a free competition in a given market by prohibiting price fixing agreements is that it is clear that it would almost always cause anticompetitive harm.

The collusion to decrease the price by increasing their quantity of the input purchased, however, does not cause anticompetitive effects or at least it is not so obvious to conclude that the anticompetitive effects will almost always happen like a typical oligopsony case. Thus, it would be difficult to assume the anticompetitive effect only from the conclusion of agreements among collusive buyers.

In addition, in Japan, constituent elements of the law have been considered what classified illegal conducts based on common sense. However, under present

[237] *See* SANEKATA, supra note 196, at 10.

circumstances, it would be difficult to decide swiftly that common sense among Japanese has been established that this collusion is illegal.

Inasmuch as constituent element level is concerned, it is appropriated to construe that the rationale of the Supreme Court judgment does not apply this kind of agreement and that the plaintiff shall bear the burden of proof to verify that anticompetitive effects could be caused from their agreement.

When the plaintiff should be successful in their verification that collusive buyers concluded an agreement which would cause anticompetitive effects, it is appropriate to construe that constituent elements of the law, (1) substantially restrain on competition in any given field of trade, (2) mutually restrict or conduct their business, and (3) against public interest, is automatically fulfilled. And such a business activity would be presumed to be illegal because the reason why the burden of proof to show the anticompetitive effects is on the plaintiff's side is that, different from the typical oligopsony, it is not clear that anticompetitive effects would occur from the agreements and other than that there are no differences from them.

Collusive buyers could make a counter argument to overturn the presumption.

One of possible arguments would be that they lacked a market power as explained before in this article.

Another argument would be that procompetitive effects swamped the anticompetitive effects or that there are no anticompetitive effects, which means that suppliers and societies would benefit. Although collusive buyers shall bear the burden of proof, given that they would succeed in their verification, their argument should prevail.

In this regard, the district court in the U.S., in the case where buyers agreed to increase their input purchased to lower the unit price of bottle, points out the fact that output of product has been increased as a demonstration that the defendant's business activities are procompetitive without mentioning the long term anticompetitive effects which could be caused through buyers collusion to increase their input purchased.[238] In addition, the court did not assume the long term anticompetitive effects only from the agreements among buyers but instead ruled that the plaintiff should bear the burden of proof to show that their agreement would cause anticompetitive effects.[239] From the rationale of this judgment, it should be upheld that the long term anticompetitive effects is not automatically presumed only from the agreements to increase the quantity of input purchased.

Given that courts rejected the counter argument explained above, joint purchasers could raise an argument as a cause of non imputability that they are inculpable since they believed that their joint purchasing would never yield anticompetitive effects or that the procompetitive effects would swamp the anticompetitive effects.

This counter argument, however, is not likely to prevail as explained earlier in this article.

(4) Summary of Analysis

[238] *See* Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1988). In this case, the court declared that "Plaintiff has failed to prove that defendants' actions have harmed or will harm the competitive process. Since the formation of Southeastern through 1986, plastic bottle prices have decreased, output of plastic bottles has increased, the number of competitors has remained the same, market concentration has decreased, and production processes have become more efficient. At best, plaintiff has shown that Southeastern has at times experienced quality problems with its bottles…certain companies have decreased research and development expenditures. However, plaintiff has not produced evidence of a decline in overall plastic bottle quality or research and development expenditures in the market as a whole…Plaintiff has failed to set forth specific facts demonstrating an actual or probable adverse impact on competition." *Id.* at 1218-1219.

[239] *Id.*

As discussed above, when an agreement among collusive buyers to exercise their market power should be found, except from the agreement to increase the quantity of input purchased, the business activities would be presumed to be illegal and meet the condition of the Japanese Antimonopoly Law, art. 2, para. 6. automatically and the necessity and the burden of proof shift collusive buyers' side to justify their collusion.

Therefore, in spite of the fact that the characteristics of B2B could make it possible to enhance efficiency, productivity and profitability, inasmuch as a buyers' anticompetitive agreement would not entail these pro transactional effects, once the agreement should be found, it is presumed to be illegal.

It is, however, not always easy to find an agreement among buyers even on B2B or obtain direct evidence like on a real market place, although there are some records as to communications among buyers to conclude agreements at internet providers or servers.[240] This is especially true when the information as to lowering price is available not only for buyers but for sellers.[241] In addition, the fact that the most of B2B lack the mechanism through which buyers and sellers signal each other about future price changes makes it harder to make an inference that price coordination is occurring.[242] Therefore,

---

[240] *See* Baker, *supra* note 12, at 47. It suggests that, in electronic market places, the feature that the negotiation process is always recorded makes it easier for the law enforcement agencies to detect the agreement.

[241] *Id*. However, it suggests that this generalization argument does not always hold water in sellers' price fixing agreement by giving the example that sellers negotiate a price fixing agreement publicly by giving advance notice of anticompetitive price increase so that the competitors modify or adjust before the consensus is reached. *See also* Gotfredson, *supra* note 52, at 131. It says that the "primary difficulty in policing potential price-fixing agreements in the B2B industry, as elsewhere, will likely involve cases lacking an express agreement. It can be very difficult to distinguish between an implicit price-fixing agreement and simple competitive behavior." *Id*. at 131. Further it pointed out that "[m]ere "follow the leader" behavior, in which no seller is willing to cut prices unless another seller does so first, is not illegal as long as there is no actual agreement, tacit or otherwise, to fix prices, even if the result is supracompetitive pricing." *Id*. at 130.

[242] *See* Gotfredson, *supra* note 52, at 131.

even if an agreement should be concluded via communication system on B2B, it is necessary to examine tangential facts and circumstantial evidence to infer collusion.[243]

Moreover, in Japan, since a fact-finder is not jury but professional judge whose examination on inference is strict, it would be useful to review what factors to be raised to find collusion on B2B.

Further, although the FTCJ has a strong authority to investigate a cartel case, that is, compulsory measures[244] admitted to prosecutors as well,[245] under the

[243] *See* U.S. v. Airline Tariff Publishing Co., 58 FR 3971 (Department of Justice Jan. 12, 1993). In this case, the price fixing among sellers on electronic commerce occurred over a network more readily available for sellers than consumers and was conducted through communication with little value to buyers. Thus it is assumed that this information generalization defense was not raised from sellers.

[244] The Japanese Antimonopoly Law, art. 46, para.1. says " (1) The Fair Trade Commission may, in order to conduct the necessary investigation with regard to a case of violation, take any one of the following measures: (i) Ordering persons concerned with a case, or witnesses to appear for interrogating, hearing their views or collecting reports from them; (ii) Ordering experts to appear to have them give expert testimony; (iii) Ordering persons holding accounting books, documents and other matters to submit the same, or to retain such submitted matters; or (iv) Entering any place of business of the persons concerned with a case, or other necessary places and inspecting conditions of business operation and property, accounting books, documents and other matters." Precisely speaking, all the measures admitted to the FTCJ are different from compulsory measures in that it does not need to obtain a writ from courts, which means that there are no safe guards to prevent their excessive exercising of these measures. This difference is embodies in the law, art. 46, para. 4, which says that "The authority to take action pursuant to the provision of subsection (1) above shall not be construed as one granted for criminal investigation." Due to this difference, however, there are no procedures codified in the Japanese Antimonopoly Law for the prosecutor to take over the evidence obtained by the FTCJ. In spite of this imperfection of the law, there has been no major problem arising out of it, because, in Japan, criminal cases due to a violation of the Japanese Antimonopoly Law are rather rare. On Jan. 1991, a consensus was created at the meeting between the FTCJ and the Prosecutor's Office in connection with how to corporate effectively each other in their criminal investigation. Up until now, however, no sweeping reforms have been taken in this area at Japanese side.

[245] *See* Masahiro Murakami, *Joukyoshokoniyorukakakukaruterunoninntei* [*Finding a Cartel from Circumstantial Evidence*], 1003 HANREITIMES 64, 71 (1999). It suggests that since the FTCJ could exercise their compulsory measures and direct evidence to prove an agreement is not difficult, in criminal cases, there are no needs to infer an agreement from circumstantial evidence. However, as discussed later in this article, this argument is not at all appropriate because it is equal to admitting the present tendency to place too much emphasis on confessions from the defendant. In Japan, the regulation on interrogation has been castrated through the practical importance in obtaining confession. Denying the importance of examination on tangential facts and circumstantial evidence could lead to the conclusion to admit the present tendency. Therefore, unless the Japanese Antimonopoly Law would be amended so that the necessary safe guards to prevent the excessive investigation should be codified, examinations on tangential facts and circumstantial evidence are still indispensable.

Punitive Penalty (Surcharges) system,[246] the FTCJ shall bear the heavy burden of proof to verify an agreement up to the standard required in the civil litigation cases, the preponderance of the evidence.

---

[246] The Japanese Antimonopoly Law, art. 7-2. says that " (1) In case any entrepreneur effects an unreasonable restraint of trade or enters into an international agreement or an international contract containing such matters as constitute an unreasonable restraint of trade, which pertains to the price of goods or services or results in affecting in effect the price of such goods or services by curtailing the volume of supply thereof, the Fair Trade Commission shall order the entrepreneur concerned, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, to pay to the Treasury a surcharge of an amount equivalent to an amount arrived at by multiplying the sales amount of such goods or services, computed in accordance with the method prescribed by a Cabinet Ordinance, for the period from the date on which the entrepreneur was engaged in the business activities as implementation of such conduct to the date on which the entrepreneur ceased to engage in the business activities as implementation of such conduct (in case such period exceeds three years, the period shall be for three years retroactively from the date on which the entrepreneur ceased to engage in the business activities as implementation of such conduct; hereinafter referred to as "period of such implementation") by six percent (or by two percent for retail business or by one percent for wholesale business): Provided, That in case the amount thus computed falls below five hundred thousand yen, the Commission shall not order the payment of such a surcharge. (2) In the case of the preceding subsection, the term "six percent" appearing in the preceding subsection shall be "three percent" and the term "two percent" shall be "one percent," if the entrepreneur falls under any one of the following paragraphs: (i) Any company whose capital or subscription is not more than 300 million yen and any company or individual whose pay-roll employees are not more than 300 persons, whose main activity is to carry on business in the fields of manufacturing, construction, transportation and other kinds of business (excluding the kinds of business stipulated in paragraph from (ii) to (ii)-3 of this subsection and the kinds of business stipulated by the Cabinet Ordinance pursuant to paragraph (iii) of this subsection); (ii) Any company whose capital or subscription is not more than 100 million yen and any company or individual whose pay-roll employees are no more than 100 persons, whose main activity is to carry on business in the fields of wholesale trade (excluding the kinds of business stipulated in the Cabinet Ordinance pursuant to paragraph (iii) of this subsection); (ii)-2 Any company whose capital or subscription not more than 50 million yen and any company or individual whose pay-roll employees are no more than 100 persons, whose main activity is to carry on business in the fields of service (excluding the kinds of business stipulated in the Cabinet Ordinance pursuant to paragraph (iii) of this subsection); (ii)-3 Any company whose capital or subscription not more than 50 million yen and any company or individual whose pay-roll employees are no more than 50 persons, whose main activity is to carry on business in the fields of retail trade (excluding the kinds of business stipulated in the Cabinet Ordinance pursuant to paragraph (iii) of this subsection): (iii) Any company whose capital or subscription is not more than that specified by the Cabinet Ordinance for each kind of business and any company or individual whose pay-roll employees are not more than that specified by the Cabinet Ordinance for each kind of business, whose main activity is to carry on business in fields specified by such Cabinet Ordinance. (3) Any person who has received an order under the provisions of (1) shall pay the surcharges as provided for in (1) and (2) of this section. (4) In case the amount of surcharge calculated in accordance with the provisions of (1) or (2) of this section contains a fraction less than ten thousand yen, such fraction shall be disregarded. (5) In the case the entrepreneur who has committed an act in violation of the provision of (1) above is a company and if such company has ceased to exist through a merger with another company, the violation of such company shall be considered as a violation of the merging company or consolidated company as a result of the merger, and the provisions of the preceding subsections shall apply thereto. (6) When a period of three years

has elapsed from the date of expiration of the period of such implementation (or when a period of one year has elapsed from the date on which the hearing procedures ended in case such hearing procedures had been initiated with respect to such a violation (in case the expiration of the three-year period following the expiration of the period of such implementation, then the date on which the three-year period expired)), the Fair Trade Commission shall not order such entrepreneur to pay a surcharge for such violation: Provided, That the foregoing shall not apply to cases where the Fair Trade Commission has ordered to pay the surcharge for the said violation to the Treasury under the provisions of art. 48-2 (1) [surcharge payment order] and thereafter."

In this regard, the law, art. 48-2. stipulates that "(1) The Fair Trade Commission shall, when it finds there exists a fact as provided for in subsection (1) [surcharges] of art. 7-2 (including cases where this provision is applicable mutatis mutandis under art. 8-3 [surcharges against constituent entrepreneurs]; hereinafter the same in this section), order the entrepreneur or the constituent entrepreneurs of the trade association (or other entrepreneur in case a constituent entrepreneur is acting for the benefit of the other entrepreneur; hereinafter the same in this section) to pay to the Treasury a surcharge as prescribed in art. 7-2(1) or (2): Provided, That in case hearing procedures have been initiated with respect to such violating act, such order shall not be issued by such time as such procedures have been completed. (2) An order prescribed in the preceding subsection ("payment order") shall be made by serving to such entrepreneur a certified copy of such payment order which states the amount of the surcharge to be paid, the basis of calculation of such amount, the violating act responsible for such surcharge and deadline for payment. (3) The deadline for payment of such surcharge as prescribed in the preceding subsection shall fall on a date two months after the date on which such payment order is forwarded. (4) The Fair Trade Commission shall, when it contemplates issuing a payment order, give in advance, the entrepreneur or the constituent entrepreneur of the trade association concerned, an opportunity to present his views and to submit evidence in support thereof. (5) If any person is dissatisfied with the payment order, he may, in accordance with the Rules of the Fair Trade Commission and within thirty days from the date on which the certified copy of such order was forwarded, request the Commission to initiate hearing procedures on the said case. (6) Expect in cases where such a decision was rendered pursuant to the provisions of subsection (4) of the preceding section, art. 53-3 [consent decision] or art. 54 [formal decision] with respect to the said violating act, a payment order (One against the constituent entrepreneurs of the trade association whose act has infringed in violation of art. 8(1) or (2) is excluded.) shall be deemed final and conclusive for the purpose of applying the provisions of art. 26 [restriction on exercise of the right to claim for damages in court, prescription], after the lapse of the period prescribed in the preceding subsection."

See also MURAKAMI, supra note 176, at 468. The Punitive Penalty (Surcharges) system is the system which makes it possible for the FTCJ to order the parties committing a violation of the law as cartel to pay the penalty calculated by multiplying the amount they earns through their cartels by certain percentage stipulated in the law, which was introduced in the amendment taken place in 1977. The targeted cartel in this system is what purports to provide products or services or has any connection with them. When a cartel should be found, the FTCJ is bound to order the penalty and there is no discretion as to whether to order it. The characteristics of the Punitive Penalty (Surcharges) system are basically considered to be the confiscation of illegal profit due to cartel and sanction on the violation of the law. Given emphasizes the latter character, it is apprehended it would be against the double jeopardy rule in Constitution of Japan, art. 39.

In this regard, it has been construed that this system is not against the double jeopardy rule because administrative sanctions are different from criminal offenses. *See* MURAKAMI, *supra* note 176, at 470. The FTCJ expressed its understanding about the Punitive Penalty (Surcharges) that this system was established to order the relevant parties to pay illegal profit which they had obtained through their cartels to national treasury in order to make the regulation on cartel under the Japanese Antimonopoly Law more effective based on the present situation where there were so many cartels and recidivist. Further it added that although it could not be denied that the Punitive Penalty (Surcharges) had a aspect as a sanction, it was the administrative order not the criminal punishment and that judging from its inherent nature there was no discretion granted to the FTCJ concerning whether or not it ordered

and what amount to order. *See* the Fair Trade Commission in Japan, *Dokusenkinshihou Kaiseino Youten* [*The Gist of the Amendment of the Japanese Antimonopoly Law*], 320 KOUSEITORIHIKI 15 (1977). After the introduction of this system, although the Japanese Industry recognized it as the sanction on forming a cartel, it has contributed the deterrence of a violation of the law and pervading the realization that forming a cartel should be illegal. Accordingly, the number of cartel cases accused by the FTCJ decreased although this was also due to the careful antitrust practice adopted at the FTCJ because when finding a cartel it had been obliged to order the Punitive Penalty (Surcharges). The amount of penalty under this system was raised due to the sever criticism from the U.S. government in 1991 that, in Japanese market, cartel, bid rigging, and group boycott were rampant partly because the sanction on them was so loose that there could not be expected any effects of deterrence from it. The FTCJ expressed in the report in relation to the Punitive Penalty (Surcharge) in December 1990 that the characteristic of the Punitive Penalty (Surcharge) was purporting the realization of social justice as well as making the regulation of cartels in the law more effective and that the amount of penalty should be established in a manner which could prevent formation of cartels effectively and not be necessarily corresponding to the profit enjoyed by cartel parties. *See* the Fair Trade Commission in Japan, *Dokusenkinshihou Kenkyukai Hokokusho* [*The Report by the Study Group Concerning the Japanese Antimonopoly Law],* 15-20 (2003), *available at* http://www2.jftc.go.jp/pressrelease/03.october/sochi2.pdf (last visited Feb. 25, 2005).

Along with the introduction of the Punitive Penalty (Surcharge), in order to prevent oligopilists from gaining excessive profits in a highly concentrated market, the reporting requirement on parallel price increases was introduced in art. 18-2. of the law, which says "given in any particular field of business where the total price of goods (this term refers to the price of the goods concerned less an amount equivalent to the amount of taxes levied directly on such goods) of the same description supplied in Japan (excluding those exported; hereinafter the same in this article) or the total prices of services (this refers to the price of the services concerned less an amount equivalent to the amount of taxes levied on the recipients of such services with respect thereto) of the same description supplied in Japan during a one-year period designated by a Cabinet Ordinance, is in excess of 60 billion yen, the ratio of the total amount of such goods or services supplied by the three entrepreneurs, which rank among the three largest entrepreneurs in Japan in terms of volume of supply (this refers to the quantity of goods or services of the same description which one entrepreneur supplied during a given one-year period, and in case it is not appropriate to be calculated by the quantity, the quantity shall be represented in terms of the amount of their prices; hereinafter the same meaning in this section) to the aggregate volume of such goods or services of the same description supplied in Japan during such one-year period (hereinafter referred to as "the aggregate volume") exceeds seven tenths, and if two or more major entrepreneurs (including the largest one) (this term means the five entrepreneurs each of which account for one twentieth or more of the aggregate volume and rank among the five largest entrepreneurs in Japan; hereinafter the same meaning in this article) raise the price they use as the basis of their transactions in such goods or services of the same description by an identical or similar amount or percentage within a period of three months, the Fair Trade Commission may ask such major entrepreneurs for a report, furnishing a statement of reasons for such a raise in the price of such goods or services: Provided, That this shall not apply to price increases effected by entrepreneurs whose price of such goods or services is authorized or approved by, or filed with the competent minister in charge of the business in which the said entrepreneurs are engaged (in case such price shall be filed with the competent minister, this shall apply only to such cases where the competent minister has the authority to order a change in such price)."

Although this reporting requirement could be praised given information provided by reports based upon this article could be beneficial in exposing cartels, it has been criticized that it cannot be expected that parties required to report based upon this article could inform unfavorable information to them and that cracking down on cartel has been made easier on the misassumption that most of cartel case should be dealt with the requirement of report based on this article. *See* Murakami, *supra* note 176, at 400. This consideration has been supported by the fact that after the introduction of the reporting requirement the price raise by news publishers had not come to be exposed by the FTCJ.

It should be borne in mind that obtaining direct evidence is not always easy even when the FTCJ exercise compulsory measures to expose an agreement as far as it follows the regulation strictly.

In addition, it is not appropriate to argue that an examination on tangential facts and circumstantial evidence is not necessary on the ground that the FTCJ is always able to obtain direct evidence to prove an agreement by exercising compulsory measures.[247] Although it is true that direct evidence has been sometimes acquired through interrogation by violating the regulations, these historical facts would never justify the castration of the law. On the presupposition that the regulations on compulsory measures, especially on interrogation by the FTCJ, do not function very well under the present practices, it should be construed that an examination on tangential facts and circumstantial evidence would be indispensable and that heavy reliance on direct evidence, that is, confessions, is not appropriate. In connection with finding buyers' agreements from tangential facts and circumstantial evidence, Part V of this article provides several factors to find an agreement among buyers.

V. Several Factors to Find Buyers' Agreements

Even through the price of product at an upstream market seems to have been lowered, as explained before, absent an agreement to reduce the price [248] this

---

Responding to the criticism outlined above, the FTCJ is now in the process of reviewing as to how to change so that this system may work more effectively. *See The Report by the Study Group Concerning the Japanese Antimonopoly Law, supra* note 246, at 58.

[247] Murakami, *supra* note 245, at 71-72.

[248] With regard to the definition of " agreement", *see* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984). It defined "agreement" that "concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id*. at 764. *See also Collaboration Guideline*, *supra* note 30, at 2. *See also* Baker, *supra* note 12, at 45. It stated that "common judicial definitions of agreement -- a "meeting of the

business activity is not a violation of the Japanese Antimonopoly Law, art. 2, para. 6. Therefore, obtaining evidence to infer an agreement among buyers is often the decisive point in these cases.

In this regard, in Japan, it has been construed that, in order to find an agreement, a concurring among the parities based on communications is necessary.[249] Given that there are no communications among parties, under the Japanese Antimonopoly Law, it is impossible to infer an agreement, because the constituent elements of the law are not fulfilled. In addition, if concluding an agreement does not make any economic sense, which will be raised from defendants as a justification defense, no inferences could be drawn from any circumstantial evidence.[250]

---

minds" or "conscious commitment to a common scheme" -- are not the most useful tools to identify agreements from circumstantial evidence in parallel pricing cases" and that "the inference of conspiracy could make economic sense. In particular, a court should be willing to infer an agreement in a parallel pricing case in an industry where entry and discounting are discouraged if the firms appear to have been doing more than merely following each other's market moves. Three economic indicators could help courts infer that firms have selected a coordinated equilibrium by engaging in the forbidden process of negotiation and exchange of assurances." *Id*. at 45.

[249] *See* Baker, *supra* note 12, at 47. It discusses the communications among the competitors in the context of plus factors to mere parallel pricing to find an agreement. It notes that given that the parties have gone through a process of negotiation and exchanged assurances in addition to their parallel behavior the strong inference would be drawn to support the conclusion based on the totality of the circumstantial evidence that they have done more than following the price the other competitors have set.

[250] In this regard, *see* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 596, 598 (1986). In this case, the Supreme Court in the U.S. refused to permit the inference of conspiracy that did not make an economic sense. *See also* Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 49-55 (7th Cir. Ill. 1992). In this case, the court said that no inference as to conspiracy could be drawn without direct evidence in high concentrated market for a standardized product with inelastic demand curve. *See also* Baker, *supra* note 12, at 47. It pointed out that, if the industry structure is not conductive to coordination, a court should recognize that it would be irrational for firms to take a risk of prosecution by engaging the forbidden process without any hope of gaining market power. However, as explained earlier in this article, since the Supreme Court in Japan adopted the principal that would presume the illegality when an agreement among parties should be concluded, the defendant shall bear the burden of proof to demonstrate that concluding an agreement does not make any economic sense in the context that they lacked the market power.

See also Montana v. Superamerica, Div. of Ashland Oil, Inc., 559 F. Supp. 298 (D. Mont. 1983). In this case, the court declined to infer an agreement to fix the price for the retail gasoline in the absence of direct evidence in a market with competitive characteristic.

Given that communications among buyers included critical information as to their price raise or it was assumed that the parties engaged in communications as to price, there would be strong presumption that they reached an agreement.

On the other hand, provided that their communications should not include any information as to price or it should not be assumed that the parties engaged in communications as to price,[251] it would be necessary to examine other tangential facts and circumstantial evidence to decide whether or not it could be possible to make an enough inference to find an agreement. Hereinafter, this article provides several factors to consider in this examination.

(1) Factors to Infer Buyer's Agreements

(A) Large Market Share [252]

---

[251] Given there are systematical safeguards created in B2B to prevent the formation of cartels, even if there are communications among purchasers, it would be difficult to assume only from the communications that they agreed to fix the price. In this regard, *see* Gotfredson, *supra* note 52, at 131-133. It suggests that the most commonly suggested solution in preventing the formation of cartel consists of restrictions on the amount of information that buyers are allowed to share in transactions on B2B. *See also* The Original Equipment Suppliers Association, *Comments Prepared for the Federal Trade Commission in Connection with Its Workshop on Competition Policy in the World of B2B Electronic Market Place*, 3-5 (2000), *available at* http://www.ftc.gov/bc/b2b/comments/oesa.pdf (last visited Feb. 5, 2005). It proposes creating vertical path within the exchange information via B2B, protected firewalls within the software driving B2B. Vertical path allows a purchaser to see the bid which it has made, and not the bids for other purchasers. Given this systematical restriction on information sharing among buyers, it would be difficult to draw inferences from communications that they reached agreements.

[252] With regard to market delineation, *see* the U.S Department of Justice and the Fair Trade Commission, *Horizontal Merger Guidelines*, (1992), *available at* http://www.ftc.gov/bc/docs/horizmer.htm (last visited Feb. 6, 2005) [hereinafter *Horizontal Merger Guideline*]. It defines that "A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test. The "small but significant and non-transitory" increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases." *Id*. at section 1.0. *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 335 (1962). In this case, the Supreme Court held that "the proper definition of the market is a 'necessary predicate' to an examination of competition that may be affected by the horizontal aspects of merger." *Id*. at 335. The market delineation-market share measurement approach

In order to analyze market power of given parties, in Japan, the most important factor is said to be measuring the market share.[253] Given that collusive buyers have only small market share at an upstream market, even though the collusive buyers try to lower their input purchased, their competitors would substitute the reduced demands easily. Consequently, there would be no change in quantity of input purchased at an upstream market.

On the contrary, given that collusive buyers have large market share, they can reduce total quantity of input purchased at an upstream market at their will. Therefore, provided that purchasers at an upstream market have large market share, when a quantity of input purchased has been lowered below competitive level, it can be assumed the exercise of oligopsony power and agreements among collusive buyers.

In this regard, the FTCJ commented that given that joint purchasers had large market share in total demands of certain products, joint purchasers were likely to have market power and to exercise it and that it was apprehended that the exercise of oligopsony power would restrict the free competition.[254] Although the only factor to

---

was further sophisticated in United States v. Philadelphia National Bank, 374 U.S. 321, 355-369 (1963). When delineating the market, it would be necessary to examine whether B2B itself provides a new products or services separated from the product being traded on a real market place. This should be, however, discussed in the context of demand substitutability and the characteristics of B2B itself do not justify the conclusion that products traded in a real market place are always considered separated products transacted on B2B as a different market. *See also* BLAIR & HARRISON, *supra* note 66, at 83. It says that in the case of monopsony, market definition is in many respect the reverse of that applied in the case of sellers and that the market are comprised of buyers who are seen by sellers as being reasonably good substitutes. According to this article, the greater the number of good substitutes from the point of view from sellers, the more easily sellers may substitute away from low paying buyers in favor of high paying buyers, which is represented in elasticity of supply curve.

[253] *See* SULLIVAN & HOVANKAMP, supra note 92, at 624. *See also* Horton & Schmitz, supra note 209, at 1249. *See also Philadelphia National Bank*, 374 U.S. at 360-363. In this case, the court held that the large market share was a convenient proxy for appraising the danger of monopoly power resulting from a horizontal merger. Under its rationale, it added that a merger resulting in a large market share was presumably illegal, rebuttable only by a demonstration that merger would not have anticompetitive effect. *Id*. at 363.

[254] *Consultation Case Concerning B2B*, *supra* note 9.

measure market power that the FTCJ suggested in its guidelines is market share, it should be kept in mind that the FTCJ did not deny other factors to draw inference. As explained earlier in this article, joint purchasers with only modest market share might be able to control the price and quantity at an upstream market in which both supply and demand elasticity were low. Therefore, in order to measure market power accurately, it is necessary to take into other factors consideration together with market share.

In addition, the FTCJ demonstrated its view that the market share was the basic indication to infer the market power and that when given parties have large market share in a given market place the degree of the restriction on the free competition would be higher.[255]

In addition, the FTC and the DOJ have demonstrated its concern about market share in connection with measuring market power and established the safety zone in relation to market share, which describes situations in which a collaboration agreement will be presumed to be lawful.[256] These considerations demonstrate their concerns about market share in the context of measuring market power.

---

[255] *See* The Fair Trade Commission in Japan, *Dokusenkinshihoujouno Kigyoketugosinsa Nikansuru Unyohshisin* [*The Guideline Concerning the Examination on Merger and Acquisition under the Japanese Antimonopoly Law*], 18 (2004), *available at* http://www2.jftc.go.jp/pressrelease/04.may/04053101.pdf (last visited Feb. 28, 2005) [hereinafter *Examination Concerning Merger and Acquisition*].

[256] *See Collaboration Guideline*, *supra* note 30, at 26. *See also* the U.S. Department of Justice And the Federal Trade Commission, *Statement of Antitrust Enforcement Policy In Health Care*, (1996), *available at* http://www.ftc.gov/reports/hlth3s.htm (last visited Feb. 6, 2005). It mentioned that "Agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement among health care providers where two conditions are present: (1) the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement." *See also* Charles F. Rule, *The Antitrust Division's Approach to Shipper's Associations, addressed before Chemical Manufacturers Association*, (1985), *available at* http://www.usdoj.gov/atr/public/speeches/2163.htm (last visited Feb. 6, 2005). He addressed his concern about market share in the context of measuring the market power and mentioned that "we need to know the percentage of final product or service price represented by the transportation cost

(B) Entry Barrier [257]

Even when collusive buyers have large market share, given that there is low entry barrier to the market and new entry is quite easy, collusive buyers are not likely to collude because even though they try to lower the quantity of their input, new participants of the market are ready to substitute the reduced demands. In this case, even when they collude, since there are no prospects to obtain market power in competitive

---

component in question. As this percentage increases, the collective purchase of transportation at identical rates may enhance the ability of member firms collectively to reach and maintain prices above the competitive level...if the transportation cost represents less than 20 percent of final product price, a shippers' association's setting of transportation rates would not significantly enhance the likelihood that this form of anticompetitive pricing would result."

[257] *See Horizontal Merger Guidelines*, *supra* note 248, at section 3.0. It says that "A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis." *Id*. at section 3.0.

With regard to this definition, there are several criticisms. *See* United States v. Baker Hughes, Inc., 285 U.S. App. D.C. 222, 908 F.2d 981 (1990). The court point our that "That the "quick and effective" standard lacks support in precedent is not surprising." *Id*. at 987. Some of the lower courts treated easy entry into the market as a trump to overturn the presumption. *See* United States v. M.P.M., Inc., 397 F. Supp. 78, 92, 94 (D. Colo. 1975). In ruling that acquisition was not the violation of the section 7 of the Clayton Act, the courts listed the ease of entry as one of many reasons, despite the fact that it would create concentration over the Philadelphia standard. *See also* United States v. Waste Management, Inc., 743 F2d. 976, 983-984 (2d Cir. 1984). In this case, the district court had blocked the merger involving waste haulers, after concluding that easy entry merely weakens the inference of anticompetitive effect arising from concentration. The court noted that there is no persuasive authority for allowing low entry barriers and potential competition to overcome a strong prima facie showing of concentration in the existing competitive structure. *Id*. at 983-984. United States v. Waste Management, Inc., 588 F. Supp 498, 513 (S. D. N. Y. 1983). The second circuit rejected this legal proposition and reversed the district court decision. It held that a finding of easy entry into trash collection trumps the other evidence relied upon. *Id*. at 513. *See also* United States v. Calmer Inc., 612 F. 2d 1298, 1306 (D. N. J. 1985). In this case, the district court rejected to be concerned about a merger in pump sprayers once it found that any firm in the injection molding business could easily make them and thus enter the market. *Id*. at 1306. Although these examinations are concerning how to tramp the presumption created through high market share and market concentration under the Philadelphia Bank Standard, it can be said that given that entry into the given market should not be easy, the inference shall be drawn that given parties are likely to have market power in the market place vice versa.

market with low entry barrier, it is difficult to assume that they concluded an agreement to reduce the price.[258]

On the other hand, it can be said that there were a high entry barrier at a given market, it could be easier for them to collude to lower their input. Therefore, provided that quantity of input purchased has been lowered below competitive level at an upstream market with high entry barrier, it could be assumed that there were an agreement among them.[259]

The FTCJ expressed its view in the guidelines concerning merger that an entry barrier should be taken into account in measuring market power.[260] It explains that given entering into a given market is easy, even when given parties try to raise the price or arrange the quantity of their product, their competitor immediately enter the market, which makes it difficult for them to enjoy benefit arising from their coordination.[261] It adds that due to this difficulty they are less likely to collude in a market with low entry barrier.[262] Further it says that when examining entry barrier, it is necessary to take into account such factors as the regulation on entering into the market, minimum amount of cost which shall be borne by new participants, the location of the market, the technology to be developed to enter the market, the ways to procure raw materials, the condition of selling the products, the difficulty for other competitors which have been manufacturing

---

[258] *See* Baker, *supra* note 12, at 47. It said that "if instead entry is not easy and firms can discourage price cutting, a court should consider whether it was necessary for the firms to engage in the forbidden process to reach a coordinated, high-price equilibrium, or whether they could achieve the same outcome through leader-follower behavior that does not carry the risk of liability." *Id*. at 47.

[259] *See Collaboration Guideline*, *supra* note 30, at 21-22. It pointed out that "[e]asy entry may deter or prevent profitably maintaining price above, or output, quality, service or innovation below, what likely would prevail in the absence of the relevant agreement." *Id*. at 21-22.

[260] *See Examination Concerning Merger and Acquisition*, supra note 255, at 22.

[261] *Id*.

[262] *Id*.

other products to switch their production, and the possibilities for foreign firms to enter the market.[263]

(C) Purchase Obligation

Given that collusive buyers are obligated not to buy products out side of their collaboration, it is assumed that they collude to lower the quantity of input purchased, because they are likely to be motivated that they discontinue their competition in buying products from sellers at an upstream market. Therefore, in this case when the quantity of input purchased has been lowed below competitive level, it is assumed that they concluded an agreement to lower their input purchased.[264]

In this regard, although not discussed in the context of inferring an agreement among buyers, the FTCJ says it could be a violation of the Japanese Antimonopoly Law when collusive buyers are obliged not to buy anything outside of an upstream market since in this case a free trade between sellers and buyers are likely to be substantially restrained.[265]

(D) Complexity of the Behavior

When communications among the parties are more complex than would be plausible absent an agreement, such communications as including "we should raise price with common percentage" and "we do not solicit each other's customers," it could be inferred that the parties exchange the forbidden information as to price and therefore reach an agreement.[266] In order to conclude an agreement, the negotiations among the parties should include several and complex bargaining processes. Therefore, when the

---

[263] *Id*.
[264] *See Consultation Case Concerning B2B*, *supra* note 9.
[265] *Id.*
[266] *See* Baker, *supra* note 12, at 47.

communication should be complex, it would be more likely that the parties concluded an agreement through forbidden process of exchanging information. [267]

(E) Fewness of Buyers

When the number of buyers is small, less time and cost would be necessary to reach an agreement and police the implementation of it.[268] Therefore, it can be said that, compare to the market with large number of buyers, they are more likely to be motivated to conclude an anticompetitive agreement.[269] Historically, in real market places, there had been small number of suppliers with numerous buyers, whose interest diverged, which made it difficult to organize them into powerful buying unit.[270]

On the other hand, in B2B, there would be the market with small number of buyers. Through emerging of B2B, it can be said that this factor is more likely to be realized.

(F) Product Homogeneity

When the products at an upstream market are homogeneous, an agreement among buyers could be simplified, because there is only a single price to reduce in a given market.[271]

On the other hand, provided that products are heterogeneous, complex price schedule would be necessary to maintain equilibrium price differentials.[272] This leads to differences of opinion and causes to undermine stability of buyers' agreement.[273] Therefore, it can be said that, compare to the market with heterogeneous products,

---

[267] *Id*.
[268] *See* BLAIR & HARRISON, *supra* note 66, at 43.
[269] *Id*.
[270] *See* Havighurst, *supra* note 215, at 421.
[271] *Id*. at 44.
[272] *Id*.
[273] *Id*.

provided that products in a given market should be homogeneous, they are more likely to be motivated to conclude an anticompetitive agreement.

(G) Sealed Bids

When buyers offer sealed bids on items, collusion would be facilitated because no one can cheat on the agreement without being discovered.[274] Therefore, in this situation, they would have more incentive to conclude an anticompetitive agreement because it would be more stable and less cost would be necessary for policing.

(H) Inelasticity of Supply

When supply at an upstream market should be inelastic, buyers need not to restrict their purchases much in order to accomplish a desired price reduction.[275] The greater the reward to their successful collusion, the more incentive they will have to reach an agreement.[276]

(I) Inelasticity of Demand

When demand at an upstream market should be inelastic, collusions by buyers are likely to be successful because given they reduced their purchase other competitor cannot substitute the reduced demands.[277] The greater the possibility of their successful collusion is, the more incentive they will have to reach an agreement.

(J) No Justification on their Coordinated Behavior

When claims of legitimate business justification on coordinated behavior are unconvincing or pretextual, it is inferred that they reached an anticompetitive

---

[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *See* Havighurst, *supra* note 212, at 435.

agreement,[278] compared to the situation where ample business justifications have been offered. Although the justification that their posting price is to tell sellers what price they are going to buy is plausible,[279] given that information is not available for sellers easily, an inference would be strengthened that they reached an agreement.

(2) Summary of Analysis

When the price of products at an upstream market seems to have been lowered and yet communications among buyers should not include any information as to price or it should not be assumed that the parties engaged in communications as to price, it would be useful to examine factors indicated above in order to find an agreement, indispensable element of the Japanese Antimonopoly Law, art. 2, para. 6.

Under the present antitrust practices in Japan, when the FTCJ find an anticompetitive agreement, it shall order the Punitive Penalty (Surcharge), whose amount is far larger than criminal penalty, to the parties involved as well as ordering elimination measures to restore the free competition at a given market. Based on these practices, careful fact-finding of an agreement is required and thoughtlessreliance on direct evidence, especially confessions from parties involved, should be refrained.

In a transaction via B2B, because communications among buyers are recorded either on web-server or administrator of B2B, compared to real market places, it is easier to obtain tangential facts and circumstantial evidence and would not be necessary to depend so much on confession from the parties involved.

In Japan, traditionally, both courts and the FTCJ have relied on direct evidence so heavily, that is, confessions from relevant parties, which is said to have lead

[278] *See* Baker, *supra* note 12, at 48.
[279] *Id*.

to illegal interrogation practices and to the situation where fact finding based on tangential facts and circumstantial evidence has not been developed. In order not to confirm the present antitrust practices in Japan, it would be desirable to try to examine carefully both tangential facts and circumstantial evidence in finding an agreement among buyers on B2B.

In addition to above, as an antitrust policy making matter, by amending the Japanese Antimonopoly Law, it is necessary to strengthen investigation measures by the FTCJ so that it may collect evidence more effectively to cope with transaction via internet and to enact the protection for whistle blowers, at the same time making their procedure more strictly and clearly. As present measures under the Japanese Antimonopoly Law were built based upon transactions on real market places, not all measures are useful for investigating cases concerning buyers' agreement on B2B. Especially, measures to confiscate transaction record on B2B under the supervision of courts would be necessary.

In addition, although it goes without saying that whistle blowers have played a large role in cartel cases, also it is true to say that they have faced some sort of retaliations. Since their cooperation will be useful even in cases on B2B, it is desirable to set up appropriate protections for them.

VI. Concluding Remarks

Due to the advancement of the internet technology, million of businesses can participate in market places on the web site at the same time with ease where they shop for information, buy and sell goods and services. The technological developments that have made B2B possible also have enhanced the efficiencies of businesses to collect,

analyze, store, and transfer vast amount of data, and communicate easily through internet. Both sellers and buyers on B2B could be benefited through these procompetitive efficiencies. These procompetitive effects of B2B could contribute to turn around Japanese economy and to accomplishment of the purpose of the Japanese Antimonopoly Law. Therefore, the importance of these procompetitive effects should not be overlooked and it is not appropriate to regulate B2B in a manner which might cause chilling effects.

But on the other hand, it should be noted that, on B2B, buyers are able to form a cartel or conclude anticompetitive agreements to restrain the free competition and to detect deviation from them via efficient communications on B2B far much easier than real market places. Buyers are more likely to collude on B2B than real market places because they are able to do so easily by making use of efficient communication tools on B2B. And when buyers collude to affect the price, like in sellers' cartel cases, anticompetitive effects would be almost always caused by their agreements.

As explained in this article, even when joint purchasing would yield procompetitive effects or transaction should be concluded in the form of all-or-nothing deal, there would be almost always anticompetitive effects either in the short term, in the long term or both. Therefore, as in sellers' cartel case, it is necessary to regulate them under the Japanese Antimonopoly Law.

In this regard, although there are no court cases and recommendations at the FTCJ concerning buyers' cartel agreements, because the reason why the illegality of cartels does not depend on a showing of its unreasonableness is that it is contrary to the policy of competition and there is no difference between buyers' cartel agreements and sellers' ones in that they do cause anticompetitive effects on the free competition, the

interpretation of the Japanese Antimonopoly Law established through sellers' cartel cases shall apply to buyers' cartel agreements, except for agreements to increase the quantity of input purchased. It is consistent to the principal purpose of the Japanese Antimonopoly Law to construe in this way.

Based on this conclusion, except for agreements to increase the quantity of input purchased, since when buyers' agreement should be found, it is presumed to be illegal, chilling effects on B2B could be caused by the present tendency that both courts in Japan and the FTCJ have placed too much emphasis on direct evidence. In finding agreements, courts and the FTCJ should adopt the way to examine tangential facts and circumstantial evidence carefully and correct their present practices to rely heavily on confessions thoughtlessly.

For fundamental solution, after balancing both the necessity to regulate illegal buyers' agreement on B2B and to prevent any chilling effects on B2B to be caused, the best way is to strengthen the investigation measures invested with the FTCJ so that it may collect evidence more effectively to cope with transaction via internet and to enact the protection for whistle blowers, at the same time making their procedure more strictly and clearly. Through these fundamental measures, it could be possible for the FTCJ to deal with buyers' agreements on B2B more appropriately.

REFERENCES

CHARLES J. GOETZ, LAW AND ECONOMICS CASES AND MATERIALS (West Publishing Co. 1984).

Charles F. Rule, *The Antitrust Division's Approach to Shipper's Associations, addressed before Chemical Manufacturers Association*, (1985), *available at* http://www.usdoj.gov/atr/public/speeches/2163.htm (last visited Feb. 6, 2005).

Clark C. Havighurst, *Antitrust Issues in the Joint Purchasing of Health Care*, 1995 UTAH L. REV. 409 (1995).

Compuware Corporation, *About Covisinst*, *at* http://www.covisint.com/about/ (last visited Feb. 4, 2005).

Conor Maguire, *B2BhaEUtonihonnodokusennkinnsiseisa kujounokyouteinokibantonaruka* [*Whether B2B become a foundation of treaty concerning antitrust policy between EU and Japan*], (2000), at http://www.jmcti.org/jmchomepage/jmcjournal/data/2000_09/kikou01.pdf (last visited Dec. 22, 2004).

DAVID D. FRIEDMAN, PRICE THEORY (2d ed. 1990).

DON BELLANTELL & MARK JACHSON, LABOR ECONOMICS: CHOICE OF LABOR MARKET (McGraw-Hill 1979).

Donald L. Beschle, *"What, Never? Well, Hardly Never": Strict Antitrust Scrutiny As An Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471 (1987).

E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE; CASES, MATERIALS, PROBLES (Lexis Nexis 5d ed. 2003) (1984).

F. Martin Dajani, *Beyond Covisist-Antitrust Scrutiny of B2B Exchanges*, 57 J. MO. B. 186 (2001).

George Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439 (1982).

Gail F. Levine, *B2Bs, E-Commerce & The All- Or- Nothing Deal*, 28 RUT. COM. & TECH. L. J. 383 (2002).

Garen Gotfredson, *Business-to-Business Internet Purchasing Exchanges: The Promises and Antitrust Risks of a New e-Commerce Platform*, 2 MIMM. INTELL. PROP. REV. 107 (2001).

GYO HAYASHI, NIHONBAN DOTCOM BUSINESS SEIRYOKUZU [POWER BALANCE IN INTERNET BUSINESS IN JAPAN] (Askee, 2000).

Hideyuki Kobayashi, *Kokusaisaibannkankatu to Malaysia Koku Jikenhanketu* [*International Judicial Jurisdiction and the Malaysia Airline Decision*], 26 HOUGAKU SEMINER 20 (1982).

Hideyuki Kobayashi, *Kokusai Sosho Kyogo* [*International Parallel Litigation*], 525 NBL 34 (1993).

Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295 (1987).

International Information Study Group at Chiba University Faculty of Horticulture Economy Division, *Aiteinosinpotoryutuseido* [*Development of IT technology and*

distribution system], (2004), *available at* http://www.h.chiba-u.ac.jp/glocal/lec10404.htm (last visited Jan. 30, 2005).

James C. Lanik, *Stopping the Tailspin: Use of Oligopolistic and Oligopsonistic Power to Produce Profits in the Airline Industry*, 22 TRANSP. L. J. 510 (1995).

James D. Hurwitz, *Abuse of Governmental Prosecces, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L. J. 65 (1985).

James Murphy Dowd, *Oligopsony: Antitrust Injury and Collusive Buyer Practice in Input Market*, 76 B. U. L. REV. 1075 (1996).

Joe Sims, *Developments in Agreements Among Competitors*, 58 ANTITRUST L. J. 433 (1989).

Jonathan B. Baker, *Identifying Horizontal Price Fixing in The Electronic Marketplace*, 65 ANTITRUST L.J. 41 (1996).

Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrision*, 37 ANTITRUST BULL. 151 (1992).

Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust*, 36 ANTITRUST BULL. 1 (1991).

KAN IJUH, DOKUSENKINSHIHOH NO TEBIKI [THE GUIDANCE OF THE JAPANESE ANTIMONOPOLY LAW] (Tokyokeizaishinpousha 1982).

KENZE SANEKATA, JOHKAI DOKUSENKINSHIHOH [THE INTERPRETATION OF THE JAPANESE ANTIMONOPOLY LAW] (Kobundo 1997).

Koichi Inoue, *Kokusaiteki Nijusosho wo Meguru Saikinno Dohkoh* [*Trend of Recent Case Law Concerning International Duplicative Litigation*], 21 KOKUSAISHOJIHOMU 403 (1993).

Masahiro Murakami, *Joukyoshokoniyorukakakukaruterunoninntei* [*Finding a Cartel from Circumstantial Evidence*], 1003 HANREITIMES 64 (1999).

MASAHIRO MURAKAMI, DOKUSENKINSHIHOH [THE JAPANESE ANTIMONOPOLY LAW] (Hirobundou 2000) (1996).

Masahiro Murakami, *Dokusenkinshihou Ihannituiteno Tokubetuno Songaibaishoseidonoigi* [*The Significance of the Special Restitution System Concerning Violation of Antimonopoly Law*], 959 HANREITIMES 4 (1998).

Marius Schwartz, *Buyer Power Concerns and the Aetnea-PrudentilıMerger, addressed at 5 th Annual Health Care Antitrust Forum (Oct. 20, 1999)*, (1999), *available at* http://www.usdoj.gov/atr/public/speeches/3924.htm (last visited Feb. 6, 2005).

Maxwell M. Blecher, *The "New Antitrust" As Seen by a Plaintiff's Lawyer*, 54 ANTITRUST L. J. 43 (1985).

MILTON FRIEDMAN, PRICE THEORY (Chicago: Aldine Publishing Co. 1976).

Morio Takeshita, *Note*, 637 KINYU SHOJI HANREI 49 (1982).

Nikkei Computer. Co., *B2Btointernettorihikisho* [*B2B and Transaction Through Internet*], NIKKEI COMPUTOR, Jun 19, 2000.

Noriyuki Nishida, *Dokusenkinshihohniokeru Keijibatuno Kyokanituite* [*The Strengthening of the Criminal Sanction to a Violation of the Japanese Antimonopoly Law*], 13 KEIZAIGAKKAI ANNUAL REPORT 71 (1992).

RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (University of Chicago Press 1976).

Richard Friedman, *Antitrust Analysis and Bilateral Monopoly*, 1986 WIS. L. REV. 873 (1986).
Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).
Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539 (1989).
Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U. L. REV. 331 (1992).
ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY ANTITRUST LAW AND ECONOMICS (Princeton University Press 1993).
Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL. L. REV. 297 (1991).
ROGER D. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS (Richard D. Irwin 1985).
Sam Kinney, *An Overview of B2B and Purchasing Technology,* (2000), *available at* http://www.ftc.gov/bc/b2b/comments/freemarketsinc.pdf (last visited Feb. 5, 2005).
Steven Salop, *Measuring the Ease of Entry*, 31 ANTITRUST BULL. 551 (1986).
Takao Sawaki, *Saiban Kankatuken Saiko* [*Judicial Jurisdiction Revisited*], 9 KOKUSAI SHOJI HOMU 611 (1981).
The Federal Trade Commission, *Entering the 21st century: Competition Policy in the World of B2B Electric Market Place*, *available at* http://www.ftc.gov/os/2000/10/b2breport.pdf (last visited Jan. 31, 2005).
The Federal Trade Commission, *FTC Terminates HSR Waiting Period for Covisint B2B Venture*, (2000), *available at* http://www.ftc.gov/opa/2000/09/covisint.htm (last visited Feb. 2, 2005).
The Federal Trade Commission Public Workshop, *Emerging Issues for Competition Policy in the World of E-Commerce (Thursday, June 29 2000) Volume 1*, (2000), *available at* http://www.ftc.gov/bc/b2b/b2btrans000630 (last visited Feb. 5, 2005).
The Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (last visited Feb. 3, 2005).
The U.S. Department of Justice And the Federal Trade Commission, *Statement of Antitrust Enforcement Policy In Health Care*, (1996), *available at* http://www.ftc.gov/reports/hlth3s.htm (last visited Feb. 6, 2005).
The U.S Department of Justice and the Fair Trade Commission, *Horizontal Merger Guidelines*, (1992), *available at* http://www.ftc.gov/bc/docs/horizmer.htm (last visited Feb. 6, 2005).
The Fair Trade Commission in Japan, *Dokusenkinshihoujouno Kigyoketugosinsa Nikansuru Unyohshisin* [*The Guideline Concerning the Examination on Merger and Acquisition under the Japanese Antimonopoly Law*], (2004), *available at* http://www2.jftc.go.jp/pressrelease/04.may/04053101.pdf (last visited Feb. 28, 2005).
The Fair Trade Commission in Japan, *Genzairyotouno choutatuwo mokutekitosuru kigyoukanndennsishoutorihikisijounoseturitunikanns uru jigyoukshakaranosoudannjireunituite* [*Consultation Case Concerning Establishment of E-Commerce market with the view to Purchasing Raw Materials*

Jointly], (2000), *available at* http://www.jftc.go.jp/pressrelease/12index.htm#dec (last visited Feb. 2, 2005).

The Fair Trade Commission in Japan, *Dokusenkinshihou Kaiseino Youten* [*The Gist of the Amendment of the Japanese Antimonopoly Law*], 320 KOUSEITORIHIKI 15 (1977).

The Fair Trade Commission in Japan, *Jigyoshadantainokatudonikan surudokusennkinnshioujounosisin* [*The Guideline of the Japanese Antimonopoly Law Concerning Activities by the Body of Businesses*], (1995), *available at* http://hrsk.jftc.go.jp/dk/View_HTML.asp (last visited Nov. 3, 2004).

The Fair Trade Commission in Japan, *Risaikurutounikakarukyodono torikunikansurudokusennkinnsihouounosisinn* [*Antitrust Guideline Concerning Joint Activities on Re-use of Resource*], (2001), *available at* http://hrsk.jftc.go.jp/dk/View_HTML.asp (last visited Feb. 5, 2005).

The Fair Trade Commission in Japan, *Dokusenkinshihou Kenkyukai Hokokusho* [*The Report by the Study Group Concerning the Japanese Antimonopoly Law],* (2003), *available at* http://www2.jftc.go.jp/pressrelease/03.october/sochi2.pdf (last visited Feb. 25, 2005).

The Original Equipment Suppliers Association, *Comments Prepared for the Federal Trade Commission in Connection with Its Workshop on Competition Policy in the World of B2B Electronic Market Place*, (2000), *available at* http://www.ftc.gov/bc/b2b/comments/oesa.pdf (last visited Feb. 5, 2005).

Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructual Market Power*, 69 N. Y. U. L. REV. 1 (1994).

Thomas J. Horton & Dr. Stefan Schmitz, *The Lessons of Covisnt: Regulating B2Bs Under European and American Competition Laws*, 47 WAYNE L. REV. 1231 (2001).

YOHOJI TANIGUCHI, DENKISHOTORIHIKISHIJOH KOHCHIKU [ESTABLISHMENT OF WEB-BASED MARKET PLACE] (Seiseisha, 2000).

YOSHIO KANAZAWA, KEIZAIHOH [LAW OF ECONOMY] (Yuhikaku 1980).

YOSHIHIKO RYOKAKU, KYOSOH TO DOKUSENNO HANASHI [THE TALK ABOUT COMPETITION AND MONOPOLY] (Soukeisha, 1978).