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A STUDY IN THE ROLE OF CENTRAL AND LOCAL GOVERNMENTS REGARDING THE ENFORCEMENT OF COMPETITION LAW

NAOAKI OKATANI

I. INTRODUCTION

In the European Union, the national judicial courts of each member country and the European Court of Justice finally are determining whether an agreement constitutes an infringement of Article 81.1 of the Treaty Establishing the European Community¹ by reviewing the regime in which the European Commission has controlled the dispensation system defined in Article 81.3.

Japan developed the Decentralization Promotion Program in 1998 based on the recommendations prepared by the Decentralization Promotion Program. The Decentralization Promotion Program defines the abolition of organizationally delegated operations and the enlargement of the range of local governmental discretion. Following the Program, Japan amended the Act Against Unjustifiable Premiums and Misleading Representations² in 1999 to abolish Section 9-5 in which the Japanese Fair Trade Commission (JFTC) supervised and controlled prefectural governors as well as redefine how the JFTC may provide technical advice and recommendations and request document submission and rectification.

In many of the major developed countries like the United States and the Federal Republic of Germany, authority over the domain of competition law is delegated substantially to local governments, with central and local organizations responsible for the synergistic execution of the law. I will examine what form the executive authority of central and local organizations in Japan should take and how this should be coordinated synergistically. I also will discuss the relationship between the organizations in light of enhancing the executive power and effectiveness of Japan's competition laws by increasing observation and supervisory spots supporting actions that restrain competition.

1. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997).

2. Futo Keihin Rui Oyobi Futo Hyoji Ho [Act Against Unjustifiable Premiums and Misleading Representations], Act No. 134 of May 15, 1962, *available at* <http://www.jftc.go.jp> [hereinafter Act Against Unjustifiable Premiums and Misleading Representations].

II. EXECUTION OF COMPETITION LAW BY STATE CARTEL OFFICES IN GERMANY

A. *Executive Organizations Under the Act Against Restraints of Competition*

Three organizations enforce the German Act Against Restraints of Competition (GWB)³: the Federal Cartel Office (*BundesKartellamt*), state cartel offices, and the Federal Ministry of Economics and Technology. In addition, the *Monopolkommission* acts as an executive organization by conducting surveys, preparing reports, and proposing amendments based on the concentration status of economic power and the application status of acts concerning business combinations.

1. *Federal Cartel Office*

The Federal Cartel Office is an independent agency responsible for enforcing the GWB under the authority of the Federal Ministry of Economics and Technology.⁴ It possesses jurisdiction over restraints of competition that influence or affect more than one province, leaving state cartel offices with jurisdiction over purely intrastate matters. In addition, the Office has exclusive authority to: (1) authorize the exemption of particular cartels from the GWB; (2) regulate business combinations; and (3) apply the GWB to postal or telecommunications services. Upon discovery of infringement, the Office may conduct an examination and, if appropriate, order an injunction.

2. *State Cartel Offices*

a. *Coordination of Authorities Between Federal and Local Organizations*

The state cartel offices possess authority over issues not specifically under the jurisdiction of the Federal Cartel Office or the Federal Ministry of Economics and Technology.⁵ Any state office that institutes or executes any investigation or procedure must inform the Federal Cartel Office, and each must transfer any case in which it does not have jurisdiction.⁶ Any party

3. Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition], 26.8.1998 (BGB1. I S.1081) [hereinafter GWB].

4. *Id.* § 51(1).

5. *Id.* § 48(2).

6. *Id.* § 49(2).

being investigated that questions any office's jurisdiction may receive a preliminary ruling from that office, which the party may challenge independently.⁷

b. Authority to Investigate and Issue Administrative Dispositions

State cartel offices possess the same investigative authority as the Federal Cartel Office. Each may screen and examine evidence as necessary,⁸ confiscate objects critical to the screening,⁹ and inspect and request documents.¹⁰ In addition, they possess the same authority as the Federal Cartel Office to order either any type of administrative disposition or any cartel participant to pay a fine.

c. Participation of the Federal Cartel Office in Certain State Administrative Procedures

The Federal Cartel Office participates in certain administrative procedures conducted by state cartel offices, a practice designed to ensure the unified operation of the GWB.¹¹ The Federal Cartel Office also participates in any proceeding where parties have appealed a decision handed down by a state cartel office.¹² The Federal Cartel Office may state its opinion or submit evidence in any procedure in which a state cartel office participates. In theory, the Federal Cartel Office could appeal any decision or legal interpretation made, as the language of Section 63(2) of the GWB seems to allow *any* party to a proceeding to appeal.¹³

B. Evaluation of Organizations with Authority on Matters Subject to the GWB

1. Outline of the Federal Cartel Office

Part II of the GWB deals exclusively with "Cartel Authorities," which applies specifically to both the Federal Ministry of Economics and Technology and the Federal Cartel Office. There are 250 staff members in

7. *Id.* § 55(1).

8. *Id.* § 57(1).

9. *Id.* § 58.

10. *Id.* § 59.

11. *Id.* § 54(3).

12. *Id.* § 67(2).

13. Section 63(2) states that "[t]he appeal shall be open to the parties to the proceedings before the cartel authority..." *Id.* § 63(2).

the Federal Cartel Office, 120 of which are attached to the *Vergabekammern* to monitor purchase orders made by ten statutory organizations, as well as the public purchase orders made by other organizations.

The mission of the *Vergabekammern* is defined in Part IV of the GWB. The *Vergabekammern* are responsible for resolving conflicts between ordering divisions at the federal level and bidders concerning order placement. The *Vergabekammern* are completely autonomous and independent; their decision-making authority is not governed or restricted by any superior governing body.¹⁴ Any parties that object to a decision handed down by a *Vergabekammer* may appeal to the appropriate local court that possesses jurisdiction.¹⁵

2. Budget and Sphere of Order

The annual budget of the Federal Cartel Office is approximately DM 35 million. The types and number of actions taken by the Office are enumerated in its annual Activity Reports. Execution and enforcement of the Act Against Unfair Competition¹⁶ (UWG) is beyond the scope of the Office's authority.

3. Preventative Measures

From 1997 to 1998, the Federal Cartel Office issued measures (1) preventing Lufthansa from monopolizing pricing on German air routes,¹⁷ (2) preventing abusive interference by the Canadian film projector manufacturer IMAX,¹⁸ and (3) monitoring abuses in deregulated sectors such as the telecommunications, postal, energy, and transportation industries.

14. *Id.* § 105.

15. *Id.* § 116.

16. Gesetz gegen den unlauteren Wettbewerb [Act Against Unfair Competition], v. 24.3.1999 (BGBI. I S.402).

17. Claiming unfair exploitation of a monopolized route, the Federal Cartel Office prohibited Lufthansa from charging prices on the Berlin-Frankfurt/Main route (which Lufthansa was the sole provider on) that were higher than it charged on similar routes within which there was actual competition.

18. The Federal Cartel Office held that IMAX's refusal to simultaneously supply two proximately located cinemas in Berlin with certain large screen projection systems violated the GWB as an abuse with the intention to hinder, in spite of IMAX's exclusive contract with one of the two cinemas.

4. Examinations of Business Combinations

The Federal Cartel Office specifically conducted 3,639 examinations of business combinations from 1997 to 1998.¹⁹

Table 1²⁰

	1997	1998
Combinations examined prior to merging	1,207	1,300
Combinations examined after merging that the Office possesses a specific duty to observe	366	391
Combinations examined after merging that the Office does not possess a specific duty to observe	178	197

Most combinations brought to the attention of the Federal Cartel Office were placed under preventative observation. The Office classified the majority of the merging firms as relatively minor firms that were merging with large firms for business reasons that did not involve anticompetitive facets. However, it is important to note that all large-scale mergers with significant influence over Germany's markets were under strict scrutiny by the European Commission during the time period in question and therefore are not included in the tabulated figures.

5. Competence

Section 48 of the GWB delineates the legal basis of the federal and state cartel offices. Unless specifically appropriated, Section 48 indicates that the Federal Cartel Office retains sole authority for regulating interstate matters

19. See Bericht des Bundeskartellamts über seine Tätigkeit in den Jahren 1997/1998 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet [Annual Report of the Federal Cartel Office 1997/1998] (1998), available at <http://www.bundeskartellamt.de>.

20. *Id.*

involving discriminatory or restrictive conduct or its influence. The GWB specifically demarcates boundaries preventing multiple cartel offices from hearing the same cases to prevent disparate decisions from being made on the same case and issue. There currently are no plans to amend any provisions of the GWB related to the scope or authority of the cartel offices.

6. Relationship Between the Federal and State Cartel Offices

The GWB defines the relationship between the Federal and state cartel offices. The GWB requires the Federal Cartel Office to notify the appropriate state office that possesses jurisdiction over a matter if the Federal Cartel Office conducts an investigation or institutes any proceedings within that jurisdiction. Similarly, any state office that conducts an investigation or institutes any proceedings must inform the Federal Cartel Office of its actions.²¹ When jurisdiction demands it, the investigating cartel office must transfer the case to the cartel office that maintains primary jurisdiction.²² The Federal and state cartel offices meet annually to exchange opinions (*Erfahrungsaustausch*) about the most recent developments in case practice and competition law.

C. Case Study—Nordrhein-Westfalen

The Ministry of Economy and Middle-class, Technology, and Transportation (MWMEV) enforces the GWB in the state of Nordrhein-Westfalen. To date, the MWMEV has examined issues surrounding interference with both energy supplier substitution and the distribution and authorization of cooperation by and between public and private energy-related enterprises. It also conducted a statewide investigation into natural gas rates in 2000, using individual customers as its primary focus. Other examples of execution include enforcement of the monopolization of pricing of telephone directory publishing, regulation of unlawful interference by newspaper and magazine distributors, and regulation of restraints of competition arising from the granting of sweepstake sales shop contracts.

Subjects protected under the UWG are principally different from those protected by the GWB. The GWB ensures free market entry and the existence of competition while the UWG ensures faithfulness in competition. Compliance with the UWG is not regulated or controlled by any central organization but rather is ensured through recommendations by public

21. GWB § 49(1).

22. *Id.* § 49(2).

economic organizations and the institution of civil litigation.

The relationship between Nordrhein-Westfalen and the Federal Cartel Office parallels that of every other state within Germany: the GWB mandates that the Federal Cartel Office assume responsibility for any task or responsibility within Nordrhein-Westfalen where the impact of any market trend, restraint of competition, discriminatory practice, or competition provision exceeds the state boundaries.²³

D. Case Study—Bavaria

The state cartel office in Bavaria is a division of the Department of Economy, Public Transport and Technology. Its primary foci include: (1) regulating agreements that restrain competition; (2) assisting cooperation to improve the efficiency of small and medium-sized enterprises; (3) regulating the abuse of dominant market positions; (4) policing the legality of mergers; (5) regulating discrimination and interference against small and medium-sized enterprises; (6) specifically regulating agreements among the operators of public transportation; and (7) policing the conclusion of contracts and market activities in energy supply industries.

III. INDIVIDUAL STATE ENFORCEMENT OF U.S. ANTITRUST LAW

Federal law applies to all interstate transactions and state laws apply to purely intrastate transactions. The state attorney general not only exercises the antitrust law within his or her particular state but also plays an active role in executing federal antitrust law by pursuing actions both as a private person and in *parens patriae* actions.

A. The Sphere of State Antitrust Laws

1. The History of State Antitrust Law Enactment

At least twenty-six states enacted state antitrust laws before the enactment of the Sherman Antitrust Act in 1890.²⁴ One legislative purpose behind the Sherman Act was to enact a nationwide antitrust statute to complement these existing state laws that were limited strictly to intrastate application.

The legislative movement of state antitrust law accelerated in the early 1970s due to an increase in the number of class actions seeking treble

23. *Id.*

24. Sherman Act, 15 U.S.C. §§ 1-7 (1994).

damages. States and cities recovered significant damages in actions where the government brought the complaint. This proliferation of successful litigation motivated many states to empower attorneys general to increase damage recovery by initiating actions in state or federal court on behalf of their particular states or cities or counties therein.

In 1976, the enactment of the Antitrust Grant Program²⁵ and the Hart-Scott-Rodino Antitrust Improvements Act²⁶ materially enhanced state antitrust law. The Antitrust Grant Program allocates seed money for states when they sue under their antitrust laws while the Hart-Scott-Rodino Act's provision of *parens patriae* authority allows state attorneys general to pursue treble damages on behalf of persons injured by a violation of the Sherman Act.

2. *Current State Antitrust Law*

Every state currently has antitrust legislation in place. In addition, at least thirty-nine states have enacted laws that parallel Sections 1 and 2 of the Sherman Act, while fewer states possess statutes corresponding to Sections 3 and 7 of the Clayton Act. Most states possess statutes targeting specific industries in addition to their laws targeting specific actions such as bid rigging and price fixing. Almost all states differ on the degree to which they rely on federal precedent when applying state antitrust law, with some considering federal law to be persuasive only. In addition, most state laws contain specific exceptions for certain industrial sectors, although the degree and scope of these exceptions vary from state to state.

3. *Sanctions*

Forty-seven states and the District of Columbia have instituted criminal penalties for actions that restrain competition. The maximum fines range anywhere from one thousand dollars in North Carolina to one million dollars in Colorado. Many states also possess provisions providing for imprisonment in extreme cases. Many states allow treble damage awards, a determination ultimately delegated to the discretion of the courts. Finally, several states have established "antitrust revolving funds," which are composed of a specific percentage of the recovery in antitrust litigation involving the state attorney general. In contrast with federal antitrust law, seventeen states and

25. The Antitrust Grant Program granted nearly thirty million dollars to state antitrust enforcement. *See* Crime Control Act of 1976, Pub. L. No. 94-503 § 116, 90 Stat. 2407, 2415 (1976).

26. Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1994).

the District of Columbia allow for indirect purchasers to recover for infringements of state antitrust laws as well as *parens patriae* actions to allow states to institute suits on behalf of their citizens.

IV. ENFORCEMENT OF THE ACT AGAINST UNJUSTIFIABLE PREMIUMS AND MISLEADING REPRESENTATIONS BY PREFECTURES IN JAPAN

A. The Executing Power of Prefectures

Section 9-4 of the Act Against Unjustifiable Premiums and Misleading Representations enables prefectures to request reports from business owners regarding any premiums offered or representations made, and, if necessary, conduct inspections of the owners' business premises.²⁷ Notwithstanding this statutory language, prefectures handle the majority of related matters over the telephone, and only occasionally will require representatives of business organizations to attend official hearings.

Section 9-2 of the Act provides prefectural governors with the power to either issue a cease and desist order to an infringing business, or publicize details of the business' infringing actions.²⁸ This remains an underutilized enforcement tool, as the largest number of such orders issued by prefectures in any one year in the 1990s was three in 1992. In addition, the period from 1995 through 1999 saw no official orders issued at all, with the only issued disposition constituting an unofficial "warning."²⁹

B. Relationship with the Japan Fair Trade Commission

Section 9-3 of the Act Against Unjustifiable Premiums and Misleading Representations provides prefectures with the authority to request the JFTC to "take appropriate measures" in cases where the infringing business does not comply with the prefectural governor's instructions.³⁰ Due to the low number of issued orders by prefectural governors, it is not surprising that they have not invoked their Section 9-3 authority to request JFTC intervention in over ten years. In addition, Section 9-6 of the Act provides the JFTC with the authority to require prefectural governors to correct any official actions they conduct that either violate the provisions of the Act or

27. Act Against Unjustifiable Premiums and Misleading Representations § 9-4.

28. *Id.* § 9-2.

29. See Kosei Torihiki Inukai [Fair Trade Commission], Kosei Torihiki Inukai Nenji Hokoku [Fair Trade Commission Annual Report] 108-9 (2000).

30. Act Against Unjustifiable Premiums and Misleading Representations § 9-3.

clearly impair the public interest.³¹ Similar to Section 9-3, the JFTC has not exercised its authority under Section 9-6 in at least ten years. However, the relationship and cooperation between the prefectures and the JFTC extend beyond actual enforcement. The staff members of the prefectures meet with the JFTC twice per year to discuss training, enforcement, and all relevant and current policy concerns.

C. Challenges

The most noticeable challenge facing enforcement of the Act Against Unjustifiable Premiums and Misleading Representations involves the severe limitation on available administrative resources. Of primary concern is the fact that the entire staff in each prefecture usually is limited to one or two individuals, with each staff member concurrently responsible for a range of other related and miscellaneous duties. In addition, from 1995 to 1999, no prefecture issued an official disposition relating to an infringement of the Act. This lack of enforcement activity necessitates a closer examination of prefectural enforcement, as any improperly enforced regulation truly is not worth the paper it originally was transcribed on. Consequently, certain issues should be examined if and when prefectures ever assume executive authority for antitrust law enforcement: (1) ensure each prefecture possesses a professional staff, sufficient budget, and efficient organizational structure; (2) foster complete and unadulterated professionalism in enforcement; and (3) ensure transparency of execution.

V. ISSUES FOR THE FUTURE

The fact that prefectures possess even a small measure of enforcement authority gives the impression that this extended antitrust presence will lead to the increased prevention of infringing actions. However, any enforcement by the prefectures will be only moderately effective without heightened cooperation between the prefectures and the JFTC to coordinate and harmonize the uniform application of all antitrust laws. One only need examine the cooperation between Germany's federal and state cartel offices to see the benefits of such an approach. Due to the limitations on administrative resources and enforcement experience, a framework akin to Germany's cooperative, distributive enforcement of one universal competition law based on sphere of influence would benefit Japan far more than applying separate competition laws at differing levels would, as the

31. *Id.* § 9-6.

United States has found success with. The success of such a framework would be dependent on increased coordination between Japan's central and local governments, increased scrutiny of and participation in prefecture procedures by the JFTC, and the establishment of an organized system for the consistent exchange of the most current information and suggested policy measures.