

## **Alternative Competition Regimes**

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### **I. Increasing popularity of competition laws**

According to a survey by the Hong Kong Consumer Council, at least 50 countries and territories, representing 80% of world trade, have adopted competition laws of various forms. These regimes include

- The Americas: USA, Canada, Mexico, Argentina, Brazil, Chile, Peru and Venezuela;
- Asia: Japan, Korea, Taiwan, China, Thailand, Indonesia, India and Philippines;
- Pacific: Australia, New Zealand, and Fiji;
- Europe: all members of EU, and most of eastern Europe including Russia;
- Middle East: Israel, Turkey;
- Africa: South Africa, Zimbabwe, and Algeria.

Many of these laws were introduced since 1990, primarily by developing and transition economies. For such countries the introduction of competition policies is seen as a necessary complement to the restructuring of their economies, as well as a means to better integrate them in the emerging world markets and to achieve higher growth rates.

### **II. Approaches and coverage of competition laws**

The traditional approaches to competition policy (Roger Alan Boner and Reinald Krueger, “The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities”, *World Bank Technical Paper* no.160, 1991) encompass three key aspects:

1. Structure: with the focus on market concentration, which may serve as a trigger for investigation. Investigation would take into account the definition of the relevant market, from both the supply and the demand sides, and determining factors such as substitutability, geographic coverage and temporal considerations. In terms of practical policies, the competition authority will look at the issues of monopolies, mergers and

acquisitions, etc. Orders of divestiture and non-approval (or conditional approval) of mergers and acquisitions are some of the most common responses.

2. Conduct: with the main attention on anti-competitive, restrictive, or unfair trade practices. These practices can be broadly grouped into (a) vertical restraints such as resale price maintenance, exclusive dealings, tie-in sales etc., and (b) horizontal restraints including price-fixing, collusive bidding, division of output and market etc. Unfair conduct that undermines competition, e.g. counterfeit products, false advertising and damages to others' reputation, may also be scrutinized.

3. Performance: with the focus on observed prices charged and output produced. The authority may simply monitor and announce statistics regularly or resort to remedial measures.

Under these approaches, the widest coverage of a competition law would include five aspects:

1. Monopoly and cartels
2. Merger and Acquisition
3. Horizontal restrictive practices
4. Vertical restrictive practices
5. Unfair trade practices

There is a diversity of national competition laws, with different coverage and severity of sanctions (which may be administrative, civil or criminal, or a combination). These reflect the different stages of development of economies. Typically, the more developed economies have had established competition laws and agencies for a considerable period of time, i.e., US, Canada, UK, European Community, Australia, Japan, Korea and Taiwan.

More recently, many developing countries are enacting competition laws as an important part of economic restructuring, for example, former Eastern Bloc countries.

### **III. Exemptions and review mechanisms**

In any competition regime, provisions governing exemptions from the competition law are an essential ingredient of the legal process and actual implementation. Exempted cartels, for example, are based on various economic and social considerations. Roger Alan Boner and Reinald Krueger (1991) ("The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities", *World Bank Technical Paper* no.160) have categorised nine possible reasons for exempting cartels from competition scrutiny in their Table 7.1 They basically fall into three groups:

(1) Recession and depression cartels are allowed because of the proposition that, absent cartelisation; open competition among suppliers would lower economic performance and cause undue hardship on producers.

(2) Specialisation, rationalisation, R&D, and standardisation cartels are based on the assumption that collaboration can allow producers to realise economies of scale or other efficiency gains (e.g. risk sharing) that would not be available in the absence of cooperation.

(3) Export and import cartels are typically justified by the argument that they allow an unconcentrated industry to offset the market power of foreign monopolists or oligopolists.

Marketing, price, and production – essentially price fixing agreements among competing firms to raise prices and restrict production.

Depression – firms of a specific sector make cooperative reductions in production capacity when that sector is in long-term decline. Similar to recession cartels.

Specialization – firms producing complementary or similar products allocate the production of these products among themselves so as to achieve production economies of scale and scope.

Rationalization – firms jointly share services or activities so as to realize economies of scale and scope (e.g. marketing); similar in principle to specialization cartels.

Recession – firms in a specific sector make cooperative reductions in output during a temporary economic recession in that sector.

R&D – firms in a specific sector cooperatively determine the direction and funding of commercial research and development.

Standardization – competing firms agree on product quality.

Export – firms exporting from a particular jurisdiction set prices and outputs for export in a cooperative fashion.

Import – firms importing a particular item purchase that item cooperatively.

Of course, whether any of these exemptions should be given must be carefully considered in the light of the specific circumstances of an economy. Granted exemptions need also be regularly reviewed.

Besides exemption procedures, the review or redressing mechanism against the decision of a competition authority under a competition law is another important from the perspective of protecting the accused and maintaining fairness in a fair trade law.

The reviewing/redressing institution has differed across competition regimes, as Table 3.1 of Boner and Krueger (1991) reveals. Some authorities relied on an administrative process with no further judicial avenue, while others provided judicial scrutiny only. On the other hand, full judicial reviews were available in mature systems including the US, Canada, and Australia. The US was also unique, in the sample under study, in having both administrative and judicial review mechanisms.

However, some of the information in the table has become outdated. In Britain, previously, the only avenue was a “Restrictive Practices Court”, an administrative agency. Similarly was the “Market Court” for Sweden, which was “semi-judicial” in nature, as the “court” had a mixed membership of judges and experts, but acted according to some judicial codes. Nevertheless, after the enactment of the Competition Act of 1998 in Britain (<http://www.hmso.gov.uk/acts/acts1998>), it has become possible for an accused party to further appeal through a relevant court against the decision of an appeal tribunal (similar to the restrictive practices court in the past), but only (a) on a point of law arising from a decision of the appeal tribunal; or (b) from any decision of the appeal tribunal as to the amount of a penalty. The situation in Sweden has also turned more legalistic and complicated after the Competition Act of 1993 and some later changes of rules ([http://www.kkv.se/engwebb/eng\\_doc/com\\_act.htm](http://www.kkv.se/engwebb/eng_doc/com_act.htm)).

#### **IV. Convergence of trends**

While there are differences between the laws and agencies, the differences should not be exaggerated. It is evident from examining the laws that there is very large convergence of basic policies that:

Treat "hard core" cartels as the most serious breaches of domestic competition law.

Hard core cartels are generally understood to be agreements among actual or potential competitors involving price fixing, bid rigging, output restrictions or customer allocation and market divisions. (See “Hard Core Cartel”, *OECD Report*, 2000; downloadable from the OECD website [http://www.oecd.org/daf/clp/CLP\\_reports/hcc-e.pdf](http://www.oecd.org/daf/clp/CLP_reports/hcc-e.pdf).) Such horizontal agreements clearly distort the operation of markets and are considered as a serious breach of most competition law regimes. They are commonly regarded as “per se” prohibitions. Vertical restraints, the abuse of monopoly power, and

mergers control, are more complicated issues, and may need further consideration, particularly for developing economies that are going through a process of liberalisation.

Apply principles of transparency and non-discrimination to the institutional setting.

Decisions are made in public forums, either through the court system, a specialist tribunal, or by the agency itself.

Define narrow sectoral exclusions from competition laws.

Exemptions from the law, justified on public benefit grounds (including the reasons listed in section III above), are granted to clearly defined sectors for specific conduct. Moreover, the process of excluding conduct is undertaken through a public process; i.e. public hearings, or consultations.

Give an advocacy role to competition authorities.

Being general in nature, the agencies have a wide ranging brief to promote competition in the economy, across all sectors. Importantly, this is to remove the possibility of industry capture that can arise with industry specific regulators.

Place importance on international co-operation with other agencies.

With globalisation playing such an important part in a nation's economy, there is a need for agencies to at least obtain information on corporate activities in other economies that may be impinging on domestic markets. This can be arranged through informal dialogue that commonly arises through international seminars etc. attended by competition agencies; or by formal memorandums of understanding.

A common principle on hard-core cartels found in all legislation also promotes an enhanced awareness of the need for international co-operation against international cartels. In fact, these cartels constitute the highest priority for proponents in the WTO for a policy on international antitrust enforcement.

Agencies also find it useful to exchange ideas between each other to:

- analyse common problems that emerge in similar economies; and
- design a future strategy to address problems that are emerging in their own economies, but have been addressed elsewhere.

## **V. Institutional models**

Having regard to other models used in competition law jurisdictions, there are three basic models under which competition laws can be administered, and decisions are made that conduct is anti-competitive and that sanctions should be applied.

- The Court based process
- A hybrid Court/Agency process
- Agency as the “sole” decision maker

An example of each follows.

### The Court process

The best-known example of this model is the administration of US antitrust laws by the Antitrust Division of the Department of Justice (DoJ) (<http://www.usdoj.gov/atr>), and by private action. The Division comes under the supervision of the US Attorney General, and all decisions are made by the Attorney General and the Assistant Attorney General who heads the Antitrust Division.

US antitrust laws have general application and prohibit a variety of practices that restrain trade, such as price-fixing conspiracies and predatory acts designed to achieve or maintain monopoly power, corporate mergers likely to lessen competition in markets and vertical restraints (essentially the Sherman Act as well as the Clayton Act). Other than the DoJ, the Federal Trade Commission (FTC) (<http://www.ftc.gov>) also has anti-trust and consumer protection functions under the Federal Trade Commission Act and the Clayton Act (actually also other laws which make up a total of 46 according to the latest count).

To focus on regime choice, let us look at the work of the Antitrust Division of the DoJ. It prosecutes serious and what it considers wilful violations of the antitrust laws by filing criminal suits in the court system that can lead to large fines and jail sentences. The DoJ has discretion in whether to take action, and what form it should take.

For example, Sotheby's auction houses recently pleaded guilty and paid a \$45 million criminal fine for fixing the price of commission rates charged to sellers of art, antiques, and other collectibles at auctions. Felony charges were laid for conspiracy to suppress and eliminate competition by fixing prices in violation of the US Sherman Act.

Where criminal prosecution is not appropriate, the DoJ institutes a civil action seeking a court order forbidding future violations of the law and requiring steps to remedy the anti-competitive effects of past violations. For example, a number of orders have been given in the past against Microsoft in relation to anti-competitive licensing agreements with PC manufacturers, and it has recently sought the break up of the corporation for violating the same Act.

The US courts have developed a principle known as the “rule of reason” that excludes from the operation of antitrust law, arrangements whose objective is not to fix prices directly, but nevertheless still have that incidental effect. The Courts have been willing to consider this as a defence, and accordingly, the DoJ will consider the facts of cases that come before it and apply what they assume will be the court's view. For example, the joint collection of composers and performers royalties, through an

association that fixes the fees received from radio stations, is considered to be exempted from the law, by virtue of the “rule of reason”.

#### A hybrid Court/Agency process

The Australian Competition and Consumer Commission (ACCC) (<http://www.accc.gov.au>) has as its role, the administration of a general competition law that prohibits conduct similar to US legislation. In addition, the law, known as the Trade Practices Act, includes consumer protection legislation aimed at unfair marketing practices, and also provides the ACCC with a role in administering industry specific rules for telecommunications, and shipping that address issues specific to those industries. There is also a role for arbitrating on access to any economic sector that has 'essential facilities' to which competitors need access.

The ACCC is a statutory body with its Members appointed by the Federal Government (in co-operation with state governments). All decisions are made by the Members, without reference to the Government of the day. Members, who may be full time, including a Chairman, Deputy Chairman, or part time associates, are drawn from a wide range of the community, in order to achieve a breadth of experience and expertise.

There are no criminal sanctions against anti-competitive conduct, and the ACCC is required to apply for orders and fines through the court system, using the civil standard of proof. There is a right for private parties to take action through the courts, with the exception of injunctions to prevent mergers or acquisitions. While it is little different in respect of taking court action to that of the US DoJ, it does have a range of administrative powers, for example, in relation to granting exemptions, and telecommunications issues peculiar to that industry. It also administers the access rights to essential facilities 'declared' by a special competition advisory body, the National Competition Council.

As far as exclusions from the law are concerned, the ACCC is able to make decisions exempting conduct from most of the anti-competitive conduct provisions of the law, except for abuse of market power. It makes these decisions by a public consultation process, and grants exemption on the basis that there is (in general terms) a public benefit that outweighs the detriments to competition arising from the conduct. This is similar to the US rule of reason. However, all the ACCC decisions on exemption can be appealed to a special Competition Tribunal, which is part of the court process, but which has a three member panel - made up of a judge, an economist, and a business person.

For example, the ACCC has in the past exempted from the application of the law, music royalty collection associations similar to the US, as well as many other arrangements between competitors that while having some anti-competitive detriment, bring about overriding public benefits.

### Agency as the “sole” decision maker

The Taiwan Fair Trade Commission (FTC) (<http://www.ftc.gov.tw/>) is the central authority in charge of competition policy and administration of the Fair Trade Law in Taiwan. It has a role of formulating and drafting fair trade policy, laws, and regulations, and investigating and handling various acts impeding competition, and other restraints on competition or unfair competitive practices such as misleading and deceptive conduct. As such it is similar in the breadth of its operation as the ACCC, but with greater decision-making powers than the ACCC. Unlike a court-based system, of course, litigation costs are much reduced.

The duties of the FTC, as provided under the Fair Trade Law, include:

- preparation and formulation of fair trade policy, laws and regulations;
- review of any fair trade matters related to the Law;
- investigation of activities of enterprises and economic conditions;
- investigation and disposition of any case violating this Law; and
- any other matters related to fair trade.

## **VI. A closer look at Taiwan’s FTC**

The Fair Trade Law was enacted in February 1992 in Taiwan, and the FTC has since been the enforcement agency. After two years of experience, it was felt necessary to revise some of the provisions in the original Law. Draft amendments were prepared by the FTC in 1994 and a review by the Legislative Yuan was completed in June 1996. Then started a lengthy consultation period, and an amended Law was decreed in February 1999.

The original 1992 version of the Fair Trade Law of Taiwan authorised the FTC to be the administrator, judgment making body, and enforcement agency at the same time. Moreover, the Law specified criminal penalties, on top of civil ones, for various violations of the Law. The FTC could, therefore, previously hand out criminal sanctions; although the accused could go to court to appeal.

The system under which the FTC operates has recently been changed from one where criminal sanctions applied directly to anti-competitive agreements and misleading and deceptive conduct, to a new system that applies criminal incarceration and punishment through the court, with the exception of multi-level sales, for which the FTC has maintained the power stipulated in the original 1992 Fair Trade Law. In the own words of the FTC,

- 3.1 Criminal punishment for illegal activity is the most severe punishment and should be a measure of last resort. Where administrative sanctions are sufficient to meet regulatory objectives, such administrative sanctions should be used before applying criminal punishment based on the principle of proportionality. Article 35 of the old Law (i.e. , prior to amendment) directly subjected abuses of

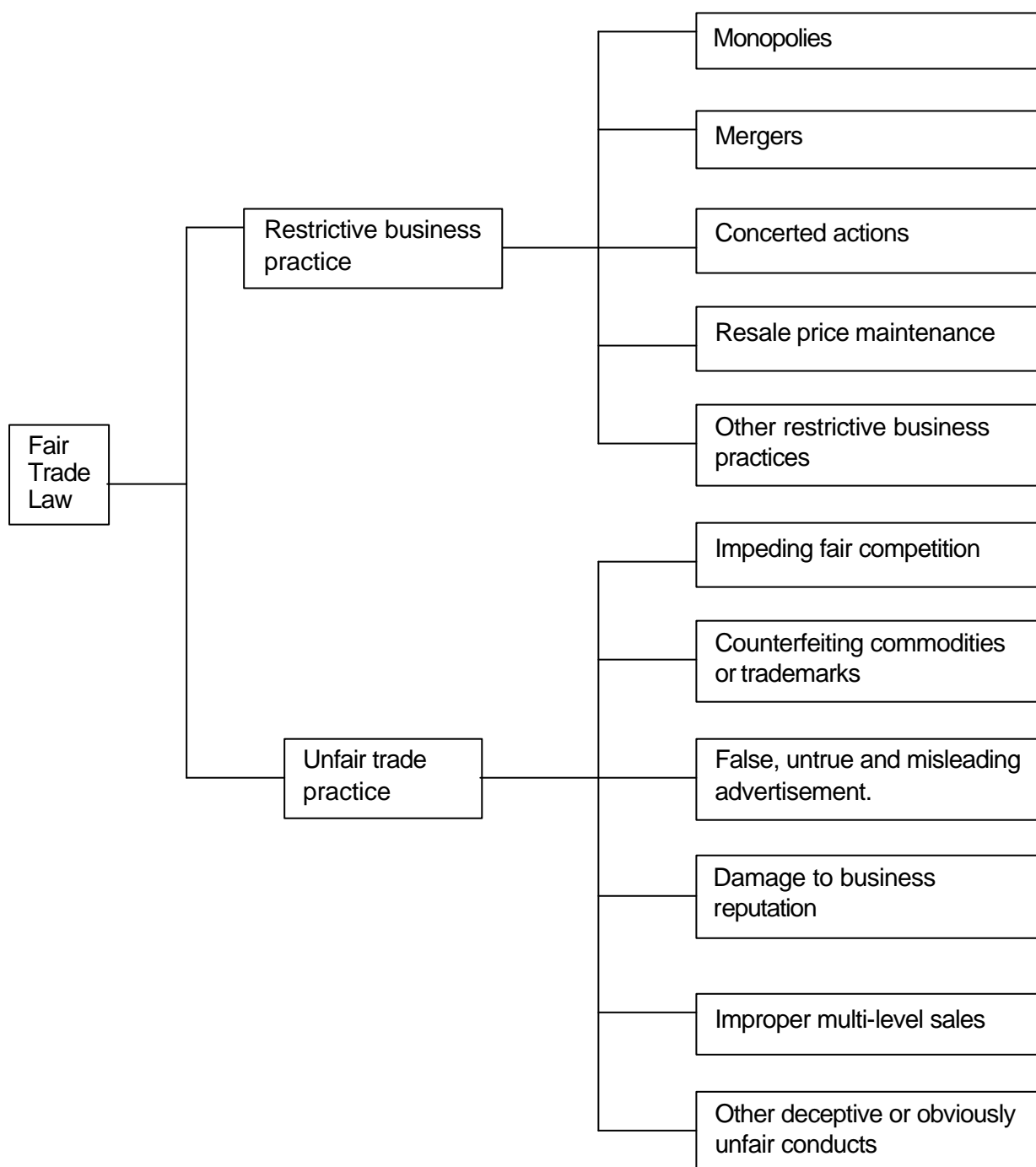
monopolistic power, concerted actions, and passing-offs to criminal sanctions. Since its implementation, this approach has drawn heavy criticism from industry as being too harsh. Scholars and experts had on several occasions suggested that administrative measures should be taken as a priority for the regulation of economic activity. Furthermore, the Law has indefinite terms such as “other acts that are abusive of market position” and “well known to the relevant public,” for which interpretation and intercession through notice and warning by the administrative branch is necessary.

For these reasons, and by reference to comparative legal studies, the system has been changed from one where criminal sanctions applied directly to conducts prohibited under Article 10, Article 14, and Article 20, to a new system that applies administrative sanctions before judicial (e.g. criminal incarceration) punishment. Violations of these provisions of the Law, in a manner similar to Article 32 of the Business Registration Law, will now first be subject to administrative disposition by the Commission, and only if the respondent fails to take corrective measures will the matter be referred to the judicial or prosecution authorities and be subject to potential criminal punishment.

It should be noted that this principle has not been adopted across the board. For example, in regard to Article 23 which regulates multi-level sales, due to the relative clarity on the requirements of the crime and the potential for serious adverse consequences, the amendments to the Law have retained the approach whereby procedures for criminal punishment may be initiated in parallel with those for administrative sanctions.

The Fair Trade Law of Taiwan has a pretty wide coverage, as Chart 1 can testify. The FTC carries out its role independently in accordance with the Law and can dispose of cases in respect of fair trade in the name of the Commission.

The FTC has as its decision-making organ the “Commissioners Meeting”. The FTC is among the very few commissions under the Cabinet, which make their decisions in a collective way. To ensure that opinions from all sectors are considered and incorporated, and that cases are handled in conformity with legislative intent, FTC decisions are made by a majority vote of the commissioners.

**Chart 1 Regulatory Framework of the Fair Trade Law**

The FTC has nine full-time commissioners. The commissioners each serve a three-year term, and may be re-appointed. One commissioner is appointed chairperson, and charged with supervising the overall affairs of the FTC. The chairperson also serves as a cabinet member of the government. All nine commissioners are recommended by the Premier and appointed by the President.

Commissioners are required to transcend party affiliations and perform their duties independently under the law, free of the influence of any political party. The number of commissioners of the same political party may not exceed half the total number of commissioners.

## **VII. Who's afraid of the FTC?**

In the debate about having a competition institution in Hong Kong, there is the fear of a nightmare situation under which a competition authority with investigative powers keeps on demanding detailed financial statements from companies, interrogating business executives, and searching premises for evidence of collusion. I have already argued against such a populist fear by quoting the example of the Independent Commission Against Corruption (ICAC) in Hong Kong. Let us now look at the actual operation of Taiwan's FTC, which apparently has greater legal power, in comparison with the two other institutional models of the US DoJ and the ACCC.

First, a little reality check. The whole FTC is allowed to have a staff establishment of 180 to 242. As of July 1999, it had a payroll of 215, less than twice of the Consumer Council in Hong Kong, although Taiwan's population is more than twice that of Hong Kong's. We have yet to find out the FTC's actual budget, but staff cost is likely to be the lion's share of any competition authority, particularly for an agency-based regime like Taiwan's. And for those who are wary of possible mid-night knocks on the door, the following statistics should be re-assuring.

In the nine years of its existence, the FTC has entertained a total of over 12,000 complaints. However, it acted only on about 1,300 of them, just above 10%, as Table 1 shows. "Decision" refers to "a complaint case in which the FTC makes a decision in its commission meeting declaring that the accused enterprise violated the Fair Trade Law or related regulations or the Supervisory Regulation on Multi-level Sales and is subject to disciplinary action." The majority of the complaints actually had the fate of being terminated for further review.

**Table 1 Statistics on Complaints and Results**

	<b>Total</b>	<b>Decision</b>	<b>No-action Decision</b>	<b>Administrative Action</b>	<b>Termination of Review</b>	<b>Cases Combined</b>
<b>Total</b>	12311	1323	2387	271	7396	934
<b>1992</b>	757	51	100	-	591	15
<b>1993</b>	1094	78	200	7	749	60
<b>1994</b>	1408	118	306	40	852	92
<b>1995</b>	1643	157	281	75	997	133
<b>1996</b>	1633	172	331	62	931	137
<b>1997</b>	1662	201	320	34	912	195
<b>1998</b>	1409	218	285	23	773	110
<b>1999</b>	1453	151	284	17	912	89
<b>2000</b>	1252	177	280	13	679	103
Jan.	119	9	30	2	60	18
Feb.	87	11	28	1	44	3
Mar.	122	16	25	1	78	2
Apr.	114	23	29	2	57	3
May	117	21	31	-	54	11
June	107	21	23	-	54	9
July	108	20	17	2	53	16
Aug.	140	10	34	2	84	10
Sep.	127	17	18	1	74	17
Oct.	97	13	25	-	54	5
Nov.	116	16	20	2	67	11

Regarding those cases that the FTC did entertain, its resolutions and sanctions have been far from draconian, as Table 2 testifies. Its rulings have been largely inclined towards unfair rather than restrictive practices, with the latter accounting for only 12% of the decisions.

Table 2 Decision Rulings for Fair Trade Activities

	Cases of Decision	Restrictive Business Practice					
		Subtotal	Monopolies (Article 10)	Merger (Article 11)	Concerted Actions (Article 14)	Resale Price Maintenance (Article 18)	Impeding fair Competition (Article 19)
<b>Total</b>	1519	182	2	18	62	24	76
<b>1992</b>	63	22	-	-	4	10	8
<b>1993</b>	90	11	-	1	-	3	7
<b>1994</b>	156	7	-	1	2	1	3
<b>1995</b>	177	26	-	-	5	2	19
<b>1996</b>	197	23	-	4	5	4	10
<b>1997</b>	227	21	-	2	10	2	7
<b>1998</b>	246	17	-	-	8	2	7
<b>1999</b>	166	26	-	8	11	-	7
<b>2000</b>	197	29	2	2	17	-	8

	Unfair Trade Practice					Improper Multi-level Sales (Article 23 & Article 23-1~23-4)	Others (Fairlure to Make Correction or to Provide Date beyond deadling) (Articles 41 & 43)
	Subtotal	Counterfeiting Commodities or Trademarks (Article 20)	False, Untrue and Misleading Advertisement (Article 21)	Damage to Business Reputation (Article 22)	Deceptive or Obviously Unfair Action (Article 24)		
<b>Total</b>	1207	19	720	11	457	136	65
<b>1992</b>	44	1	42	-	1	4	-
<b>1993</b>	68	-	55	-	13	11	5
<b>1994</b>	138	-	82	3	53	14	8
<b>1995</b>	136	3	92	1	40	15	7
<b>1996</b>	165	1	104	1	59	5	8
<b>1997</b>	185	2	109	3	71	19	11
<b>1998</b>	192	7	101	1	83	27	22
<b>1999</b>	129	-	69	1	59	14	3
<b>2000</b>	150	5	66	1	78	25	1

*Notes:* The figures for the year 2000 are up to November only. The cases may not add up because some may involve more than one legal action. The numbers of decisions in Tables 1 and 2 are different because the latter includes also FTC-initiated decisions.

### **VIII. Concluding remarks**

In conclusion, we wish to emphasise that there are many possible approaches to how a competition law can be enacted, administered and enforced. Apart from having key principles of prohibited conduct, interacting with market structure and performance, there are seven key questions related to how a competition law is put in practice, with different answers to each.

1. What is the optimal coverage of the competition law, given the specific conditions and developmental stage of the economy?
2. What arrangements are there for administering the law?
3. Who carries out investigations of alleged violations?
4. What body makes a judgment on whether there has been violation, the agency or the court?
5. What sanctions are available, i.e., administrative, civil, criminal?
6. What are the appeal/review arrangements, i.e. tribunal, semi-judicial or fully judicial?
7. Should there be sector-specific competition regulators and what should be their relations with the general competition authority?

Hong Kong should make careful reference to the experience of regimes that have been proven basically successful. We have summarised a few of them in this paper. If we want to be cautious, can we start with a focused competition law covering only “hard core cartels”? This could be administered and enforced in a light-handed manner by a FTC-type institution, as an alternative to court based processes that raise the spectre of high litigation costs.

Perhaps we need an independent commission to look into these crucial issues.

Attached is a table that lists the key functions and operational patterns of the enforcement agencies of the three competition regimes analysed in this paper.

Comparative Table of Three Institutional Models

	<b>Administration</b>	<b>Investigation</b>	<b>Judgement</b>	<b>Sanctions</b>	<b>Appeal</b>	<b>Industry specific regulator</b>
<b>US Dept of Justice (DoJ)</b>	Government Department  Headed by Attorney General appointed by President	Assistant Attorneys appointed by President and civil service staff of the Antitrust Division of DoJ.	Public court system.	DoJ applies to court for civil and criminal fines & orders and prison sentences.  Right of private action	Higher court.	Separate agencies for - telecomms & broad-casting, - shipping, - energy.
<b>Australian Competition and Consumer Commission (ACCC)</b>	Independent Agency.  Board of Members appointed by Govt. for fixed periods.	Civil service staff assisting the Members.  'National Competition Council' identifies 'essential facilities' for ACCC to administer access provisions.	Public court System.  Some limited administrative powers to arbitrate access disputes & grant exemptions.	ACCC applies to court for civil fines & orders.  Right of private action	Higher court.  Special competition tribunal under the court system reviews ACCC's administrative powers	All competition regulation undertaken by ACCC.  Technical/policy regulators for specific sectors have associate membership of ACCC
<b>Taiwan Fair Trade Commission (FTC)</b>	Independent Agency with nine Commissioners appointed by Govt. The Chairperson also serves as a Cabinet member of the government.	Civil service staff of the FTC.	The 'Commissioners Meeting' made up of FTC members. Decisions taken by majority vote.  Public court system for criminal matters.	FTC administrative decisions leading to fines & orders.  Application to court for criminal cases, leading to prison sentences and fines.	Higher court can review criminal sanctions.	Separate telecomms and broadcasting competition regulator.