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Doctoral Dissertation

THE REGULATION OF PRICE-FIXING CARTELS UNDER VIETNAM'S COMPETITION LAW: A COMPARATIVE ANALYSIS WITH THE JAPANESE ANTI-MONOPOLY ACT AND THE EU COMPETITION LAW

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Abstract

The purpose of this dissertation is to analyze the principles by which the Vietnam Competition Authority (VCA) examines price-fixing cartels through a comparative study with the Japan Fair Trade Commission (JFTC) and the European Commission. This dissertation found that although Vietnamese enterprises were already fiercely competing with each other, due to the ongoing evolution of Vietnam's socialist-oriented market economy concept, and the nation was benefitting from competition at the time of enacting competition law in December 2004, the concept of 'cartels' that had been adopted by law-makers in 2004, no longer meets the requirements of present-day Vietnam. While Japan and the EU are following 'conduct and effect-based' approaches, Vietnam is applying a 'traditional form-based' approach to identifying cartels. This study highlighted that cartels could not work without mutual coordination feature.

This study also explored how Japan and the EU examine the conduct and harms of price-fixing cartels, finding that the JFTC applies the rule of reason and the European Commission follows the per se illegal rule. This dissertation demonstrated that the VCA's principle of 30 percent market share threshold in the relevant market to examine the price-fixing cartels is not sufficient enough to effectively control the monopoly in an oligopolistic market. This is because the Vietnamese approach mainly relies on product definition and calculation of market share under circumstances where the VCA does not have access to sufficient data to properly define products or identify boundaries for relevant markets. The VCA also faces significant challenges due to its limited resources and its non-independent nature vis-a-vis the Ministry of Industry and Trade (MOIT).

Significantly, this dissertation found that the price-fixing cartels, which lead to monopoly and inefficient use of resources, are categorized by competition legislators as 'hard-core' cartels because of their extreme harm to markets and consumers. Many jurisdictions are applying the per se illegal rule for this kind of cartel. Finally, the study proved that after 12 years of enforcement in Vietnam, the perception of cartels has been enhanced. Stricter sanctions against such as higher fines and criminal penalty were introduced. In order to combat the price-fixing cartels effectively and efficiently, this dissertation suggests that it is crucial for Vietnam to define cartels in a more

comprehensive way that encompasses all cartel types, to apply the per se illegal rule for price-fixing cartels, to take into consideration of the concept of 'substantial restriction of competition', to examine the harms of cartels in general and introduce the leniency program, and to adopt a comprehensive competition policy that will promote greater economic efficiency in Vietnam.

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Chapter I:
Introduction

I. An Overview of Cartels

1. The General Context

The concepts of ‘anti-cartel enforcement’ and ‘equitable opportunity for all market participants’ were developed and applied in practice in the late 19th century. Canada was known as the first country in the world to enact a competition law in 1889 to tackle the problem associated with price-fixing and output restriction.[1] A year later, in 1890, the US Sherman Act was enacted and became one of the fundamental provisions on anti-cartel enforcement. Accordingly, every contract, combination or any conspiracy to restrain trade is prohibited.[2] Both competition legislations applied a strict penalty with fines and criminal sanctions to those who infringed upon the rules. As a result, the trend of anti-cartel enforcement spread to other jurisdictions. Japan enacted its anti-monopoly act in 1947 under the pressure of the Allied Forces to dissolve the cartels or zaibatsu in Japanese language after the World War Second. And the EU Competition Law was first introduced in 1951 as a regional competition rule together with its evolution of economic integration for the European Economic Community.

Vietnam has also been a part of this trend to implement competition rules. Vietnam’s Competition Law (VCL) was enacted in 2004 under the pressure of negotiating members of the World Trade Organization (WTO) as one of the preconditions to becoming a full WTO member. A question remains, however, as to whether the Vietnamese economy is ready to transplant a competition law, also referred to as the ‘economic constitution’ (where some competition scholars argue that the competition process should be protected as an important economic right).[3] Further, the question of “How does Vietnam conceptualize cartels?” also needs to be explored.

2. The Concept of Cartels

2.1 Horizontal and Vertical Cartels

[1]“Competition Policy in Canada: Past and Future,” 2016, http://www.apeccp.org.tw/doc/Canada/Policy/1c.pdf (accessed June 5, 2017).
[2] US Federal Trade Commission, “The Antitrust Laws | US Federal Trade Commission,” 2017, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (accessed June 5, 2017).
[3] Daniel Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing, 2012), 102.

In theory, the meaning of cartel is defined by different scholars with varied expression. John M. Connor, for example describes a cartel as "an association of two or more legally independent firms that explicitly agree to coordinate their prices or output for the purpose of increasing their collective profits."[4] John Sanghyun Lee defines a cartel as "a type of association consisting of competing entrepreneurs which controls sales or productions or shares knowledge with the purpose of preventing competition."[5] The International Competition Network points out that one component needed to form a cartel is an agreement between direct competitors to mutually restrict the competition in a particular sector.[6] The agreement could be understood as a contract, a record of meeting, fax, emails or Internet chat. An agreement of direct competitors refers to companies or manufacturers at the same level of competition who mutually fix the price of goods or services or to allocate the customers that causes to a competition restriction. The particular sector means that mutual agreement could happen in the goods or services market. Thus, the agreement between direct competitors is defined as a horizontal agreement.

An agreement between indirect competitors, which is conducted between manufacturers and distributors or retailers, is called a vertical agreement.[7] The conduct of vertical restraint refers to tying arrangements, exclusive dealing agreements, and resale price maintenance and territorial or customer restrictions on resale. These tying arrangements mean that a seller places the condition of the sale of one product on the buyer's agreement to buy another separate product from the same seller. According to Richard Whish and David Bailey, as a general proposition, "vertical agreements are much less likely to harm competition than horizontal ones."[8] In addition, the nature of competition restriction in vertical agreements is also different from horizontal agreements because parties operate in different businesses.

Significantly, another formality of agreement is the informal exchange of intention, for example, mutual thinking, consent, or parallel conduct that is consistent with the issue

[4] John M. Connor, *Global Price Fixing: Our Customers Are the Enemy* (Springer Science & Business Media, 2013), 20.
[5] John Sanghyun Lee, *Schemes to Achieve a Binding International Agreement on Regulating Cartels* (Springer, 2016), 11.
[6] *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties: ICN 4th Annual Conference : Bonn, Germany, 6-8 June 2005* (Office for Official Publications of the European Communities, 2005), 10.
[7] Elspeth Berry, Matthew J. Homewood, and Barbara Bogusz, *Complete EU Law: Text, Cases, and Materials* (OUP Oxford, 2013), 468.
[8] Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2012), 3.

communicated could result in an act of collusion.[9] Some scholars use the economic term, 'conscious parallelism' that as a synonym for 'tacit collusion'. Jurgita Bruneckienė proposes that although cartel and collusion have similar forms, the concept of collusion has a broader meaning than 'cartel' in economic terms.[10] In addition, Bruneckienė also differentiates between a number of forms of collusion, including informal collusion, tacit collusion and explicit collusion.[11]

On the other hand, Richard Whish and David Bailey argue that 'tacit collusion' or 'conscious parallelism' is fundamentally different from tacit or implicit agreements in the legal sense.[12] Specifically, tacit collusion means a market where goods or services suppliers are able to coordinate their price agreement without actual communication. In such circumstances, prices are elevated to monopolistic levels through interdependence and mutual awareness of each competitor. And the rationale for oligopolistic interdependence is that rational profit-maximizing firms adapt themselves to existing conduct and anticipate future conduct of their rivals. For example, in a highly concentrated industry and in an oligopoly, the number of firms is small and each firm controls a considerably large market share, so that any change of price and output decision by one firm may be observed by others and thereby affecting them. In such conditions, firms act independently but are aware of one another's existence.[13] Thus, in an oligopoly, a cartel could be formed without an agreement.

2.2 The Concept of Cartels under Vietnam's Competition Law

According to Article 3(3) of Vietnam's Competition Law, a competition restriction agreement is listed in a group of competition restriction acts that include abuse of dominant market position, abuse of monopoly position and economic concentration. Here, the anti-competitive conduct of competition restriction agreement is defined as "acts of enterprises to reduce, distort or hinder competition in the market."[14] Further, the form of cartel is defined through a list of conduct in Article 8 of the VCL. Thus, within the context of the above-mentioned theory and understanding

[9] Masako Wakui, *Antimonopoly Law: Competition Law and Policy in Japan* (Arima, 2008), 54–55.
[10] Jurgita Bruneckienė et al., *The Impact of Cartels on National Economy and Competitiveness: A Lithuanian Case Study* (Springer, 2015), 3.
[11] Ibid.
[12] Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2009), 547–48.
[13] Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (Pearson/Addison Wesley, 2005), 157.
[14] Article 3(3), Vietnam's Competition Law, Law No. 27/2004/QH11 [Luật cạnh tranh, Số 27/2004/QH11] (Vietnam Competition Authority 2004).

of cartels, the Vietnamese concept of cartel is limited to competition restriction agreements. However, this limited conceptualization of cartels under Vietnam's Competition Law is not sufficient and comprehensive enough to detect cartel activity. If, for example, a particular cartel agreement is not listed in the legislation, then the question arises as to whether or not that conduct is legal. A further question regarding cartels is whether or not the definition of cartels includes both horizontal and vertical agreements. The questions and gaps in the Vietnamese concept of cartels are indeed many: Does the Vietnamese concept of cartels include the terms of 'mutually or in concert with other enterprises' to restrict the competition as one of the significant characteristics of cartels? Should the current provision of competition restriction agreement stipulate whether it is explicit or implicit? Is there a gap between the regulation and practice on the concept of cartels under the Vietnam Competition Law? Furthermore, with such a concept of cartel, how does the VCA deal with the price-fixing cartels?

The first case of a price-fixing cartel occurred after the annual meeting of the Vietnam Insurance Association (VIA) in September 2008. Accordingly, 19 members of the VIA increased car insurance premiums without a reasonable explanation. As a result, consumers were forced to pay a very high insurance fee for their cars due to the anti-competitive conduct. Focusing on this and several cases, this dissertation considers how Vietnam currently conceptualizes cartels and considers how this conceptualization needs to be changed to meet the needs of Vietnam as it integrates into the regional and global economies.

II. Features of Price-fixing Cartels in Vietnam

1. The Nature of Price-fixing Cartels

A price-fixing cartel is a typical type of cartel formation. John M. Connor defines price-fixing cartels as "an explicit agreement among sellers of the same product."[15] Based on the characteristics of cartels, price-fixing cartels can be illustrated as any agreement among competitors (horizontal agreements) or between manufacturers and distributors (vertical agreements or resale price maintenance) to raise, fix or otherwise maintain the price of a product

[15] John M. Connor, *Global Price Fixing* (Springer Science & Business Media, 2007), 25.

or service. The objectives of price-fixing cartels are to establish a minimum price, to eliminate discounts, or to adopt a standard formula for calculating prices to maximize profits.[16]

Whish and Bailey argue that although the benefit of a price-fixing cartel is to earn more profits, enterprises often pay attention to the possible difficulty, cost and risk before coming to a decision about a cartel formation.[17] Enterprises may face difficulty in fixing an agreeable price and in keeping the price fixed. The more efficient firms can expect to have a lower price because they can attract more consumers by selling cheaper products. On the other hand, enterprises producing differentiated goods want a higher price to cover the cost of promoting their brand image.[18] Thus, cartel members could face an internal conflict of interest.

Cartel members will often meet to ensure that individual members do not break the cartel agreement by secretly reducing prices, implementing discount programs or changing product quality. Hence, if they meet to exchange information more often, there will be a risk to be detected by the competition enforcers. Further, cartel participants cautiously calculate the benefits of the cartel and possible punishments if antitrust enforcers discover their illegal conducts. To agree with this observation, Richard Posner stated a firm would balance the potential gains and costs as well as the punishment when considering the formation of a cartel.[19]

2. The Economic Effects of Price-fixing Cartels

2.1 The Harmful Effects of Price-fixing Cartels

In theory, a perfect competition in which "the benefits from competition are highest and social welfare is maximized"[20] is beneficial to both producers and consumers. Moritz Lorenz proposes that the benchmark of perfect competition includes the following four elements: (i) products are homogeneous; (ii) each individual firm is unable to influence the market price; (iii) barriers to market entry and exit don't exist; and (iv) there is available information for both firms and consumers in the market.[21]

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[16] *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties*, 10.
[17] Whish and Bailey, *Competition Law*, 522.
[18] Ibid.
[19] Richard A. Posner, *Antitrust Law* ("The" University of Chicago Press, 2001), 60.
[20] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013), 7–8.
[21] Ibid., 5–6.

Additionally, Bishop and Walker also described the perfect competition as economic efficiency, which refers to 'allocative efficiency' and 'productive efficiency'.[22] Firstly, an allocative efficiency refers to the economic resources under perfect competition are allocated between different goods and services. An allocative efficiency is achieved when perfect competition leads resources to be allocated to the highest valued use among all competing uses. Specifically, from the view of producers, they will sell products to consumers that are willing to pay the highest price. In contrast, consumers will be ready to buy the suppliers' products if the price is equal to the lowest real resource cost of supplying that product. This means that the market price is equal to the marginal cost and meets the principles of supply and demand. The improvement of allocative efficiency will maximize benefits to both producers and consumers.

A productive efficiency, on the other hand, is achieved when products are produced at the lowest possible total cost with available technology. Producers will try to reduce costs and to use as few resources as possible. If a producer makes a product having a higher cost than others, that producer will suffer a loss and will force them to leave that market. So, producers always make an effort to operate as efficiently as possible by investing more into innovation and new technology in order to improve the quality of their products and increase productive efficiency. As a result, an improvement in productive efficiency can encourage producers to develop better technology and to help reduce costs.

Sharing this viewpoint, Whish and Bailey also argue that the benefits of perfect competition are "lower price, better products, wider choice and greater efficiency than would be obtained under conditions of monopoly."[23] Additionally, Richard Posner[24] has introduced an economic approach to antitrust law because "antitrust law is a body of economically rational principles and it deals with what are at root, economic phenomena."[25] Thus, the effects of price-fixing cartels are analyzed based on how they affect economic efficiency.

Dealing with a price-fixing cartel agreement, producers will increase the price by reducing the production volume or reduce sales by increasing the price. As a result, there is an

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[22] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell, 2010), 25.
[23] Whish and Bailey, *Competition Law*, 4.
[24] Richard A. Posner was a judge in the U.S. Court of Appeals for the Seventh Circuit and a representative of the Chicago School of Competition Theory.
[25] Richard A. Posner, *Antitrust Law* ("The" University of Chicago Press, 2001), 1.

allocative inefficiency that "is called 'deadweight loss' attributable to monopoly in this situation: society's resources are not distributed in the most efficient way possible."[26] A group of scholars including Viscusi, Vernon, and Harrington also criticized the issue of deadweight loss in the book titled Economics of Regulation and Antitrust.[27] Furthermore, due to the harms of price-fixing cartels, goods and services become more expensive and consumers have less choice. Therefore, Whish and Bailey conclude that there should be an intervention of the 'invisible hand' of competition to function the society's resources in an effective and efficient way.[28]

2.2 Price-fixing Cartels as 'Hard-core Cartels' and the Application of Per se illegal Rule

To illustrate the reflection of cartels, Easterbrook held that a pricing cartel agreement is different in appearance to a traditional cartel and such an agreement should be illegal.[29] Significantly, Lande and Marvel suggest that because of the direct competitors having a strong influence in deciding the price of a product or services to gain supra-competitive power at the consumers' expense, horizontal agreements are classified as the most harmful cartels and are thus considered 'hard-core cartels'.[30] The current practice is that many jurisdictions have defined the following four types of cartels as the 'hard-core': price-fixing, output restrictions, market allocation and bid-rigging.[31]

Concurrently, many competition countries in the world apply a per se illegal rule for price-fixing cartels. In other words, any agreement that restricts competition is illegal and defendants cannot argue that the fixed price is reasonable. Robert H. Bork holds that the per se illegal rule against naked price-fixing agreements is not only justified on economic grounds but also because of the rule's clarity and ease of enforcement.[32]

3. Price-fixing Cartels in Vietnam and the 30 percent Relevant Market Threshold

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[26] Whish and Bailey, *Competition Law*, 6.

[27] W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, *Economics of Regulation and Antitrust* (Massachusetts Institute Of Technology, 2000), 77–78.

[28] Whish and Bailey, *Competition Law*, 7.

[29] Frank H. Easterbrook, "Maximum Price Fixing," *The University of Chicago Law Review* 48, no. 4 (October 1, 1981): 891.

[30] Robert H. Lande and Howard P. Marvel, "The Three Types of Collusion: Fixing Prices, Rivals, and Rules," *Wisconsin Law Review* no. 941 (2000): 947.

[31] *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties*, 10.

[32] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978), 269.

According to Article 9 of the VCL, while bid-rigging agreements are prohibited, price-fixing cartels are not illegal if the combined market share of concerned cartel members below 30 per cent in the relevant market. Why did the Vietnamese lawmakers adopt such a provision?

Consequently, in order to examine the effects of price-fixing cartels, the Vietnam Competition Authority (VCA) has adopted the principle of combined market share of 30 per cent in the relevant market. This dissertation will thus address the following three questions: How does the VCA examine the combined market share of 30 percent? Has the market share approach worked effectively to detect the price-fixing cartels since the enactment of the VCL on December 3, 2004? What is the suggestion for improvement for Vietnam to develop an effective competition policy?

III. Options for the Effective and Efficient Detection of Cartels for Vietnam

In theory, McGowan stated that the price-fixing cartel agreements are often fragile or instable because market conditions are changing quickly.[33] In addition, cartel members have to meet frequently to adjust their plans. Furthermore, Bork holds that "the temptation to 'cheat' frequently results in outbreaks of price competition that either destroy the cartel or must be repaired by further meetings and agreements."[34] In other words, these characteristics of cartels potentially make them easy to be detected by competition enforcers.

Currently, the anti-cartel enforcement is at the top of the agenda of competition enforcers. While the enforcing authorities are applying a strict sanction against cartels to deter cartel formation, many competition jurisdictions implement a leniency program to effectively combat the cartels. A leniency program is defined as an incentive policy to exempt or reduce penalties of violated conduct if cartel members voluntarily report their illegal activities to competition enforcers before and after the investigation process has started. The objective of the program is to help the enforcing authorities detect more secret cartels and to facilitate the provision of more cartel evidence to the investigation team.

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[33] Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Edward Elgar Publishing, 2010), 35–36.
[34] Bork, *The Antitrust Paradox*, 183.

The fact is that Vietnam is facing more anti-competitive agreements. However, the VCA lacks useful tools such as a leniency program to facilitate the detection of cartels. This thesis will consider whether Vietnam is ready to accept a leniency program and examine how best to make such a program function effectively in Vietnam.

IV. Aim and Structure of the Dissertation

After 12 years of enforcing competition rules, the Vietnam Competition Authority has been carrying out the first amendment process of the competition law to correspond with Vietnam's current stage of development and enhance the perception of cartels in Vietnam since late 2016. The need to stipulate an effective competition law is crucial for Vietnam's long-term economic development to ensure a level playing field for all enterprises and to eliminate anti-competitive conduct. Therefore, this dissertation analyzes the principles that the VCA uses to examine the price-fixing cartels through a comparative analysis with the principles of the Japan Fair Trade Commission (JFTC) and the European Commission. This dissertation also highlights issues that the enforcing authority needs to consider to amend Vietnam's competition rules effectively and efficiently. Concurrently, while the law needs to be revised in accordance with the current condition of Vietnam, there is also a need for the future competition rules to be compatible with the current trends and practices of the world to ensure a free and fair competition regime.

To this end, this dissertation presents a comparative study on the regulation of price-fixing cartels under Vietnam's Competition Law, the Japanese Anti-Monopoly Act and the EU Competition Law. With a 70-year history of evolution of the Japanese Anti-Monopoly Act and a 66-year history of development of the first regional EU Competition Law, this dissertation proposes that the practices and experiences of these two competition jurisdictions present very practical and useful lessons for Vietnam. From a comparative perspective, this dissertation will provide a background to the historical cartel development of Japan and the EU, why these competition countries have a different approach towards cartels compared with Vietnam, how these competition jurisdictions examine the price-fixing cartels and how are these two jurisdictions able to fight cartels effectively and efficiently.

In terms of the structure, this dissertation commences with an introduction part that includes theories related to cartels and price-fixing cartels, their economic harms and the current cartel provisions of Vietnam Competition Law. Chapter II will review the reasons why Vietnam enacted its competition rules, what Vietnamese lawmakers expected from the enforcement of competition law and pinpoint the concept of cartels and regulation of price-fixing cartels. Chapter III will review and analyze the legislation and practices of Japan and the European Union dealing with price-fixing cartels. Chapter IV will present a comparative study about the conditions, perception of cartels and the way to examine price-fixing cartels in Vietnam, Japan and the EU. This chapter will also address the question why Vietnam maintains a different approach to examining price-fixing cartels. This is particularly relevant in the context of Vietnamese legislators who are currently discussing the first amendment to the competition law, as this chapter will contribute important suggestions for improvement. Finally, Chapter V will consolidate fact-finding and analysis from the previous chapters and answer all questions that were posed in the introduction.

Last but not least, in order to create favorable conditions for the readers to look up cartels regulations under the Vietnam Competition Law, the dissertation cites some significant articles as appear in the Appendix. Moreover, this research paper will not analyze in detail the examination of vertical pricing agreements and international cartels. These issues may be further explored in the future.

Chapter II:
Vietnam Competition Law: Centralism on the Principle of Market Share

This Chapter focuses on reviewing and analyzing the reasons why Vietnam initially implemented a competition law, how Vietnamese lawmakers deliberated and developed the competition bill, what was the impact of the competition law's enactment and what are its current weaknesses. To this end this Chapter will consider the internal preparedness of the Vietnamese government (whether it was ideologically prepared and had in place the necessary legal framework) and examine whether the current competition law still functions as originally intended. Significantly, in a changing world, the Communist Party of Vietnam made a historical decision, when it opened up the Vietnamese economy in 1986. However, the question is whether the current competition law regulations are sufficient to support a competitive business environment that promotes fair and equitable practices for the five economic forms recognized under Vietnamese law. As a starting point in addressing this question, this chapter will explore the changing perception of the market economy by the leaders of the Communist Party of Vietnam (CPV), the leading force in making the political and economic development policy of Vietnam. To identify the changing perception of the CPV, this chapter will analyze the resolutions of the Congress of the Communist Party, which are held every 5 years.

Understanding the process by which the current Vietnamese Competition Law (VCL) was enacted is crucial to gaining an appreciation of its scope and weaknesses. To this end, this chapter will also review the goals put forth for the enactment of the VCL, the principles underpinning the drafting of the Competition Bill, and the lawmakers' expectations of the ultimate outcome of the VCL. In addition, this chapter will examine the discussions of Vietnamese lawmakers on critical issues concerning competition restriction agreements to understand what they expected. By reviewing the current competition law and regulation as well as by illustrating and analyzing the cases after more than 12 years of enforcement of competition rules in Vietnam this chapter will clarify what is meant by cartels, the approach for regulating price-fixing cartels and the principles for the examination of cartels within the Vietnamese context.

I. Political and Economic Conditions of Vietnam

1. Before Doi moi: Centrally Planned Economy

After Vietnam declared independence on September 2, 1945, it commenced the development of a Socialist State. Accordingly, Vietnam built its ideological theory based on the concept of socialist ownership, which meant that all means of production were owned by the state. The economic sectors consisted of underdeveloped agricultural and industrial sectors. Specifically, the agricultural technology was primitive and relied exclusively on manual labor. Consequently, agricultural productivity was low compared to that in Thailand and Japan. While these two countries were achieving agricultural productivity levels as high as 1,200 kg per ha and 1,800 kg per ha respectively, Vietnamese was only achieving approximately 100 kg per ha. The industrial sector was also still in its infancy with only 200 factories that had been established between 1930 and 1943 and using old and outdated equipment. The majority of these 200 factories produced textiles and at the time Vietnam had no industrial manufacturing capabilities.[35]

Following Vietnam's declaration of independence, the French returned and engaged in a war with the Vietnamese from 1946 to 1954 (The Anti-French Resistance War[36]). During this period, the Vietnamese economy relied mainly on agricultural production, however the conflict with the French resulted in a growth of the defense industry, and ultimately stimulated the production of essential consumer goods to meet the growing domestic demand. In order to make up for Vietnam's low capacity for manufacturing weapons and essential goods, the Chinese government provided assistance to meet the growing demand.[37]

The French left Vietnam by signing the Geneva Accords in 1954, which established the 17th parallel as the boundary between Vietnam's communist North and non-communist South. But as communist regimes quickly became entrenched throughout Indochina and the communist regime had already taken control of Mainland China, founding the People's Republic of China the U.S. decided to intervene in Vietnam to stop the Domino effect. The Domino effect was inspired

[35] Editor in Chief Nguyen Ba Khoang, "[60 Years of Economic and Social Development from a Democratic Republic of Vietnam to the Socialist Republic of Vietnam] [60 Năm Phát Triển Kinh Tế-Xã Hội Từ Nước Việt Nam Dân Chủ Cộng Hò Đến Nước Cộng Hoà Xã Hội Chủ Nghĩa Việt Nam]," 2005, http://www.gso.gov.vn/default.aspx?tabid=382&idmid=2&ItemID=2998 (accessed March 26, 2016).

[36] Also known as the First Indochina War

[37] Ho Khang, "[China and Soviet Union Assisted Vietnam in the Battle of Dien Bien Phu] [Trung Quốc, Liên Xô Giúp Đỡ Việt Nam Trong Chiến Dịch Điện Biên Phủ]," *Báo Nhân Dân - Nhân Dân điện tử*, May 3, 2014, http://www.nhandan.com.vn/chinhtri/item/23091602-trung-quoc-lien-xo-giup-do-viet-nam-trong-chien-dich-ðien-bien-phu.html (accessed June 12, 2017).

by former U.S. President Dwight Eisenhower, who at that time feared that losing one country to communism could trigger more countries following suit.[38]

The legal system in Vietnam at that time was hybrid in nature, with the French imposed civil law system which originally was intended to govern French citizens, and the Nguyen Code and customary practice governed the Vietnamese.[39] The U.S. government backed Southern Vietnam and promoted the development of the economy in a capitalism-oriented direction. The French legal system in Southern Vietnam was subsequently supplemented when U.S. legal advisors arrived in the early 1960s. The U.S. set up a new constitutional framework, which consisted of a presidential system and the separation of powers between the executive, legislative, and judicial branches.[40]

In contrast, the economy of Northern Vietnam relied on the Soviet Union assistance for military equipment and food to sustain the fighting against the Southern forces. Consequently, the legal system in the North was heavily influenced by the socialist legal system of the Soviet Union, consisting largely of legal transplantation. This process of legal transplantation was also influenced by the "Rule of Traditional Law" and thus the socialist legal system that developed in Northern Vietnam contained elements of "Eastern culture, morality, Confucianism and traditions."[41]

Following the war with the U.S., which ended on April 30, 1975, the South and the North of Vietnam were unified as one independent country. Vietnam restructured the legal and political institutions of the country. As a part of this restructuring process, in 1976, the Vietnamese government commenced significant reforms of the nation's economy and established a centrally planned economic system. Following this restructure, there were only two types of business forms

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[38] David A. Welch, *Painful Choices: A Theory of Foreign Policy Change* (Princeton University Press, 2005), 126.

[39] Andrew L. Odell and Marlene F. Castillo, "Vietnam in a Nutshell: An Historical, Political and Commercial Overview," *NYSBA International Law Practicum* Vol. 21, no. No. 2 (2008): 83.

[40] Andrew L. Odell and Marlene F. Castillo, "Vietnam in a Nutshell: An Historical, Political and Commercial Overview," 83.

[41] Nguyen Xuan Tung, Ministry of Justice, "The Socialist Legal Tradition in Vietnam: Some Thoughts - Truyền Thống Pháp Luật XHCN Tại Việt Nam: Đôi Điều Suy Ngẫm," *The University of Procuratorate*, 2013, http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/119/635 (accessed October 1, 2016).

permitted: state-owned[42] and collectively owned enterprises.[43] These two types of businesses did not compete with each other because their business rights were limited through government supervision and management of all business activities. The nature of this supervision and management meant that government often determined the kinds of products that state-owned enterprises (SOEs) produced, and for the products that the domestic industry was unable to produce, the government appointed specific SOEs to import and distribute such goods domestically. These arrangements meant that the principle of supply and demand did not exist and as a result, the supply of goods did not meet the demands of the people.

The State controlled every aspect of Vietnam's economy and offered no ground for competition.[44] The rights of Vietnamese were closely controlled by the State, and any activity, particularly commercial activity, was unlawful unless expressly authorized by law.[45] Legal interpretation was not based on legal precedent, but on the "guiding principles" set forth by the State.[46] Economically, the ten years following unification of the country were considered the gloomiest years in Vietnamese history.[47] It was ironic that while more than 80 percent of Vietnamese resided in the countryside, Vietnam was unable to produce sufficient quantities of food to meet the basic needs of its population and thus was required to import rice. The industrial and commercial sectors were stagnant, the availability of food and equipment was not sufficient to sustain daily needs and the inflation rate reached a record high of 774.7 percent in 1986. Consequently, the lives of the Vietnamese people were extremely miserable with little scope for improvement.[48]

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[42] A state-owned enterprise (SOE) is a legal entity that is created by the government in order to partake in commercial activities on the government's behalf.

[43] Collectively-owned enterprise is owned by the government and is composed of cooperatives.

[44] Vietnam Open Educational Resources, "[Overview on Vietnam Economy] [Tổng Quan Kinh Tế Việt Nam]," n.d., http://voer.edu.vn/m/tong-quan-kinh-te-viet-nam/f4200aee (accessed March 26, 2016).

[45] Carol V. Rose, "The 'New' Law and Development Movement in the Post-Cold Era: A Vietnam Case Study," *Law & Society Review* (1998): 2.

[46] Andrew L. Odell and Marlene F. Castillo, "Vietnam in a Nutshell: An Historical, Political and Commercial Overview," 84.

[47] Tran Van Tho, *A Shock of Timing and Vietnamese Economy [Cú Sốc Thời Gian và Kinh Tế Việt Nam]* (Knowledge Publisher, 2015), 19.

[48] Vietnam Open Educational Resources, "[Overview on Vietnam Economy] [Tổng Quan Kinh Tế Việt Nam]."

However, as the population of Vietnam increased by 22 percent over this period, the Gross Domestic Product (GDP) per capita was in fact one percent increase only.[49] This resulted in the stagnant economy because Vietnam had only just ended its war with the U.S. and faced with the massive tasks of rebuilding the country. In addition, the U.S. and other Western countries penalized Vietnam by imposing trade embargo as a consequence of the Cold War and the confrontation between the socialist and capitalist ideologies. Furthermore, Professor Tran Van Tho stated that Vietnam applied socialist ideology in the Southern Vietnam in a hasty manner.[50] Professors Doan Hung and Doan Minh Tuan also stated that we have made a number of mistakes because of not properly grasping the rules of socialism in a colonial, small, backward country like Vietnam. This is a manifestation of the doctrine of dogmatism, copying the model of socialist construction of the Soviet Union into Vietnam, not fully derived from the practical circumstances and conditions of Vietnam at that time.[51]

While Vietnam was struggling to develop its economy, many East Asian countries were undergoing strong economic growth. The Republic of Korea, Taiwan, Hong Kong and Singapore, known at the time as the Newly Industrialized Countries (NIC) in 1979, following on from Japan's and Japan was successful in gaining a high growth rate of 10 percent during the period of 1955-1973. [52] In order to stimulate the agricultural development, the Vietnamese government commenced a policy of nationalization of land ownership. Following the implementation of this policy, land ownership resided with a "collective" and the government assigned a manager to act as a head of each collective and take charge of cultivating and harvesting the rice fields. The Vietnamese leaders believed that this approach would result in the development of a productive system. However, the system ultimately failed, largely due to land and harvest being based on common ownership and thus the potential of the farmers was never fully realized.

At the very time that Vietnam's economy was struggling, other socialist countries were also facing economic difficulties and gradually reduced their economic aid to Vietnam, further

[49] Tran Van Tho, *A Shock of Timing and Vietnamese Economy [Cú Sốc Thời Gian và Kinh Tế Việt Nam]*, 20.

[50] Ibid.

[51] Doan Hung and Doan Minh Tuan, "The Communist Party of Vietnam Led the Building of the Socialism in the Nothern Vietnam [Đảng Lãnh Đạo Xây Dựng Chủ Nghĩa Xã Hội Ở Miền Bắc]" (National Political Publishing House, 2016).

[52] Steven Radelet, Jeffrey Sachs, and Jong Wha Lee, "Economic Growth in Asia," *The Asian Development Bank* (July 1997).

compounding the economic problems facing the nation. In an attempt to stimulate agricultural productivity, the Vietnamese government adopted Agricultural Resolution No. 10[53] to a number of provinces, which allowed land to be assigned to farmers and to cultivate and harvest for their own benefit. This initiative proved successful and was subsequently rolled out on a broader scale. The broad success of this initiative resulted in the government beginning to contemplate the renovation of the country's economic system, which became known as *Doi moi* or the "Open-door policy." Accordingly, a central element of *Doi moi* became the recognition of the private ownership of small enterprises alongside the state-owned and collectively owned enterprises.[54]

2. After Doi moi: Towards a Socialist-oriented Market Economy

While Vietnam initiated *Doi moi* in 1986, the concept of "market economy" was not fully defined at that time. Rather, the Vietnamese government gradually shifted its position regarding the concept. This shift began with the Resolution of the Sixth Congress of the Communist Party of Vietnam in 1986, which stated, "the Vietnamese economy, in its first period in transition to socialism is an economy, which utilizes the ability of other economic forms in a united force under the directions of the socialism economy."[55] In other words, while the Vietnamese government allowed the establishment of other economic forms, the 'state economy'[56] played a leading role in the development of the country towards the socialist ideal. As a result of this resolution, the first five-year period following *Doi moi*, saw a surge in exports, which helped Vietnam achieve significant economic growth, with an average GDP growth rate of 4.4 per cent between 1986 and 1990.[57]

Greater productivity in the agricultural sector, especially in food production represented a significant achievement for *Doi moi*. The rapidly increasing food production meant that Vietnam

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[53] In April 1988, the Communist Party Politburo approved the Resolution No. 10/NQTU on the "Renovation of economic management in agriculture" which was known as Agricultural Resolution 10 to allow farmers to directly invest and produce on state-owned land and lease to individual farmer households.

[54] Vuong Quan Hoang, *The Vietnam's Economy and Its Fledgling Financial Markets: 1986-2003* (Centre Emile Bernheim - Research Institute in Management Sciences, 2004), 3.

[55] Communist Party of Vietnam, "[Document of the Sixth Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Sáu]" (Truth Publisher, 1987), 44.

[56] It means that the Stated-Owned Enterprises and Big General Companies set up by the Government.

[57] "Vietnam's Notable Economic Achievements after 30 Years of Doi Moi - News VietNamNet," 2016, http://english.vietnamnet.vn/fms/business/149675/vietnam-s-notable-economic-achievements-after-30-years-of-doi-moi.html (accessed October 3, 2016).

was not only able to guarantee the domestic demand, but also was able to commence the export of rice in 1989. During this period the Vietnamese government also encouraged other economic forms to develop the nation's industrial sector. However, a legal framework to protect the rights of the economic forms did not exist at that time.

Encouraged by the nation's economic achievements in the first five-year period after the initiation of *Doi Moi*, the Seventh Congress of the Communist Party of Vietnam (CPV) in 1991 clearly affirmed its support for the market economy concept. The Congress Resolution stated, "the Vietnamese economy is a multi-forms commodity economy, which operates in the market economy mechanism under the State management."[58] In other words, this policy pursued a socialist-oriented market economy and permitted the types of business forms to expand within Vietnam's economy. As a result, the number of economic forms expanded to five, to include state-owned enterprises, collective cooperatives, the private sector, state capitalists, and businesses with foreign owned capital.[59] The CPV's recognition of the importance of multiple economic forms was a new development in recognizing the market economy. In this socialist-oriented market economy, economic forms are allowed autonomy in production and business, cooperation, joint ventures, equality, and legitimate competition.

As an outcome, on December 21, 1990, the Vietnamese National Assembly enacted the Law on Company and the Law on Private Enterprise. These laws resulted in the establishment of privately-owned enterprises such as limited companies, the joint stock companies and the private enterprises. Following the enactment of these laws, the National Assembly amended the 1992 Constitution. The CPV also started removing monopolies and privileges in most industries and economic sectors. However, as this was the first time the CPV recognized the market economy as a mechanism to manage the economy, a full understanding of the market economy had not yet been developed.[60]

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[58] Communist Party of Vietnam, "[Document of the Seventh Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Bảy]" (Truth Publisher, 1991), 21.

[59] Pham Van Dung, "Economic Forms: The Realisation of the Theory and Practice in Vietnam," *Science Magazine Hanoi National University, Economics and Business* No. 27, no. 1–10 (November 18, 2010): 3.

[60] Associate Professor, Dr. Nguyen Thanh Tuan, "[The Socialist-Oriented Market Economy through the Documents of the Communist Party in the Era of Doi Moi] [Kinh Tế Thị Trường Định Hướng Xã Hội Chủ Nghĩa qua Các Văn Kiện Của Đảng Trong Thời Kỳ Đổi Mới]," *Communist Party of Vietnam Magazine*, 2016, http://www.tapchicongsan.org.vn/Home/Nghiencuu-

The Eighth Congress of the Communist Party of Vietnam in 1996 marked a new milestone in recognizing and implementing the market economy. The CPV more fully defined what the socialist-oriented market economy would include. Specifically, the resolution stated that "in the commodity economy of multi-economic forms, the socialist-oriented market economy is a united way with many forces in the production and distribution, in which the state economy takes the leading role. The domestic market is associated with the international market. The market is both the foundation and subject of the plan."[61] Following the Eighth Congress, the government shifted the focus of its economic policy to the development of the goods and services market, to strictly control land ownership and the real estate market, and to develop the capital market and stock market.[62] In addition, the Vietnamese government started amending the Law on Enterprises in 1999 and the Law on Investment in 2000. By this time, the number of newly established enterprises increased to approximately two hundred thousand. As a result, competition among these different economic forms gradually began to increase, not only due to a greater recognition of the value of the market reform, but also the protection of their rights to conduct business under the 1992 Constitution.

While the Eighth Congress of the Communist Party of Vietnam was significant, it still did not fully define the concept of the "socialist-oriented market economy". The Ninth Congress of the Communist Party of Vietnam in 2001 was a significant turning point in defining this concept. The Congress Resolution stated, "the Communist Party and the State have a consistent and long-term policy to implement a 'multi-forms goods economy' operating in accordance with the market economy under the management of the State in the 'socialism orientation'; that is the socialist-oriented market economy."[63] In addition, the Communist Party clearly defined the objectives of the socialist-oriented market economy. The Resolution stated that "the objectives are to develop

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Traodoi/2016/37543/Kinh-te-thi-truong-dinh-huong-xa-hoi-chu-nghia-qua-cac.aspx (accessed March 26, 2016).

[61] Communist Party of Vietnam, "[Document of the Eighth Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Tám]" (Truth Publisher, 1996), 99.

[62] Central Economic Committee, *[Review Report on Some Practices in the Past 30 Years of Open Door (1986-2016) on Promoting the Industrialisation and Modernisation of Vietnam] [Báo Cáo Tổng Kết Một Số Vấn Đề Lý Luận - Thực Tiễn qua 30 Năm Đổi Mới (1986-2016) về Đẩy Mạnh Công Nghiệp Hoá - Hiện Đại Hoá Đất Nước]* (Hanoi, March 2016), 15, Hanoi.

[63] Drafting Competition Committee under the Ministry of Trade, *[The Ninth Report of Drafting Competition Committee under the Ministry of Trade to Prime Minister] [Tờ trình lần thứ chín của Ban Soạn thảo Luật cạnh tranh trực thuộc Bộ Thương mại lên Thủ tướng Chính phủ]*, 2003.

the production forces, to develop the economy to build the infrastructure and technology of socialism, to improve the living standards of the people and to implement an equal society."[64]

Another important outcome of the Ninth Congress was the establishment of 2010 as the deadline to complete the foundational structure for Vietnam's socialist-oriented market-economy. As a result, in 2005, Laws on State-owned and Private Enterprises combined into one Law on Enterprises. Further, the Civil Code was amended and Law on Investment, Commercial Law were enacted to create a legal framework for businesses and to recognize the equality between the different types of enterprises in the economy.[65]

The Tenth Congress of the Communist Party of Vietnam in 2006 made it their priority to continue the structuring of a socialist-oriented market economy. The Congress Resolution affirmed that the socialist-oriented market economy must respect the objective principles of the market economy.[66] Accordingly, the resolution recommended that resource allocation be implemented based on the market mechanism and that economic and social efficiency should be parameters, that an economic democracy would be implemented, in which the enterprises would be able to do business with the economic sectors that are not prohibited by the law, and that enterprises would be protected by the law and be allowed to join and contribute to the economic policy making process.[67] Vietnam subsequently became a full member of the WTO in 2007, with the status of "non-market economy". The "non-market economy status meant however, that Vietnam was in a weak position concerning dumping related lawsuits.[68] To address this weakness, the Vietnamese government made a considerable effort to persuade other countries to recognize it as a full market economy. As a result, sixty-four countries agreed to formally acknowledge Vietnam's status as a market economy.[69]

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[64] Communist Party of Vietnam, "[Document of the Ninth Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Chín]" (National Politics Publisher, 2001), 86.

[65] Quang Minh, "Why Need to Amend the Civil Code [Vì Sao Cần Tiến Hành Sửa Đổi Bộ Luật Dân Sự?]," Vietnam Legal Newspaper, January 9, 2015, http://baophapluat.vn/su-kien/vi-sao-can-tien-hanh-sua-doi-bo-luat-dan-su-206599.html (accessed April 28, 2016).

[66] The principle of value, supply and demand, and the principle of competition

[67] Communist Party of Vietnam, "[Document of the Tenth Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Mười]" (National Politics Publisher, 2006), 77.

[68] The catfish price of Vietnam is referred at the price of a third country.

[69] Nhan Dan Online, "Prime Minister Nguyen Xuan Phuc: Macro Economy Stabilised in Nine Months," October 20, 2016, http://en.nhandan.com.vn/business/economy/item/4719802-government-proposes-more-agricultural-tax-exemptions.html (accessed June 13, 2017).

The Eleventh Congress of the Communist Party of Vietnam in 2011 clearly articulated the government's commitment to the improvement of the socialist-oriented economy, which "successfully completes socialism in Vietnam and achieves the goals of: prosperous people, strong, democratic, equitable and civilized country."[70] The Eleventh Congress also resulted in a commitment to improving the Vietnam's socialist-oriented market economy institutions, to ensure macroeconomic stability, and to mobilize and utilize resources effectively.

The difference between a market economy and a socialist-oriented market economy is the degree and nature of intervention by the state into the economy. While the market economy respects a laissez-faire point of view, it refrains from intervening in the market by building a legal system, which is friendly to the market,[71] and by building institutions to prevent risks that threaten the market and thus the society. In contrast, in Vietnam's socialist-oriented market economy, the government utilizes mechanisms and institutions to directly intervene into economic activities. Examples of such mechanisms and institutions include the national land ownership policy and the active participation of state owned enterprises in a substantial number of economic sectors.[72] For the period of 2007-2013, there is no breakthrough in developing the liberalized economic level. Vietnam is ranked in the lower level in comparison with the region and the world.[73]

The resolution from the Twelfth Congress of the Communist Party of Vietnam in 2016 stated that by 2020 Vietnam would strive to complete the institutional structures of the socialist-oriented market economy based on the common standards of market economy modernization and international integration."[74] Vietnam is putting a priority to reform the administrative procedures to enhance the competitiveness. In addition, the government is accelerating the SOEs equitization. Currently, Vietnam has remaining one thousand SOEs, which account for 40 per cent of GDP of

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[70] Communist Party of Vietnam, "[Document of the Eleventh Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Mười Một]" (National Politics Publisher, 2011), 99.

[71] The term is defined as a combination of legal regulations governing the business activities, commerce which is designed to make a legal framework for the market economy operate smoothly and safely in the principles of market.

[72] Dinh Tuan Minh and Pham The Anh, *[Report on the Development of the Vietnamese Market Economy 2014][Báo Cáo Phát Triển Nền Kinh Tế Thị Trường Việt Nam 2014]* (Knowledge Publisher, 2015), 18.

[73] Ibid., 21.

[74] Communist Party of Vietnam, "Document of the Twelfth Congress of Communist Party of Vietnam [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Mười Hai]" (National Politics Publisher, 2016).

Vietnam.[75] However, the process of SOEs equitization is slowly happening for the last several years due to the complex ownership structures, weak management and unclear financial and debt obligations.[76]

In summary, the Communist Party of Vietnam has actively proposed significant economic development plan by revising and re-conceptualizing the socialist-oriented market economy in accordance with the domestic and international expectations and the development of production capabilities relevant to each five-year period. The Party has recognized market economy principles while promoting economic development through its unique socialist-oriented approach. In addition to the economic reforms that have taken place since *Doi moi*, the Vietnamese Government has carried out legal reforms to create a transparent and fair business environment for enterprises. Furthermore, the Party also gradually reduced the degree of state intervention into the economy. As a result, the Party has been successful in creating a solid foundation for a socialist-oriented market economy, contributing to the industrialization and modernization processes of Vietnam.

II. Background and Rationale for the 30 percent Market Share Threshold

1. Vietnam's Approach to Anti-Competitive Acts before the Competition Law

Efforts by the Vietnamese lawmakers to regulate competition through legislation firstly appeared in the Commercial Law in 1997 (Article 8 & 9). However, the provisions in this Law only dealt with competition on a very basic level. Article 8 of the Commercial Law provides that:

> Traders shall be entitled to engage in lawful competition in commercial activities. In addition, the practice of speculation by traders for the purpose of market manipulation and unfair trade practices such as dumping of goods; defamation of other traders; obstructing, enticing, buying off or intimidating employees and/or customers of other traders; infringing upon trademark rights; other industrial property rights of other traders; making deceptive advertisements; conducting unlawful commercial promotion; and the acts of unlawful competition which are harmful to Vietnam's national interests are prohibited.

[75] Mark Williams, *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing, 2013), 131.
[76] Asian Development Bank, *State-Owned Enterprise Reform in Vietnam: Lessons Learnt and Future Directions*, July 2015, 1.

Article 9 of the Commercial Law (1997) regulated price-fixing behavior of traders, by prohibiting traders from increasing or reducing prices to the detriment of producers and/or consumers. Article 9 also protected the legitimate rights of consumers, providing, for example, "consumers have the rights to establish organizations to protect their legitimate interests under the provisions of law, the rights to lodge complaints against traders to a competent state body and the rights to take legal action against traders at a court in accordance with the provisions of law." In other words, the Commercial Law functioned to protect the civil rights of consumers.

However, the main objective of the Commercial Law in 1997 was to govern the commercial activities of businesses. Consequently, its guidelines focused on the establishment of a legal framework and mechanisms that would enable enterprises to do business smoothly. Therefore, the regulations on competition were largely forgotten and consequently not implemented.[77] This is despite the fact that the content of these regulations was taught within Vietnamese law schools at that time, and many regulations governing activities, such as advertising, sales promotion, and intellectual property rights were made to prohibit unfair competitive behavior. However, these regulations focused mainly on state management. Furthermore, the Commercial Law did not provide detail on the proceedings and the procedural guidance for consumers to exercise these rights. As a result, the impact of the Commercial Law on anti-competitive behavior was limited.

In 2002, Vietnam managed the price of goods based on the Ordinance on Price.[78] Accordingly, enterprises and individuals could freely fix the price of goods, except for about 20 essential commodities under the monopoly of the State. These essential commodities included products such as gasoline, petroleum, cement, iron and steel, fertilizer, paddy, rice, coffee, seed cotton and raw cotton, sugar cane, salt, and some kinds of medicine. Also, pursuant to Article 28(1) of the Ordinance, no enterprises or individuals could collude with other enterprises or individuals to jointly monopolize prices, causing damage to the legitimate interests of other manufacturers, business organizations or individuals and of the consumers and the State interests.

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[77] Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Competition Law in Vietnam [Pháp luật cạnh tranh tại Việt Nam]* (Judicial Publisher, 2006), 91.

[78] The Ordinance on Price No. 40/2002/PL-UBTVQH10 [Pháp lệnh Giá 2002, Số 40/2002/PL-UBTVQH10] (2002).

If any enterprise violated the Ordinance, the price control authority would issue a cease and desist order, an administrative fine, criminal sanction, or punitive damages depending on the seriousness of the case. However, the Ordinance did not work well because of limited public awareness of competition and the ineffectiveness of the price control authority. The Ordinance on Price reflected the fact that the State controlled and monopolized the price. This could be a legacy of the centrally planned economy. At a later stage, the Law on Price, which entered into force since January 01, 2013, replaced the Ordinance on Price. Following the implementation of this law, the government only controlled and stabilized the prices of several essential products and services that had the potential to impact the daily life of the people.

When Vietnam's *Competition Law* was enacted on December 3, 2004, a level playing field for market participants was set up and competition was reinforced. In addition, the law not only governed business organizations and individuals, but also enterprises operating in the State-monopolized sectors, foreign enterprises operating in Vietnam, as well as professional associations.

2. The Process Behind the Development of the Vietnamese Competition Bill

2.1 The Preparation and Expectations by Lawmakers During the Drafting Process

Drafting of the Competition Bill started in April 2000. On April 12, 2000 in accordance with a Resolution by the National Assembly, the Minister of Trade established the Drafting Committee on Competition Bill. During the process of drafting, there was close coordination and involvement by representatives from the Economic and Budget Committee of the National Assembly, the Legal Committee of the National Assembly, the Ministry of Planning and Investment, the Ministry of Finance, the Ministry of Justice, the Office of the Government, the Chamber of Commerce and Industry of Vietnam and a number of research institutes, universities and colleges. To learn experiences from other countries, the Drafting Committee reviewed the competition law of nine countries and territories, which are China, Thailand, Croatia, Bulgaria, Turkey, France, South Korea, Japan, Canada and Taiwan.[79] In addition, the Committee referred to template regulations

[79] Drafting Competition Committee under the Ministry of Trade, *[The Ninth Report of Drafting Competition Committee under the Ministry of Trade to Prime Minister] [Tờ trình lần thứ chín của Ban Soạn thảo Luật cạnh tranh trực thuộc Bộ Thương mại lên Thủ tướng Chính phủ]*, 4.

that had been developed by international organizations such as the United Nations Conference on Trade and Development (UNCTAD) and the World Bank.[80]

The Drafting Committee also conducted an extensive review and systematization of existing Vietnamese laws which included an assessment of existing specific competition law-related provisions, and identification of inconsistencies within the rules with the aim of ultimately drafting a single, clear, complete and consistent competition law. In order to assess the status of the competitive practices in the market, the Drafting Committee was also required to consult with businesses, experts and state management authorities in Vietnam and abroad.[81] In compliance with the requirements the Drafting Committee held multiple workshops and meetings with representatives from around the world, and consulted extensively with domestic interests.[82] Based on this exhaustive research, the Drafting Committee initiated the drafting process. The Competition Bill underwent multiple revisions, and was finally submitted, in its ninth iteration, to the Prime Minister for consideration.

2.2 The Establishment of the Drafting Committee

A Drafting Committee was established specifically to draft a Competition Law for Vietnam following Resolution No.12/2002/QH11, dated December 16, 2002. The National Assembly agreed upon this resolution about a program for drafting laws and ordinances[83] (2002-2007). The Prime Minister subsequently issued Decision No.35/2003/QĐ-TTg dated March 6, 2003,

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[80] Trade Policy Review Body on Vietnam, *World Trade Organisation - Trade Policy Review 2013 Report by Vietnam*, August 13, 2013, 11.

[81] Drafting Competition Committee under the Ministry of Trade, *[The Ninth Report of Drafting Competition Committee under the Ministry of Trade to Prime Minister] [Tờ trình lần thứ chín của Ban Soạn thảo Luật cạnh tranh trực thuộc Bộ Thương mại lên Thủ tướng Chính phủ]*, 4.

[82] In 2000, the Drafting Committee held two workshops with businesses (August 09, 2000 with the businesses in the north and on September 18-19, 2000 with the enterprises in the south), four international conferences (May 09, 2000 with experts from the French Competition Authority, October 30-31, 2000 with the U.S. Federal Trade Commission, Bureau of Competition, June 29-30 2000, with the Federal Antimonopoly Service of the Russian Federation, and October 10-13, 2000 with the Competition Authorities from Germany and UNCTAD). In 2001, the Drafting Committee held three international workshops with experts representing Competition Authorities of countries and territories such as Germany, Japan, the Republic of Korea, Australia and Taiwan.

In 2002, the Drafting Committee held four international workshops with experts and representatives from the Competition Authorities of countries such as Canada, US, Japan and Taiwan. In 2003, in preparation to submit the Competition Bill to the relevant authorities, the Drafting Committee held three meetings to consult domestic businesses and two meetings with state management bodies. In particular, the Drafting Committee published a full text of the competition bill on the Internet so that the public could provide comments and input to the Drafting Committee for consideration

[83] The eleventh tenure of the National Assembly (Each tenure lasts five years).

assigning the Minister of Trade[84] to draft and edit the competition law, and coordinate related government bodies, agencies and other stakeholders during the drafting process. The Ministry of Trade worked through fifteen iterations of the Competition Law before agreeing upon the final draft bill. The draft bill was circulated widely among state management agencies, businesses and associations, and domestic and foreign experts for consultation. Following an extensive consultation process, Vietnamese lawmakers debated the draft bill over two sessions of the National Assembly.

At the fifth session of the Eleventh National Assembly in 2004, the Government submitted the 15th version of the Competition Bill for review by the Economic and Budget Committee under the National Assembly. Based on this 15th version, the National Assembly had both plenary and provincial group discussions on the Competition Bill. Noting the comments from the various delegates of the National Assembly, the Drafting Committee on Competition Law revised and re-submitted an amended version to the Standing Committee of the National Assembly to finalize outstanding issues. The National Assembly once again deliberated the draft Bill and subsequently approved it at the sixth session of the Eleventh National Assembly on December 3, 2004.

2.3 Principles for Drafting the Competition Bill

In order to draft the legislation, the Drafting Committee established three principles. Firstly, the legislation needed to firmly and fully institutionalize guidelines and policies of the Communist Party of Vietnam in economic development under its socialist-oriented market economy. This is because Vietnam has a one party political system in which the Communist Party represents the leading force of state and society. Pursuant to Article 4(1) of the Constitution of 2013:

> The Communist Party of Vietnam - the Vanguard of the working class, concurrently the vanguard of the laboring people and Vietnamese nation, faithfully representing the interests of the working class, laboring people and entire nation, and acting upon the Marxist-Leninist doctrine and Ho Chi Minh Thought, is the force leading the State and society.[85]

[84] Ministry of Trade and Ministry of Industry were merged into Ministry of Industry and Trade in 2006 by a Decision of the Prime Minister.
[85] Article 4(1), the Vietnam Constitution 2013

In other words, it is the role of the Communist Party to drive government policy development, which is assessed, improved and made more concrete through each Communist Party Congress. In particular, the Resolution of the Eighth Congress of the Vietnam Communist Party states, "The market mechanism requires the formation of a fair, legal and civilized competitive environment. Competition is for the interests of national development, rather than declaring bankruptcy en masse, wasting resources, mutual annexation."[86] The Ninth Congress of the Vietnam Communist Party further affirmed and clarified its commitment to the *Doi moi* reforms by promoting the core role of orientating and regulating the economy in the market; defining the timeframe for reasonable and effective protection for some important products, actively preparing to expand the international market integration, and restricting and controlling the monopolies.

Secondly, the draft legislation was required to effectively control the monopolies. The degree of state intervention in the Vietnamese economy[87] remained very high and it thus monopolized many sectors. The following CPV statement reinforced this degree of state intervention:

The state economy which has been and will continue to be innovative and promote the leading role, is an important material force for the State to orientate, regulate the economy and to ensure the market-oriented socialist economy in Vietnam. In the period of 2001 - 2005, the state economy has been dominant in the economic structure and achieved high growth rates in comparison with other economic forms. The economic contribution of the state economy in the total annual GDP stood at about 40 per cent, of which about 8 per cent of the administrative units, public service careers, others are of the SOE.[88]

However, in the process of economic integration, many multinational companies also invested in production and trade in Vietnam. In addition to state dominated economic sectors, these multinational companies were dominant players in certain sectors. Therefore, the

[86] Communist Party of Vietnam, "[Document of the Eighth Congress of Communist Party of Vietnam] [Văn Kiện Đại Hội Đảng Cộng Sản Việt Nam Lần Thứ Tám]."

[87] State economy is an economic component based on public ownership regime (public ownership) on capital goods (public ownership and state ownership). The state economy includes state-owned enterprises, national reserves, the state insurance fund and the assets owned by the state.

[88] "[Strongly Develop the Economic Forms, Various Forms of Production and Business] [Phát Triển Mạnh Các Thành Phần Kinh Tế, Các Loại Hình Tổ Chức Sản Xuất, Kinh Doanh]," *Communist Party of Vietnam Online Newspaper*, September 30, 2015, http://dangcongsan.vn/tu-lieu-van-kien/tu-lieu-ve-dang/gioi-thieu-van-kien-dang/doc-593020152145456.html (accessed March 9, 2016).

competition legislation needed to control monopolies and enable enterprises to enter the market in a fair and competitive way.

Thirdly, the competition law needed to be consistent with competition-related provisions set out in other Vietnamese laws. At the time of drafting the competition legislation, the specific provisions relating to competition were set out in various laws including: The Civil Code, the Law on Foreign Investment in Vietnam, the Law on State Enterprise, the Law on Cooperatives, the Law on Enterprises, Commercial Law, the Law on Credit Institutions, and the Law on Insurance Business. Therefore, the drafting committee responsible for the competition legislation needed to ensure that the new rules would not conflict or overlap with existing legislation.

2.4 Necessity for the Enactment the Competition Law and its Objectives

According to the fifth iteration of the Competition Bill, there are three factors affecting the building of the Competition Law: (i) The need to regulate the market economy with a comprehensive rule system such as Competition Law which presents specialized area of general law; (ii) The need to control monopoly, especially when Vietnam integrates into the international economic community, and (iii) The requirement to create and maintain a fair business environment. These are set out in detail as follows:

+ *The need to regulate the market economy with a Competition Law*

The Vietnamese government implemented a policy of renovation to drive the economy to operate in accordance with market mechanisms. However, it retained control over the market and competition was not a factor of this centrally planned economy. Given the stagnating economy in Vietnam, competition was later seen as an important factor in operating the market economy and a driving force of economic development.

The 1992 Constitution (amended in 2001) recognized the rights to freedom of business and the economic development of many economic forms in Vietnam, which laid the basis for competition among enterprises under different forms of ownership. Subsequently, various laws were enacted that contributed to the legal framework necessary for the implementation of those rights of business including, the Civil Code, the Law on Foreign Investment, the Law on State Enterprise, the Law on Cooperatives, the Law on Enterprises, the Law on Commercial Activities,

the Law on Credit Institutions, and the Law on Insurance Business. However, since the concept of competition became recognized as an important mechanism in sustainable economic growth, competition-restricting acts and unfair competition between businesses has emerged as a problem that threatens the right to operate, causing adverse effects on the business environment, for genuine business enterprises and consumers. Meanwhile, the provisions of law relating to competition have been unable to prevent sophisticated anti-competitive activity.

This study asserts that institutions in Vietnam that existed before the enactment of Competition Law were unable to deal with the complexity of such anti-competitive acts for two reasons. Firstly, there were no laws governing the behaviors and agreements that restricted anti-competitive behavior such as conniving or colluding that can be detrimental to business operations. To the contrary, Vietnam had a legacy of competition limiting agreements that actually prevented other firms from participating in business activities, expanding operations, applying new technologies, determining output, and boycotting the supply of products or services.[89] Further, prices of some goods, such as electronics and agricultural products were manipulated and controlled when some businesses colluded to fix prices.

Secondly, the abuse by businesses that dominated the market was yet to be regulated by law. Such abuses included the setting up of a business monopoly to fix the purchase price of products at lower prices (such as purchasing agricultural products from farmers), exclusive sale agreements, the manipulation of prices in order to obtain super-profits or to exclude competitors. Such conduct imposes unreasonable constraints on businesses such as forcing them to buy and sell, buy together, cross-sell products and services not needed. These types of activities were prevalent between processing plants, and companies buying products from farmers. While the media exposed cases of abuse on several occasions, there were no mechanisms to prevent or penalize such behavior.

+ The need to control monopoly, especially when Vietnam integrates into the international economic community

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[89] Drafting Competition Committee under the Ministry of Trade, *[The Ninth Report of Drafting Competition Committee under the Ministry of Trade to Prime Minister] [Tờ trình lần thứ chín của Ban Soạn thảo Luật cạnh tranh trực thuộc Bộ Thương mại lên Thủ tướng Chính phủ]*, 11.

After *Doi moi*, Vietnam expanded its diplomatic and trade relationships with other countries around the world. Vietnam's economic integration into the South East Asian region and the world started in 1995, when Vietnam became a full member of the Association of South East Asian Nations (ASEAN). Also in 1995, Vietnam also commenced negotiating membership accession to the World Trade Organization (WTO).

Monopolization of business in the market place can negatively impact the national economy in numerous ways. However, it is perhaps the monopolistic price formation and high-price manipulation, which has the greatest impact due to its adverse effects on the interests of consumers. Despite such negative impacts, natural monopolies and state monopolies continue to exist in most countries around the world. In the case of Vietnam, state monopolization is likely to remain in a number of economic sectors as a consequence of the relatively low starting point of the nation's economic development. To avoid negative consequences for Vietnam's society, the Competition Law sets out provisions that enable the state to limit monopolies, bid-rigging, and anti-competitive effects of monopolization.

Further, in parallel with Vietnam's efforts to open its markets through bilateral and multilateral trade agreements, the Vietnamese government has been working to attract multinational companies to invest and operate in Vietnam. These companies, with their economic strength, have the capacity to monopolize the market, consequently forcing domestic enterprises with limited resources out of the marketplace through the importation of hundreds of tons of "courtesy products" or by dumping products in Vietnam. Such activities have occurred regularly, undercutting the ability of domestic businesses to maintain normal production. To prevent such monopolistic actions by multinational firms, a legal basis to protect the rights of Vietnam's domestic economic forms became crucial.

+ *The requirement to create and maintain a fair business environment*

Although the 1992 Constitution officially acknowledged the existence of economic forms and affirmed a level playing field among them, many state agencies failed to fully comply. Discrimination between economic forms, particularly between state enterprises and private enterprises is common. Further, due to local interests, it was still common for some state agencies to indirectly interfere in the business activities of enterprises by issuing administrative orders,

which in turn creates advantages for one or a number of businesses. This created trade barriers within the domestic market. Examples of such domestic trade barriers included: the requirement that certain building materials can only be purchased from a specific cement company located in a particular province, or schools that can only buy ballpoint pens from certain vendors. Such practices limited the opportunities for other companies to compete fairly, and ultimately this leads to negative consequences for consumers. Thus, to prevent this kind of activity, it was necessary to adopt a Competition Law with strict penalties for acts that interfere with the fair and equitable transaction of business.

In summary, together with the development of the socialist-oriented market economy and the economic integration process into the region and the world,[90] there was a need for Vietnam to restrict the anti-competitive and unfair trade acts through the enactment of the competition law. This would result in a fairly competitive business environment for all economic forms.

3. Provision of Cartels under Article 9(2) of the Competition Bill: Discussion by Lawmakers during the Enactment Process

3.1 Insights Regarding the Concept of Competition Restriction Agreements

Vietnamese Lawmakers understood that the competition restriction agreements were included as competition restriction acts. However, the Competition Bill did not prohibit all competition restriction agreements. Instead, the Competition Bill contained a number of exceptions. Specifically, the Competition Bill allowed price-fixing agreements. This conduct was prohibited only when enterprises engaging in such conduct had a combined market share of 30 per cent or more. The Drafting Committee rationalized that once an enterprise had gained the threshold market share, they would be in a position of economic power and influence that had the potential to restrict competition and would result in actual harm to the business environment and consumers. Furthermore, the 30 per cent market share threshold had been applied in many countries including Germany and Canada and this threshold standard was reflected in the enacted law, which remains current in Vietnam.[91]

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[90] As of 2003, there were 82 countries and territories worldwide that had laws regulating competitive activities and monopoly control (according to the UN Conference on Trade and Development - UNCTAD).

[91] At the time of writing this dissertation, this provision was in force.

The Competition Bill established criteria, which allowed for exemption under certain circumstances. For example, if the competition restriction agreements resulted in lower costs and benefits for consumers, enterprises were eligible for an exemption from the application of the prohibition against certain restrictive agreements. The Competition Bill provided that an exemption would only be allowable if the enterprise met the statutory conditions and obtained the written consent of competition authorities.

In a report that noted the comments of Delegates of the National Assembly regarding the drafting of the Competition Bill, some lawmakers expressed concern over the unclear classification of horizontal and vertical agreements under Article 10(2) of the Competition Bill. Accordingly, they understood that the horizontal agreements were agreements between the same production line enterprises or the same industry associations. Lawmakers made clear that these kinds of agreements should be prohibited because they eliminated competition and forced buyers to pay a higher cost for goods and services. Additionally, as the vertical agreements were agreements between enterprises and distributors, which were generally beneficial for consumers, the lawmakers expressed a need to distinguish between the two agreements, in order to regulate the threshold of market share in the relevant market in an appropriate way.

In response to the lawmakers' comments, the Drafting Committee argued that horizontal and vertical agreements were theoretical terms and that most countries did not use these terms in a legal sense. However, the Competition Bill already considered that element because the horizontal agreements have more harmful effects on the competitive business environment than the vertical. For the vertical agreements, not all agreements are detrimental to the competitive business environment. But, once an enterprise, which has a bigger, market power (dominant position or the monopoly) forces in the formality of an agreement with its distributor to fix the minimum sale price so that the distributors cannot compete with others. And this is a typical dominant or monopolistic position abuse. The distributors, which are forced to commit a vertical agreement, are victims of the abused conduct. Therefore, the horizontal agreements are stipulated separately

in the Chapter II on competition restriction agreements. And the minimum sale price are stipulated in the Chapter III on unfair competition acts.[92]

3.2 The Objective and Necessity of Article 9(2) Following the Principle of a 30 percent Threshold of Market Share

According to the Chairman of the Economic and Budget Committee under the National Assembly, Nguyen Duc Kien, enterprises with market share over 30 per cent were considered to be in a dominant position in the market. He illustrated this point by citing the case of Zuellig Pharma Company. Even though Zuelling's share accounted for nearly 30 percent of the pharmacy market, which may lead to a monopoly in the long term. Thus, Nguyen Duc Kien suggested that a threshold market share of 30 percent in the market should be applied and utilized as a means of preventing monopolization.[93]

On the other hand, some lawmakers stated that the 30 percent market share threshold was too small because it did not indicate that an enterprise has a dominant position in the market. They proposed increasing the market share to 40 or 50 percent. The Drafting Committee responded by noting that in Vietnam small and medium size enterprises, which accounted for approximately 96 percent of the total number of enterprises, had capital below five hundred thousand dollars and generally employed less than three hundred people. Thus, the Drafting Committee observed that there were only a relatively small number of enterprises with a market share above 30 percent. They also found the Zuellig Pharma company case illustrated the significance of the 30 percent threshold amount. Furthermore, the Vietnamese Ordinance on telecommunications applies 30 percent market share threshold to determine when a telecommunications enterprise reaches a dominant position in the market. Based on these considerations, the Drafting Committee made a

[92] Drafting Competition Committee under the Ministry of Trade, *[Report on noting comments and inputs from the National Assembly Delegates by Ministry of Trade to the Economic and Budget Committee of the National Assembly] [Báo cáo giải trình tiếp thu ý kiến của Đại biểu Quốc hội về dự án Luật cạnh tranh gửi Uỷ ban Kinh tế và Ngân sách của Quốc hội]*, 2004, 16.

[93] Vnexpress.net, "[Competition Authority Would Be under Ministry of Trade?] [Cơ Quan Quản Lý Cạnh Tranh Sẽ Thuộc Bộ Thương Mại?] - VnExpress," September 23, 2004, http://vnexpress.net/tin-tuc/thoi-su/co-quan-quan-ly-canh-tranh-se-thuoc-bo-thuong-mai-2010848.html (accessed March 10, 2016).

proposal to the Economic and Budget Committee of the National Assembly to keep the 30 percent market share threshold to define the dominant position.[94]

To ensure transparency, some lawmakers proposed greater regulatory oversight in making market share determinations regarding enterprises under investigation. However, the Drafting Committee stated that the concerned enterprises in a competition violation case would be responsible for reporting their own market share. At that time, the enforcement competition authority is the one to investigate the authenticity of the proffered market share ratio.

Some lawmakers raised concerns over the definition of "the relevant market share" which is also known as a relevant "product market" or "geographic market." If it were understood as a relevant geographic market, it would cause difficulties for enterprises. This is because Vietnam's geography is comprised of a long narrow stretch of land that is classified into different regions. Thus, the lawmakers proposed to stipulate "the relevant market share" be set at 30 per cent and/or above 30 per cent.

In defining what constitutes 'the relevant market', the Drafting Committee determined that the relevant geography and relevant product market were two necessary components. The Competition Bill set out the applicable principles necessary to define the relevant geographic origin of different products, not simply based on the three regions (the North, Central and South) or administrative geography. In addition, products such as automobiles and motorbikes, were allowed to consider the relevant geography as consisting of the whole territory of Vietnam, thus not limited to any particular province or city.

In short, together with the diversification of economic forms and the enactment of the Competition Law, Vietnam tried to create a level playing field for all enterprises in which to do business. As a result of its economic integration in the region and the world and the enactment of the Competition Law, Vietnam attracted a significant amount of foreign investment. In addition, Vietnam started applying the international legal framework to all kinds of enterprises to fully comply with its commitments to the WTO, and to avoid discrimination between enterprises. However, while SOEs still play an important part in developing the economy, many countries

[94] Drafting Competition Committee under the Ministry of Trade, *[Report on noting comments and inputs from the National Assembly Delegates by Ministry of Trade to the Economic and Budget Committee of the National Assembly] [Báo cáo giải trình tiếp thu ý kiến của Đại biểu Quốc hội về dự án Luật cạnh tranh gửi Uỷ ban Kinh tế và Ngân sách của Quốc hội]*, 17.

have criticized Vietnam, requesting that the nation privatize the more than one thousand remaining entities, and demanding that it follow internationally accepted competition law practices.

III. After Adopting the Competition Law: The Current Concept of Cartels and De Minimis Principle of 30 Percent Market Share

Vietnam's Competition Law was approved by the National Assembly on December 3, 2004 and entered into force on July 1, 2005. This section describes the current concept of cartels, the provision of price-fixing cartels and De Minimis principle of market share of 30 percent in the relevant market.

1. The Concept of Cartels, Regulation of Price-fixing Cartels and De Minimis Principle

The Vietnam Competition Law (VCL) defines competition restriction acts broadly. Article 3(3) of the VCL, for example, defines harms of competition restriction acts as "acts performed by enterprises to reduce, distort or hinder competition in the market."[95] This article then elaborates upon competition restriction acts, describing such acts as comprising four kinds of conduct: competition restriction agreements, abusing a dominant position in the market, abusing a monopoly position, and economic concentration. In order to determine a competition restriction agreement, Article 8 of the VCL specifies it by listing eight types of agreements: price-fixing, market division, output restriction, bid-rigging, technological development and investment restriction, creating a barrier to new entrants, and excluding competitors from the market.

Article 8(1) of the VCL defines price-fixing agreements as agreements that directly or indirectly fix prices for goods or service. In order to illustrate the conducts of price-fixing agreements, Vietnam issued a Decree to give detailed guidelines to the enterprises. Article 14 of Decree no. 116/2005/ND-CP stipulates that a price-fixing agreement is an activity on concerted practices in one of the following forms: (1) to apply a single price to some or all customers; (2) to increase or decrease prices at a given level; (3) to apply a uniform pricing formula; (4) to maintain a fixed ratio for the price of relevant products; (5) not to grant discounts, or to apply discounts at a uniform rate; (6) to restrict customers' credit; (7) not to reduce prices without notification to the

[95] Article 3(3), Vietnam's Competition Law, Law No. 27/2004/QH11 [Luật cạnh tranh, Số 27/2004/QH11] (Vietnam Competition Authority 2004).

other parties to the agreement; (8) to use a uniform price at the commencement of negotiations on prices.[96]

Vertical pricing agreements, as also referred to as resale price maintenance, is described in Section 2 of the VCL as abuse of dominant position in the market (Article 13(2)). Acts of imposing sale prices of products or services are regarded as "irrational" and prohibited, creating a dominant or monopolist position, which causes damage to customers.

In order to verify whether price-fixing agreements are legal or not, the VCL only examines the market share basis on the relevant market. According to Article 9(2) of the VCL, only the price-fixing cartels with a combined market share of 30 per cent or more on the relevant market are prohibited. The approach of a combined market share threshold of 30 percent or more on the relevant market is also applied to the following conducts: (i) Agreements to share consumer markets or sources of supply of goods and services; (ii) Agreements to restrain or control the quantity or volume of goods and services produced, purchased or sold; (iii) Agreements to restrain technical or technological developments or to restrain investment; and (iv) Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract.

Significantly, Article 9(1) of the VCL prohibited the three following conducts: (i) Agreements which prevent, impede or do not allow other enterprises to participate in the market or to develop business; (ii) Agreements which exclude from the market other enterprises which are not parties to the agreement; and (iii) Collusion in order for one or more parties to win a tender for supply of goods and services (bid-rigging). In other words, the *per se* illegal rule (which doesn't require any proof of harm to competition and does not allow parties to claim an efficiency justification)[97] is applied for the three conducts.

In summary, the VCL classifies the competition restriction agreements, which are understood as cartels agreements, as the anti-competitive acts. And the VCL further defines the

[96] Article 14, Decree No. 116/2005/ND-CP issued on September 15, 2005 by the Government on Detailing the Implementation of a Number of Articles of the Competition Law [Nghị định số 116/2005/NĐ-CP ngày 15/09/2005 của Chính phủ về quy định chi tiết thi hành một số điều của Luật cạnh tranh] (Ministry of Justice 2005).

[97] OECD Competition Committee, *Rountable on Prosecuting Cartels Without Direct Evidence of Agreement - Contribution from United States*, December 15, 2005, 2.

cartels agreements by listing eight types of conducts, including price-fixing cartels. While the VCL introduces the *per se* illegal rule, it also adopts a *De Minimis* approach (which provides a safe harbor for agreements that are considered to have non-appreciable effects on competition)[98] to cartels agreements. Therefore, the price-fixing cartels having the combined market share below 30 percent on the relevant market are not considered illegal.

2. The Application of the Combined Market Share of 30 percent to Price-fixing Cartels

In order to clarify what are unlawful and lawful competition restriction agreements, the VCL is applying the methodology of the combined market share of 30 per cent on the relevant market. Specifically, the five competition restriction agreements under Article 8(1-5) of the VCL are lawful if the combined market share is below 30 per cent in a relevant market. The five agreements under this Article are: (i) Agreements either directly or indirectly fixing the price of goods and services; (ii) Agreements to share consumer markets or sources of supply of goods and services; (iii) Agreements to restrain or control the quantity or volume of goods and services produced, purchased or sold; (iv) Agreements to restrain technical or technological developments or to restrain investment; and (v) Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract. In other words, the VCL requires proof of market share.

Proof of a combined market share of 30 per cent or above 30 per cent are the thresholds used to indicate market power or a dominant position in the market. The term ‘combined market share’ is defined in Article 3(6) as “the aggregate market share of the relevant market for enterprises participating in a competition restriction agreement.” Market share is in turn defined as the percentage of the total aggregate turnover of all the enterprises that is attributed to a single enterprise “dealing in such kind of goods or service on the relevant market.” In other words, market share is the basis for defining the market power of an enterprise or a group of enterprises in a relevant market.

[98] The European Commission, “Guidance on Restriction of Competition ‘By Object’ for the Purpose of Defining Which Agreements May Benefit from De Minimis Notice,” June 25, 2014, 3, SWD(2014) 198 final, http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex_en.pdf.

According to Article 3(1) of the VCL, the terms of relevant market includes relevant product market and relevant geographical market. And the relevant product means a market comprising goods or services, which may be substituted for each other in terms of characteristics, use purpose and price. The relevant geographical market is defined as a specific geographical area in which goods or services may be substituted for each other with similar competitive conditions and has a substantial difference with neighboring areas. In order to elaborate the concept of the relevant product market and the relevant geographical market further, the Vietnam Competition Authority (VCA) defines them in Article 4-8 of Decree no. 116/2005/ND-CP issued on September 15, 2005.

According to Decree no. 116/2005/ND-CP, the VCA identifies the relevant product market based on the characteristics of a product or services, which is analyzed on the facts of physical and chemical characteristics, technical properties, side effects on users and absorbability. In addition, the Decree provides that the VCA will determine the intended use of a product or services, the price of a product or services in the retail invoice, and the interchangeability of a product or services. Furthermore, the VCA may identify an additional group of consumers living in the relevant geographical area who can't switch to buy another product or service that has characteristics and intended user similar to the product or service they are using or intend to use in case of an increase of over 10 percent in the price of such product or services maintained for six consecutive months.

In order to define the relevant geographical market, the VCA determines the boundaries of a geographical area which is based on the following grounds: (i) Geographical area where a business establishment of another enterprise participating in the distribution of the relevant product is base; (ii) A business establishment of another enterprise is based in a neighboring area sufficiently close to the geographical area defined at Point a of this clause for its participation in the distribution of the relevant product in such geographical area; (iii) Transportation costs in the geographical area; (iv) The tome of transportation costs in the geographical area; and (v) Barriers to market entry.

In short, the price-fixing cartels are not subject to the *per se* illegal rule. Instead, the VCA will identify the combined market share of detected cartel members on the relevant market, which

is based on the analysis of the relevant product market, and the relevant geographical market. The combined market share plays a decisive element to justify whether a cartel is illegal or not.

3. Analysis of the Case of *Tan Hiep Phat Company v. Vietnam Brewery Company*: Identification of the Relationship between the Relevant Market, Market Share, and Product Definition

Since 2005, Vietnam competition authorities (The Vietnam Competition Authority and the Vietnam Competition Council) have handled more than 40 competition restriction cases, if which final decisions have been reached with 3 cases. The authorities have also dealt with more than 90 unfair competition cases, and 16 cases of merger and acquisition.[99]

As described above, the VCA has applied the market share threshold of 30 percent as a basis to define the anti-competitive acts. The following case, known as the *Tan Hiep Phat* case, is concerned with competition restriction conduct, resulting from an enterprises' abuse of its dominant position in the market place. The Tan Hiep Phat Company (THP) was a beverage company that produced a particular brand of beer known as "Laser" in 2003. Vietnam Brewery Limited Company (VBL) was also producing beer and selling other brands of imported beer including Heineken and Tiger. VBL signed contracts with its own exclusive agents that included liquor shops, restaurants, bars and hotels which required the agents to refrain from promoting, introducing, and selling beer from other companies.

THP discovered that most big shops, restaurants and distribution agents in Ho Chi Minh City, Vung Tau City and some provinces in the Mekong Delta refused to distribute Laser beer because of the exclusive agent agreements that they had entered into with VBL concerning the distribution of VBL products. This conduct resulted in an unfavorable situation for THP. Although THP was well aware of this problem, the company was unable to lodge a complaint because Vietnam had not yet enacted a competition law yet as well as the VCA was not set up yet.

After the Competition Law came into effect on July 1, 2005, THP lodged a complaint to the VCA, alleging that VBL was in violation of Article 13(6) of the Competition Law, as its actions prevented THP as a new competitor from entering the market. After reviewing all relevant information, on October 12, 2007, the VCA conducted a preliminary investigation. The VCA

[99] Vietnam Competition Authority, *Annual Report Vietnam Competition Authority 2015*, 2015, http://www.vca.gov.vn/books/CucQLCT_BCThuongNien2015-1504DOI.pdf.

asked THP to provide additional evidence to assist them in their examination of the relevant market, including the relevant product market and the relevant geographic market, the market share of VBL and the anti-competitive practices of VBL. The VCA also asked THP to provide either the original or certified copies of the VBL or certified copies of the contracts. However, given the difficulty of obtaining such documents from competitors, THP was unable to comply with the VCA.

After spending more than 20 months investigating the case, on April 21, 2010, the Chairman of the Vietnam Competition Council (VCC) signed a decision to start a formal investigation of the case by setting up a Panel. However, one month later, on May 21, 2010, the Panel issued Decision no. 09/QĐ-HĐCT-HĐXL to suspend the investigation in accordance with the Article 101(1)(a) of the Competition Law because there was insufficient evidence to prove a practice in breach of the provisions of this Law. Specifically, the VCA, which is vested with the power to investigate anti-competitive cases, found that the market share of VBL in the relevant market was between 18.2 per cent and 22.4 per cent (which is below the threshold of 30 per cent, the adopted definition of dominant market position). Thus, VBL had no dominant position in the relevant market and did not violate Article 13(6). In other words, the legal ground to verify whether the conduct is in violation of the VCL or not was based on the market share basis.

Disagreeing with the Panel decision, THP appealed to the VCC on June 17, 2010. However, the VCC rejected the appeal. On November 2, 2010, THP filed a lawsuit to the Administrative Court under the People's Court of Ho Chi Minh City regarding the VCC decision. THP sought to settle complaints about the decision of the VCC’s handling of the competition case, however, on February 21, 2011, the Administrative Court of Ho Chi Minh City rejected this filing. This was because at that time, it was possible for the THP to bring in a lawsuit against the decision of VCC about the anti-competitive acts, but not the suspension decision of a case in accordance with the Article 11(21) of the Ordinance on proceedings to solve the administrative procedures.

Through the above-mentioned case, it is possible to draw some important lessons. Firstly, the VCA and VCC, as well as the Panel considered the market share in the relevant market as the decisive element to determine whether an enterprise infringes the Competition Law or not. Secondly, the VCA didn’t have a legal definition of beer when they defined the relevant product

market and the relevant geographical market. Accordingly, the viewpoint of the VCA and investigation team was that the relevant beer market was defined as the whole beer market of Vietnam. In contrast, THP held that the relevant geographical market should be defined as the detective location and the timing of alleged conduct. However, because the VCC suspended this case, THP had no opportunity to explain their circumstances.[100] Thirdly, although the harms from anti-competitive acts that are stipulated in the Article 3(3) of the VCL as "acts performed by enterprises to reduce, distort or hinder competition in the market", the VCA and VCC ignored the conducts and harms of the anti-competitive acts of VBL. Fourthly, the power and capacity of the VCA and the investigation team are extremely limited. Instead of requesting that THP to provide evidence showing that VBL had infringed upon the competition law, the VCA should have use its power to request VBL to provide the contracts.[101] This is because of the significant difficulties THP faced in obtaining certified documents from its competitors. Finally, the appeal proceedings relating to the anti-competitive acts were clearly insufficient.

IV. Enforcement of Vietnam's Competition Law

1. The Implementation of Vietnam Competition Law (2006-2015): A Focus on Advocacy

During the 2006-2015 period, the VCA initiated investigations of 83 cases concerned with competition restriction conduct.[102] Subsequently, the VCA decided to officially investigate eight of these cases. Concerning these initial investigations, the VCA was keeping track of these cases for timely disposition and recommendation once any anti-competitive signs were detected. The Vietnam Competition Council (VCC) made a final decision concerning five of the eight cases. Among the original eight cases, there were four price-fixing cases. The table below is a record of the number of cases that the VCA investigated and ultimately made the decisions against the anti-competitive acts.

[100] Mai Xuan Hoi, "Dealing with Competition Cases under the View of Business Rights [XỬ LÝ VỤ VIỆC HẠN CHẾ CẠNH TRANH DƯỚI GÓC ĐỘ QUYỀN TỰ DO KINH DOANH]," 2014, http://phapluatphattrien.vn/xu-ly-vu-viec-han-che-canh-tranh-duoi-goc-do-quyen-tu-do-kinh-doanh_n58296_g737.aspx (accessed October 17, 2016).

[101] Dr Tu Thanh Nguyen, *Competition Law, Technology Transfer and the TRIPS Agreement: Implications for Developing Countries* (Edward Elgar Publishing, 2010), 240.

[102] Vietnam Competition Authority, *Annual Report Vietnam Competition Authority 2015*, 9.

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Initial Investigation	5	3	7	7	10	10	14	12	10	5	83
Investigation	0	1	1	1	1	2	1	0	1	0	8
Decision	0	0	0	1	2	0	0	1	1	0	5

Source: 2015 Annual Report of Vietnam Competition Authority

The reason why the VCA only officially investigated eight cases concerning competition restriction is because, generally, they are not considered illegal if their combined market share is below 30 percent. In addition, the competition authority is not independent because it is under the Ministry of Industry and Trade. The cartel agreement made by steel companies not to reduce the price of steel in 2008 is a good example. The steel corporation is under the Ministry of Industry and Trade. Many scholars complained that there was no investigation or decision made by the VCA.[103] Another reason why it is difficult for the VCA to detect anti-competitive conducts is that competition restriction agreements are done in secret and they are difficult to detect, making the task for this newly set up organization with limited resources an even greater challenge.

1.1 The First Case Reflected A Strong Determination of Competition Enforcement

The first case to be dealt with under Vietnam's competition law was in 2008 and involved the Vietnam Air Petrol Corporation (Vinapco), which was, and currently is a State-owned Enterprises (SOE). The following is a summary of the case.

> Vinapco is the only company licensed by the government to supply fuel for commercial flights in Vietnam. On December 31, 2007, Vinapco and Pacific Airlines (PA) signed a Fuel Sale & Purchase Agreement ("SPA") for aviation fuel JET A-1 No. 34/PA2008. Accordingly, the two sides agreed to the fuel charge set out in the SPA. On March 12, 2008, Vinapco proposed to PA to re-define the purchase price under the SPA. PA disagreed with the increase in the fuel charge because Vinapco allowed Vietnam Airlines to purchase fuel at a lower price. On April 1, 2008, Vinapco had unilaterally terminated its fuel supply to PA. On the same day, the Ministry of Transportation ordered Vinapco to resume its fuel supply. PA flights could take off after 2-3 hours of delay. As a result, it caused a severe impact on business operations and had a substantial impact on the working schedules and interests of passengers and other customers.[104]

[103] Vietnamnet.vn, "The Competition Law: After 4 Years of Implementation, One Case Only [Luật Cạnh Tranh: 4 Năm Mới Xử Một vụ vi Phạm]," 2009, http://luatminhkhue.vn/tranh-chap/luat-canh-tranh-4-nam-moi-xu-mot-vu-vi-pham.aspx (accessed October 20, 2013).

[104] Vietnam Competition Council, *Review Report of 10 Years of Implementation of Competition Law by Vietnam Competition Council*, December 23, 2016, 24–25.

Although the concerned parties didn't file lawsuits against each other, the VCA proactively applied Article 86(2) of the VCL to initiate the initial investigation when an enforcing authority detected a violation of the competition law. In May 2008, the VCA officially initiated an investigation and on April 14, 2009, the VCC established a hearing Panel Board. The Panel concluded that Vinapco had abused its monopoly position in the aviation fuel market in violation of Article 14 (2&3) of the Competition Law by "imposing disadvantageous conditions for customers" and executing a "unilateral termination of contract without appropriate reason". The Panel took punitive action against Vinapco, requiring the corporation to pay 0.05 percent of the revenue it earned for the preceding fiscal year during which the violation had taken place. Ultimately, the VCA required Vinapco to pay o 3.378 billion VND and 100 million VND for all case handling fees. In addition, on April 14, 2009, the Panel made three recommendations:[105] (i) to divest Vinapco from Vietnam Airlines; (ii) to suggest the government to approve the licenses to other companies to supply the aviation fuel; and (iii) to strengthen the state management on the aviation fuel supply in Vietnam.

Vinapco disagreed with the decision of the VCC, and filed a lawsuit at Hanoi People's Court. Eventually, Vinapco made an appeal against the ruling of Hanoi People's Court in the Court of Appeals under the Supreme People's Court. In November 2011, the Court of Appeals under the Supreme People's Court upheld the judgment of Hanoi People's Court and rejected the Vinapco's appeal.[106]

This first case was significant because, it showed that the VCA (initiated the investigation and reported it to the VCC) and VCC were determined in detecting and combating the anti-competitive acts despite Vinapco being a state-owned enterprise. However, there were some criticisms about the *Vinapco* case. Firstly, the VCC did not use any quantitative criteria in determining the level of penalty of only 0.05 percent of the total revenue of Vinapco. Consequently, the penalty that the Vietnam Competition Law handed to Vinapco was much lower than what it should have been. The VCL allows the VCA to require a violating enterprise to pay up to 10 percent of its total revenue if it is found liable. Secondly, the sanction did not lead to a

[105] Decision no.11/QĐ-HĐXL on April 14, 2009 of the Panel to solve the case of Vietnam Air Petrol Company stop supplying the aviation fuel to Jestar Pacific Airlines (vn).
[106] Vinapco - Abuse of monopoly position [2011] (vn, November 2011).

significant change in Vinapco illegal business practices. This is because the VCC does not have authority to eliminate the monopoly of SOEs. This meant that PA had to continue its business dealings with Vinapco despite the fact that PA was not comfortable to continue the relationship.[107]

Analyzing the case from a different perspective, some scholars said that the investigation and sanctions made in accordance with the VCL was not appropriate because the nature of the dispute between Vinapco and PA was a commercial contract dispute.[108] In other words, the VCA should not intervene in disputes between enterprises. In disagreement with this viewpoint, scholar Nguyen Ngoc Son stated that competition law is an effective tool of the State in the transition period to the market economy. And thus the scope of governance of the competition law should be applied to all enterprises in accordance with Article 2(1) of the VCL. Furthermore, the conduct of Vinapco to "impose disadvantageous conditions on customers" and execute a "unilateral termination of contract without appropriate reason" violated the competition law. Although Vinapco was a state-owned enterprise, the anti-competition conduct of Vinapco was punished by the VCL. In other words, there was no discrimination between state-owned enterprises and other enterprises, including the monopolistic enterprises. Therefore, the Vinapco and PA case is not a purely contract provision dispute; rather, it is a case of competition law violation.

1.2 The First Case of Price-fixing Cartel: Focus on Advocacy

Among the eight cases investigated and reviewed by the VCA and the VCC, four of them were price-fixing cases. In 2009, the VCC made the final decision on the first price-fixing cartel case, which was a case that involved Insurance Companies. On September 15, 2008, at the annual meeting of the Vietnam Insurance Association, 19 insurance companies signed an agreement to increase the premium rate of car insurance from 1.3 percent to 1.56 percent as of October 1, 2008. At that time, the car insurance market share of the 19 insurance companies involved was 99.79 percent. This conduct was determined to constitute a price-fixing cartel. After more than one year of investigation, the VCA concluded that:

[107] Nguyen Ngoc Son "Laws and Culture of Competition in Vietnam: A Critical Analysis from Significant Competition Cases Suggestions for Future Development - File.html," 2011., http://www.asiancompetitionforum.org/docman/7th-annual-asian-competition-law-conference-2011/powerpoint-slide/55-21-tran-viet-dung-presentation/file.html (accessed March 28, 2016).

[108] Nguyen Ngoc Son, "Some Comments on Anti-Competitive Cases [Một Số Bình Luận Từ Thực Tiễn Giải Quyết vụ Việc về Hành vi Hạn Chế Cạnh Tranh]," *Legal Study Magazine* (2010).

> These 19 insurance companies violated Article 9.2 of the competition law. This is because the conduct of price-fixing with a combined market share exceeding 30 percent of the relevant market is prohibited. Thus, the VCC decided to fine the 19 insurance companies 0.025 percent of total turnover for fiscal year 2009, which was an approximate amount of 1.8 billion VND, equivalent to 85,000 USD. After that, 19 insurance companies accepted the decision of VCC and paid the penalty at the Vietnam State Treasury.[109]

The Vietnam Insurance Association argued that the agreement to increase the premium rate was "to restrain the fierce competition in the context of the high rate of compensation, inflation and the insurance business did not make profit or a negligible profit."[110] Among 19 insurance companies, most of them are Vietnamese companies. In the meanwhile, some foreign insurance companies did not agree to sign on the Vietnam Insurance Association's agreement because they found out that the premium insurance fixing infringed upon the competition law. This case showed that the understanding and knowledge about competition law was limited. The Vietnam enforcing authority needs to implement more advocacies about competition law.

The price-fixing cartel of insurance premiums caused economic harm to consumers. It reduced the level of competitiveness by eliminating competition for insurance services among the concerned enterprises. The price-fixing cartel also eliminated the chance for consumers to choose a competitive price in the market. However, the sanctions against the price-fixing cartel were too low. The VCA stated that "since this is the first cartel case in the Vietnamese competition law history, the sanctions would be mitigated and it could be understood as a warning to other companies."[111] As a result, the VCA mandated sanctions did not deter the cartels from subsequent illegal activity.

Price-fixing has become a common practice in Vietnam. This case is also concerned with price-fixing cartels in the insurance industry in Vietnam. On May 25, 2011, 12 insurance

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[109] Vietnam Competition Authority, *Annual Report Vietnam Competition Authority 2010*, June 15, 2011, 14, http://www.vca.gov.vn/NewsDetail.aspx?ID=1425&CateID=244 (accessed October 11, 2013).

[110] Ngoc Lan, "[Whether the Insurance Association Violates the Competition Law?] [Hiệp Hội Bảo Hiểm Có vi Phạm Luật Cạnh Tranh?]," *The Saigon Times* (November 11, 2008), http://www.thesaigontimes.vn/Home/taichinh/baohiem/12124/Hiep-hoi-Bao-hiem-co-vi-pham-Luat-canh-tranh?.html (accessed October 24, 2016).

[111] "Phạt 19 Doanh Nghiệp Bảo Hiểm: Mang Tính Chất Cảnh Báo," 2008, http://vneconomy.vn/tai-chinh/phat-19-doanh-nghiep-bao-hiem-mang-tinh-chat-canh-bao-20100803042740945.htm (accessed October 25, 2016).

companies signed an agreement to fix the life insurance premium for students in the Southern province of Khanh Hoa during the school year 2011-2012. According to the VCA, the combined market share of the 12 insurance companies signing the agreement accounted for 99.81 percent of the market, well in excess of the threshold of 30 percent on the relevant market. Article 9(2) of the Competition Law prohibits the price-fixing cartels. The VCA initiated an investigation of the case.

However, during the investigation process, on September 1, 2011, representatives from the 12 enterprises voluntarily terminated the committed acts. This is because these enterprises found the price-fixing conduct violated the Competition Law. In addition, the 12 enterprises also took remedial measures for their unlawful acts. The enterprises agreed to pay the administrative fee of 100 million VND for the investigation process. Therefore, pursuant to Article 101(1)(b) of the Competition Law, "the parties subject to investigation have terminated voluntarily the practice in breach, remedied the consequences caused, and the complainant has withdrawn voluntarily the complaint",[112] the VCC issued a decision to suspend the case.

2. Trade Association Involvement in Cartel Agreements: A Forum for Enterprises to Engage in Cartel Activity

Since the competition law came into force, there have been three pricing cartels agreements involving trade associations. The first case relates to steel companies concluding a cartel agreement not to reduce the price of steel in 2008. The fact of the case showed that early October 2008, to avoid the sudden lower price at the end of the year 2008, at the meeting of General Director Meeting of Steel Manufacturers, the Vietnam Steel Association (VSA) and its members agreed to fix the steel price ranging from 13.5 million VND to 14 million VND per ton. The argument by VSA for that steel price-fixing agreement was to "help steel manufacturers overcome the critical moment."[113] This is because four steel manufacturers temporarily stopped producing and other manufacturers reduced their operations due to supply exceeding the demand. Sharing with the media on October 15, 2008, the Chairman of VSA said that "VSA and its members fully realized the steel price-fixing cartel infringed the Competition Law and the Ordinance on Price

[112] Vietnam's Competition Law, Law No. 27/2004/QH11 [Luật cạnh tranh, Số 27/2004/QH11] (Vietnam Competition Authority 2004).

[113] "[Investigation the Steel Price-Fixing Conduct of Vietnam Steel Association] [Điều Tra Việc Hiệp Hội Thép Thỏa Thuận Không Hạ Giá]," September 30, 2009, http://www.baomoi.com/dieu-tra-viec-hiep-hoi-thep-thoa-thuan-khong-ha-gia/c/3278891.epi (accessed October 31, 2016).

Management. However, the VSA had to act in this way because the fixed price was in fact lower than the production price of about five to six million VND per ton. In addition, he also explained that if steel manufacturers continued to compete on the steel price, it would bankrupt some steel manufacturers and have a significant impact on the steel industry."[114] After the media and public expressed their concerns over the illegal steel price-fixing conduct, the VSA voluntarily abrogated its conduct, which violated the competition law and the VCA stopped the investigation of the case.

The second case involves the Vietnam Insurance Association's car premium insurance in 2009 as was illustrated in the previous section. The third case relates to a Roofing Panel price-fixing cartel which occurred in 2011. There are 44 companies and manufacturers operating in the fibro-cement roofing sector nation-wide. Among these 44 companies, 37 are members of the Vietnam Roofing Association. In 2011, some members of the Vietnam Roofing Association engaged in an agreement to increase the selling price of their products. In response, on April 5, 2011, the VCA detected a copy document from the Vietnam Roofing Association, requesting that member enterprises adjust selling prices of roofing panel. On the basis of this document, the VCA began an initial investigation in order to collect more information and evidence. After taking into consideration illegal conduct, the VCA decided to start a preliminary investigation on May 5, 2011, which was followed by an official investigation on July 14, 2011, based on the violation acts of price-fixing agreement in the roofing market.[115]

The Roofing Panel case is similar to *the Insurance Companies* case. Although this case is still under investigation, it reflects the limited understanding and awareness of association in enforcing competition law. In this case, the Vietnam Roofing Association acts as the coordinator for their members to implement agreements fixing prices and the cost of goods and services.

3. No Leniency Program under Vietnam's Competition Law

Although the VCL has provisions for extenuating and aggravating circumstances of competition restriction acts and unfair competition acts, which are stipulated in Article 85(1)(2) of Decree No. 116/2005/ND-CP and in Article 8 of Decree No. 120/2005/ND-CP, the reward granted to cartel

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[114] Ibid.

[115] Vietnam Competition Authority, *Annual Report Vietnam Competition Authority 2011*, May 17, 2012, 14, http://www.vca.gov.vn/NewsDetail.aspx?ID=1427&CateID=244 (accessed October 12, 2013).

members is not sufficiently clear and does not create any incentive for unveiling secret cartel agreements. Based on these provisions, the VCA will grant the extenuating circumstances to cartel members if they voluntarily report illegal acts before investigation, compensate any damage, provide secret evidence or information regarding illegal acts which the VCA was previously unaware of, and if the violated acts have positive impacts on economic development.[116]

In addition, the enforcement authority will consider applying aggravating conditions to the cartel members if they repeat their illegal activity in the same field, start illegal activity after the regulators reject the exemptions and issues the decision to stop the exemptions, ignore the decision to stop the illegal activity, and evade or conceal any illegal acts.[117] But these regulations are not sufficient in encouraging cartel members to report their illegal activity.

4. Industrial Policy and Exemptions under Vietnam's Competition Law

Vietnam doesn't have a comprehensive competition policy. Instead, Vietnam has industrial policy in various sectors which need government support to make the incentives such as tax reduction, credit access and preferential tax for land leasing. Accordingly, the industrial policy has two main goals: 1) to make domestic products more competitive to compete with the imported products; 2) and to enhance the competitive capacity of exported products.[118] The National Assembly and the Prime Minister make the industrial policy.

Currently, the Vietnamese Small and Medium Enterprises (SMEs), which account for more than 97 percent of Vietnam's total businesses, recruit more than 50 percent of the workforce, and contribute more than 40 percent of the Gross Domestic Product (GDP), are defined as the "engine of growth" and the "backbone" of the economy.[119] However, SMEs are facing three significant constraints: access to credit, falls in product demand and fierce competition with other

[116] Decree No. 116/2005/ND-CP issued on September 15, 2005 by the Government on Detailing the Implementation of a Number of Articles of the Competition Law [Nghị định số 116/2005/NĐ-CP ngày 15/09/2005 của Chính phủ về quy định chi tiết thi hành một số điều của Luật cạnh tranh] (Ministry of Justice 2005).
[117] Ibid.
[118] Phan Cong Thanh, "Competition Law Enforcement of Vietnam and the Necessity of a Transparent Regional Competition Policy" (Economic Research Institute for ASEAN and East Asia, December 2015), 3.
[119] Vietnam Business Forum - Vietnam Chamber of Commerce and Industry, "Growth Engine Powered by SMEs," November 8, 2016, 1, http://vccinews.com/news_detail.asp?news_id=34108 (accessed April 29, 2017).

economic components.[120] In order to create favorable conditions for the SMEs to access credit, the Prime Minister set up a guarantee fund at the Decision No.58/2013/QD-TTg on October 15, 2013. The guarantee fund is a non-profit organization with the role of providing credit guarantees to credit institutions in Vietnam to commit the credit responsibility for the SMEs.[121] The conditions for SMEs to be guaranteed by the fund are to have investment projects, effective production and business plans, and be able to demonstrate that they are capable of repaying loan capital. Further, they must be able to prove at the time of applying for guaranty, there are no outstanding debts to the State budget or bad debts at credit institutions or other economic organizations. In addition, the total value of the mortgaged or pledged assets must be at least 15 percent of the value of the loan and SMEs must have at least fifteen 15 percent of the equity in the investment project or production and business plan. This Decision is an incentive measure to help the SMEs easily access credit to invest and expand their business plan so that they are able to compete with other economic forms. Significantly, the government is drafting a law on the small and medium enterprises so that the government can provide comprehensive support for SMEs, increase the number of SMEs, help to improve business operations of the SMEs and encourage the SMEs to adopt new production in Vietnam.

In terms of the exemption of Competition Law, if the combined market share is 30 percent or more than 30 percent, five types of competition restriction agreements are prohibited: 1) price-fixing, 2) market allocation, 3) output restriction, 4) technology restriction, and 5) forcing other enterprises to accept conditional obligations to purchase goods or services. However, the exemption for the prohibited acts is applicable if it satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers:

(a) It rationalizes an organizational structure or a business scale or increases business efficiency;

(b) It promotes technical or technological progress or improves the quality of goods and services;

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[120] Central Institute for Economic Management, *Characteristics of the Vietnamese Business Environment: Evidence from a SME Survey in 2015*, October 2016, 22.

[121] Article 13, The Prime Minister, *Decision No.58/2013/QD-TTg issued by the Prime Minister on October 15, 2013 about the promulgation of the regulatory establishment, organisation and operation of credit guarantee fund for the small and medium enterprises*, October 15, 2013.

(c) It promotes uniform applicability of quality standards and technical ratings of product types;

(d) It unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors;

(e) It enhances the competitiveness of medium and small sized enterprises;

(f) It enhances the competitiveness of Vietnamese enterprises in the international market. The exemptions aim at enhancing the efficiency and competitiveness of the SMEs in the domestic and international markets as well as encouraging the Vietnamese enterprise to invest the advanced technology to improve the quality of the goods and services.

In terms of economic concentration, Article 18 of the VCL prohibits the enterprises participating in the economic concentration from having a combined market share in the relevant market of more than 50 percent, excepting where enterprises after the economic concentration still falls within the category of medium and small sized enterprises as stipulated by law. In addition, Article 19 of the VCL prohibits economic concentration as stipulated in article 18 of this Law may be considered for exemption in the following cases:

(a) One or more of the parties participating in the economic concentration is or are in danger of being dissolved or of becoming bankrupt;

(b) The economic concentration has the effect of extension of export or contribution to socio-economic development and/or to technical and technological progress.

The merger case of BankNetVN and Smartlink requesting for exemption is a good example to study the exemption under the Vietnam's Competition Law. A summary of the case is as follows:

On August 19, 2014, the Ministry of Industry and Trade (MOIT) received an adequate dossier requesting for exemption on economic concentration by BankNetVN and Smartlink in accordance with Article 30 of the VCL and Article 57 of Decree No.116/2005/ND-CP providing details of implementing some articles of the VCL. BankNetVN and Smartlink were two enterprises operating in the field of intermediary bank payment and planned to merge in accordance with Article 16(1) of the VCL. Under this provision, Smartlink was to be merged into BankNetVN. It was found that the combined market share of the two enterprises was more than 90

percent on the relevant market, which was prohibited under Article 18 of the VCL (prohibits if the enterprises participating in the economic concentration have a combined market share in the relevant market of more than 50 percent.

However, this case met the conditions to be granted exemption as stipulated in Article 19 of the VCL. And the competent authority to permit this exemption was the Prime Minister as set out in Article 25(2) of the VCL. The Prime Minister issued the Decision No.2327/QD-TTg dated December 22, 2014 to grant exemption to these two enterprises in the form of merger within five years. The Decision also required that the two enterprises after the merger build and implement a roadmap for the application of advanced science and technology to ensure the quality of services were maintained with the switching infrastructure. Furthermore, the merged enterprise were required to guarantee the rights of banks and businesses eligible under the law to operate and access the system and intermediary services without any discrimination.

From an economic perspective, this merger was considered as a venture that would contribute to the socio-economic development and technological advancement in the following ways:

Firstly, the merger was an option selected by the State to implement the platform of building an unified financial switching center to promote payment by bank cards, which is in line with the Government's direction to develop a non-cash payment system, increase the efficiency of the economy management done by management agencies via payment channels and to meet with the principles of transparency in the course of wider and deeper economic integration.

Secondly, the merger was also in conformity with the platform of building a unified card-switching center in Vietnam on the basis of volunteer participation of 49 members. The merged enterprises would apply advanced technology and the model of an Automated Clearing House of the U.S. Moreover, the post-merger enterprise would transfer to using the chip card payment of EMV standard in Vietnam.

Therefore, this approved merger case allowed banks and consumers to access an advanced payment method in an efficient way. The only concern is whether or not the merged enterprise will abuse the monopolistic position to conduct anti-competitive behavior. The Vietnam Competition Authority should closely supervise the merged enterprise and intervene in a timely

manner to protect the interests of other enterprises and consumers. Significantly, this merger case also shows that Vietnam should develop a comprehensive competition policy to promote the efficiency for economic development.

V. Conclusion

Vietnam enacted the Competition Law on December 3, 2004. By that time, Vietnam had undergone almost 20 years of economic reforms since the implementation of the *Doi moi* ("Open-door policy") in 1986. After starting the *Doi moi*, Vietnam achieved significant economic growth and transitioned from a net importer to net exporter of rice in 1989. The concept of a socialist-oriented market economy of the Communist Party of Vietnam developed over time. Accordingly, the number of economic forms was expanded from two to five. In addition to state-owned enterprises and collective cooperatives, the Vietnamese government allowed setting up the "private sector", "state capitalist", and "businesses with foreign owned capital" forms. This resulted in a so-called multi-forms economy. Gradually, Vietnam realized the need to apply a competition rules in the economy to deal with the anti-competitive acts in order to protect the legitimate rights of enterprises and to ensure a fair business environment.

Furthermore, in its efforts to become a full member of the WTO, the Vietnamese Government adjusted its regulatory environment to comply with specific international standards. One of the requests from WTO accession negotiation member states was to control the monopoly and to eliminate the anti-competitive acts to create a level playing field for all enterprises in the Vietnamese market. Hence, the enactment of competition rules doesn't only serve for the need to supervise and detect the anti-competitive acts or potential harms to competition to ensure a fair business environment for Vietnam itself, it also helps to satisfy the requests to become a WTO member state.

When discussing about a threshold to define a dominant position or market power in the market, the Vietnamese lawmakers decided to apply the threshold of 30 percent on the relevant market while others proposed 40 or 50 percent. Lawmakers considered it as the best option because more than 96 percent of Vietnamese enterprises were small and medium enterprises. The 30 percent threshold was consistent with the existing telecommunications regulation, which

determined a 30 percent market share as a dominant position and with countries such as Germany and Canada who also applied the same threshold.

However, with the current concept of cartels, the Vietnamese competition authority follows the form-based approach to define the cartels. Specifically, Article 8 of Vietnam's Competition Law listed eight types of cartel agreements. As a result, this approach may miss the detection of cartels if their conduct is not listed. Furthermore, while there are two kinds of cartel agreements (horizontal and vertical agreements) with different levels of harms, the concept of cartels in Vietnam does not clearly define whether it includes the horizontal agreements only or covers both horizontal and vertical agreements.

Moreover, the way that the Vietnam Competition Authority determines the price-fixing cartels based on the combined market share of 30 percent on the relevant market does not eliminate the anti-competitive acts. The fact is that many price-fixing cartels are legitimate if the combined market share below 30 percent. The case of *Tan Hiep Phat Company v. Vietnam Brewery Company* showed that a Vietnamese company couldn't compete with a foreign beer brand in Vietnam because of the market share approach.

After reviewing the industrial policy, this chapter has found that the Vietnamese government had implemented several incentives for Vietnamese enterprises, including tax reduction, access to credit and preferential taxation for land leasing. For the SMEs, the government set up a guarantee fund for the SMEs to access credit under certain conditions. Regarding exemptions under the Competition Law, this chapter also found that cartel exemption could be applied if the cartel contributes to the enhancing of quality and efficiency of services to the broader society. However, Vietnam still lacks a comprehensive competition policy to enhance competitiveness and efficiency.

Japan and the European Union (EU) have been enforcing competition rules for more than 60 years. Learning from the experiences from these two competition regimes by making a comparative study between Vietnam, Japan and the EU will help Vietnam to identify the similarities and differences, better understand the legal concept of cartels and identify best practices in dealing with price-fixing cartels in Vietnam. Significantly, comparing with Japan and the EU is a useful exercise for Vietnam to question whether or not the market share approach is

reasonable for Vietnam and whether or not Vietnam would benefit from a stricter regulation for price-fixing cartels.

Chapter III:
Japan Anti-Monopoly Act and EU Competition Law:
Centralism on Conduct and Harms

The main objective of this Chapter is to review and analyze the concept of cartels and regulation of price-fixing cartels under the Japan Anti-Monopoly Act and the EU Competition Law. This Chapter presents the review of historical background to understand the reason why Japan and the European Union (EU) introduced the Anti-Monopoly Act and the Competition Law, respectively. After that, in order to help the readers grasp how the Japan Anti-Monopoly Act (AMA) and the EU Competition Law are working, this Chapter will deeply go further in details with the following steps. Firstly, there will be a sub-section to review and analyze some cartels agreements occurred in Japan and EU to understand how the competition authorities detect and examine the cartels cases. Secondly, this Chapter will review the competition policy in Japan and EU. Thirdly, it will review the competition legislations of Japan and EU. Specifically, there will be a section to illustrate the regulatory concept of cartels and the current regulation of price-fixing cartels to see how the competition policy is reflected in the legislation to support the economic development of Japan and the EU.

Significantly, this Chapter will point out which regime is workable for the competition authority to detect cartels in an effective and efficient way.

A. The Japan Anti-Monopoly Act

I. The Development of the Japan Anti-Monopoly Act

1. The Political Situation and Legal System

In terms of the historical development of the Japanese legal system, three major periods need to be reviewed and analyzed to understand the principles of the Japanese law. These are: (i) the Tokugawa period (1603-1868) with the establishment of traditional institutions; (ii) the period before the Second World War (1868-1945) for the introduction of civilian codes; and (iii) the postwar period (1945 to the present) with the Anglo-American influence.[122] However, given

[122] Yukio Yanagida, *Law and Investment in Japan: Cases and Materials* (East Asian Legal Studies Program, Harvard Law School, 2000), 32.

length constraints, this Chapter emphasizes the political and legal development of Japan in the postwar period.

After the Second World War ended in 1945, Japan accepted the Potsdam Declaration and was supervised and controlled by the Supreme Commander of the Allied Powers (SCAP).[123] Accordingly, Japan started conducting reforms under a strong American influence in the direction of demilitarization and democratization.[124] Five prominent reforms in 1945 included equality of men and women (in the first election of 1946 women had the rights to vote for the first time), encouragement to set up trade unions (the rights of workers were enhanced), liberalization and democratization of education (the Fundamental Law on Education was enacted in 1947 and the education of Shintoism and Confucian ethics was abolished), liberalization from autocratic rule (respect for individual rights, justice and peace emphasis), and democratization of the economy (dissolution of business conglomerates) and land reform.[125] These reforms were far reaching and impacted almost every aspect of life for the people in Japan at that time.

The Constitution, which was enacted in 1946, reflected the reforms and made significant changes in the political and social system of Japan. Scholar Hiroshi Oda pointed out three major outcomes that the 1946 Constitution brought about. Firstly, the political system was changed in a democratic direction compared with the previous Constitution. Accordingly, a democratically elected Diet (known as the Parliament, including the lower house and the upper house), became the highest organ of state power, and the sole law-making organ of the State[126] with Executive power vested in the Cabinet comprising of the Prime Minister and Ministers of State who must be civilians.[127] All legislations were made and ratified by a majority vote of both houses. Secondly, Japan renounced war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes (Article 9 of the Constitution). Thirdly, the 1946 Constitution provided increased protection of the rights of the people, and mechanisms to guarantee these protections, such as judicial review were introduced.[128]

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[123] Paragragh 2, Basic Initial Post Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan, Joint Chiefs of Staff, November 3, 1945.
[124] Ibid.
[125] Hiroshi Oda, *Japanese Law* (Oxford University Press, Incorporated, 2011), 20.
[126] Article 41, The Constitution of Japan 1946, Law no. of 1946, (jp).
[127] Article 65-66, ibid.
[128] Oda, *Japanese Law*, 21.

A significant revision to the Japanese legal system was the amendment of the Japanese Code of Civil Procedure in 1948, which underwent two significant changes that shifted Japanese civil trials to an adversarial system like that used in Anglo-American systems.[129] Accordingly, the judge was not allowed to take evidence *ex officio*, except in certain special situations. Instead, the burden to present and cross-examine the witnesses belonged to the plaintiffs and their lawyers.[130]

In the early 1950s, the development of the Cold War and the Korean War made the policy shift from disarmament to rearmament. The Police Auxiliary Force was set up and later became the Self Defense Force. In 1951, Japan and the Allied Powers signed the Treaty of Peace with Japan, returning full sovereignty of the Japanese people over Japan and its territorial waters (Chapter I Article 1(b)). After that, Japan focused primarily on a policy of economic development. In January 1960, Japan and the U.S. signed a bilateral Japan-U.S. Security Treaty under which the U.S. committed to defend Japan if Japan came under attack (Japan-U.S. Security Treaty Article VI). The undertakings set out in this Treaty remain current to this day.

In the 1960s, Japan achieved a high economic growth rate due to its government policy. Significantly, the Ministry of International Trade and Industry (MITI) played an important role in coordinating and supporting private sector activities, which contributed to the rapid industrialization of Japan.[131] In addition, MITI also promoted its significant role in the fields of environment, energy saving, safety standards, trade negotiation, intellectual property rights, and the regional economic cooperation.[132] Furthermore, in terms of policy incentives, the amendment of the Foreign Exchange and Foreign Trade Control Law liberalized foreign exchange control and was a strong foundation for the internationalization of the Japanese economy.[133]

In the mid-1980s, Japan entered into a "period of bubble".[134] Accordingly, the Japanese speculated assets in real estate and stocks during the 1980s when the economic growth rate achieved a high rate. After the stock prices peaked in 1989, the bubble burst in February 1991 and

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[129] Yanagida, *Law and Investment in Japan*, 35.
[130] Meryll Dean, *Japanese Legal System* (Cavendish Publishing, 2002), 123–24.
[131] Kenichi Ohno, *Industrial Policy Formulation in Thailand, Malaysia and Japan: Lessons for Vietnam Policy Makers - Chapter 5: Role of MITI* (Vietnam Development Forum, September 2006), 1, http://www.grips.ac.jp/vietnam/VDFTokyo/Doc/TMJ_5japan_2.pdf.
[132] Ibid., 1.
[133] Oda, *Japanese Law*, 22.
[134] Shigenori Shiratsuka, "Asset Price Bubble in Japan in the 1980s: Lessons for Financial and Macroeconomic Stability" (Institute for Monetary and Economic Studies, December 2003), 1.

stock and land prices rapidly went down. And the Japanese economy spent a long-lasting recession that is called 'the lost decades'.[135]

As a legacy of the previous decade, the Japanese government utilized administrative tools such as the granting of licenses and permissions to control firms.[136] Furthermore, as a consequence of the economic slowdown, Japanese companies were struggling to survive, which in turn triggered a policy of entry restriction for foreign companies into the Japanese domestic market through structural impediments. In response to these restrictive practices the U.S. and the European Union applied pressured on Japan the Structural Impediment Initiatives Talks (SII) between the U.S. and Japan commenced in 1989 by requesting Japan to deregulate and remove the excessive regulation barriers. Accordingly, the company law was amended to strengthen the rights of minority shareholders and the streamline of patent procedures. In addition, the Administrative Reform Committee was set up in 1994 to discuss regulatory reforms aiming at reducing the government intervention in the market. Furthermore, the objective of deregulation was not only to remove regulations, but also to enhance fairness and transparency.[137]

After the SII talks, Japan and the U.S. conducted many bilateral discussions about regulatory reforms and economic harmonization. Specifically, Japan – the U.S. Enhanced Initiative on Deregulation and Competition Policy was implemented during the period of 1997-2001. Next, Japan – the U.S. Regulatory Reform and Competition Policy Initiative was initiated during the period of 2001-2009. And Japan - the U.S. Economic Harmonization Initiative was discussed since 2010. Furthermore, Japan carried out the regulatory reforms with the European Union on regulatory reforms toward trade and investment liberalization and/or facilitation since 1994 under the name of the Japan-EU Regulatory Reform Dialogue. As a result, both sides agreed to promote regulatory reform in Japan and the EU and to promote investment. Japan revised the Commercial Code to authorize triangular mergers.[138]

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[135] Nao Sudo, Michio Suzuki, and Tomoaki Yamada, "Inequalities in Japanese Economy during the Lost Decades" (Center for International Research on the Japanese Economy, July 2012), 3.
[136] Oda, *Japanese Law*, 23.
[137] Ibid., 24.
[138] "MOFA: Japan-European Union (EU) Regulatory Reform Dialogue in Tokyo (Overview)," November 25, 2004, http://www.mofa.go.jp/region/europe/eu/overview/dereg0411-2.html (accessed May 1, 2017).

Following commencement of these negotiations, Japan's reform priority gradually shifted towards a full revision and elimination/deregulation of government regulations that prevented competition in the market. In June 2010, "Implementation Policies for Regulatory/Systemic Reforms", which is the latest regulatory/systemic reform plan, set forth 61 reform items in total, which are categorized into four areas: green innovation, life innovation, agriculture, and other. Most government agencies are subject to these reforms."[139] These reforms made the overall influence of MITI on Japanese industries and enterprises decrease because the business environment was more liberalized and many Japanese enterprises became more competitive and globalized.[140] In 2001, the Japanese government reorganized its government ministries into one Cabinet and 12 ministries. At the same time, MITI was renamed it as Ministry of Economy, Trade and Industry (METI).

In terms of the administration of justice in Japan, Professor Hiroshi Oda reviewed the historical background of the Japanese system of courts in the mid-nineteenth century which was influenced by the French system.[141] Accordingly, the Statute on Judicial Matters was enacted in 1872 and is known as the first legislative act related to the judicial system. In the 1880s, the three-tier court system was introduced. Under this system, first instance civil and criminal cases were initiated in the courts of first instance, after which they were transferred to the High Courts, and the final judgment was rendered by the Supreme Tribunal. As the French court system proved to be too complicated for Japan, the Prussian model was instead adopted[142] together, with the enactment of 1889 Constitution.[143] Accordingly, District Courts were empowered to render judgment in the first instance for ordinary cases, less significant cases became the jurisdiction of ward courts, and appeals were transferred to the courts of appeal. The Supreme Tribunal retained authority to render the final judgment.

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[139] Nakagawa Junji, *2011-2012 the Japan Institute of International Affairs Research Project: Policies Needed to Ensure Japan's International Competitiveness - Chapter 5: Regulatory/Systemic Reforms for Maintaining/Enhancing Competitiveness: The Importance of Developing a Multi-Tiered Strategy* (The Japan Institute of International Affairs, 2011), 117.

[140] Kenichi Ohno, *Industrial Policy Formulation in Thailand, Malaysia and Japan: Lessons for Vietnam Policy Makers - Chapter 5: Role of MITI*, 1.

[141] Oda, *Japanese Law*, 53.

[142] Ibid.

[143] Also known as the Meiji Constitution.

Following the Second World War, a new Constitution was enacted in 1946. The Allied Forces carried out significant reforms, including the initiative to democratize the judicial system. Accordingly, the independence of the judiciary was guaranteed in the 1946 Constitution. In addition, in 1947 the Law on Courts and the Law on the Public Prosecutor's Office were enacted to make the Public Prosecutors independent from the Courts. Furthermore, in 1949 the Law on Attorneys was enacted. These three newly enacted laws on courts, public prosecutors and attorneys replaced the former Law on Court Organization to govern the current judicial system of Japan.[144] Additionally, some independent organizations were set up with a quasi-judicial and legislative function such as, Government Personnel Authority, the Fair Trade Commission, the National Public Security Commission, the Labor Commission and the Dispute Coordination Commission.

In terms of the judicial branch in Japan, there are five types of courts: the Supreme Court, High Courts, District Courts, Family Courts and Summary Courts. In the field of competition law, according to Article 85 of the Japanese Anti-Monopoly Act (AMA), it is the Tokyo High Court that presides over cases where an alleged enterprise does not agree with the decisions of the Japan Fair Trade Commission (JFTC).

Therefore, after the Second World War, Japan was under the pressure of the Allied Forces to democratize the political, economic and judicial systems. When the occupation period ended in the early 1950s, Japan proactively stimulated its economic development in its own way, in light with the national economic and social context and made many significant achievements. Japan is still on the way to implementing reforms that match with the current regional and global situations.

2. Japanese Anti-Monopoly Act Enactment

This sub-section will review the historical background of competition in Japan before the Second World War and the competition enforcement after enacting the Anti-Monopoly Act in 1947.

2.1 The Situation before the Enactment

Cartels in Japan were encouraged in the 1930s to drive the economic development as part of the nation's industrialization strategy. Initially, the Japanese government established its state-owned

[144] Oda, *Japanese Law*, 54.

enterprises to manage and develop the key industries of the economy. After that, the government transferred its ownership of these enterprises to the private sector at a cheap price. Concurrently, family controlled conglomerates, which were called *zaibatsu* in the Japanese language, operated under the supervision and control of the government. These included groups such as Mitsui, Mitsubishi, Sumitomo and Yasuda, and they rapidly developed.[145] In terms of legal support, there were two laws that encouraged the cartels formation, namely the Law on the Control over Key Industries in 1931 and the Law on National General Mobilization in 1938. As a result, the government controlled more than 2,000 associations. In addition, there were 33 cartels in heavy industry, 31 in chemicals, 11 in textiles, 8 in food processing and 18 in finance.[146] Thus, the close relationship between government and business community, which was a unique feature of the Japanese system, contributed to the development of the economy at that time.

To illustrate the above-mentioned statement, Tilton holds that Japan's rapid industrialization was indeed developed by state-supported cartels.[147] In a report to review 50 years history of the Japanese Anti-Monopoly Act (AMA), the JFTC recognized the coordination role between the government and cartels before enacting the AMA. Accordingly, during the Second World War, the pricing, production and sales allocations of almost of all materials including machines, airlines, steels, oil, cars, lumbers, agricultural and sea products were under the control of the government but its policies were implemented under delegation by private control of associations.[148] Significantly, Matsushita highlighted that the competition and the concepts of free enterprise did not exist in Japan before the Second World War.[149] Instead, the Japanese government led the economy for the purpose of self-sufficiency, regional power and militarization.[150]

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[145] Jerzy Grabowiecki, *Keiretsu Groups: Their Role in the Japanese Economy and a Reference Point (or a Paradigm) for Other Countries*, March 2006, 19.
[146] Kamekichi Takahashi, *On the Japanese Managed Economy [日本経済統制論]* (Kaizousha, 1933), 14.
[147] Mark Tilton, "The Difference Government Policy Makes: The Case of Japan," in *How Cartels Endure and how They Fail: Studies of Industrial Collusion* (Edward Elgar Publishing, 2004), 174–95.
[148] The Japan Fair Trade Commission, *The Japan Anti-Monopoly Act Policy Fifty Years History*, 1997, 21–22.
[149] Mitsuo Matsushita, "The Antimonopoly Law of Japan," in *Global Competition Policy* (Peterson Institute, 1997), 151.
[150] Vanessa Zhang, "The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation," *Competition Policy International* (October 6, 2014),

2.2 The Evolution of the Japan Anti-Monopoly Act

After the Second World War, together with other regulatory reforms like collective bargaining and securities exchange acts that were previously unknown to Japan, the Allied Occupation Forces put pressure on the Japanese government to enact the Japanese Anti-Monopoly Act (AMA) on March 31, 1947. This Act was intended as a mechanism to restructure the economy, dissolving *zaibatsu* and eliminating the excessive concentration of economic power. According to Arisawa's statistics in 1946, the big four *zaibatsu* including Mitsui, Mitsubishi, Sumitomo and Yasuda accounted for approximately 25 per cent of the total paid-in capital of all Japanese corporations.[151] However, due to the enactment of the Law against Excessive Concentration of Economic Power in July 1947, *zaibatsu* was dismantled and large companies were split into smaller companies.

The US introduced the Sherman Act in 1890 with a strict anti-cartel enforcement, and the AMA was heavily influenced by such US antitrust legislation.[152] Significantly, in terms of political meaning, the AMA enactment was also intended to restrain the Japanese government from returning to a path of imperialism. Oda stated that the AMA was stricter than the US law to a certain extent.[153] For example, businesses were not allowed to hold other companies' shares to avoid the economic concentration of power. Thus, this regulation was too stringent for Japanese companies.

However, in the 1950s, the Korean War broke out, and forced Japan and the US modify Japan's competition policy.[154] This is because the US wanted Japan to become an industrial country to help the fight against communism.[155] The first amendment of the AMA took place in 1953, just after the Occupation ended. One of the most significant amendments to the AMA was the introduction of a cartel exemption, because Japan needed a more pro-industry competition policy for the economic development.[156] Hiroshi Iyori holds that the government introduced the

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https://www.competitionpolicyinternational.com/the-2013-amendments-to-japans-anti-monopoly-act-some-history-and-a-preliminary-evaluation/.

[151] Hiromi Arisawa, *Securities History of Japan [日本証券史]*, vol. 2, 1995, 224.

[152] See Harry First, *Antitrust in Japan: The Original Intent, 9 Pac Rim L & Pol' y J 1* (2000).

[153] Oda, *Japanese Law*, 328.

[154] Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing, 2014), 13.

[155] Akira Inoue, *Japanese Antitrust Law Manual: Law, Cases and Interpretation of the Japanese Antimonopoly Act* (Kluwer Law International, 2007), 3.

[156] Kameoka, *Competition Law and Policy in Japan and the EU*, 13.

exemptions for "depression cartels" and "rationalization cartels" under Section 24-3 & 4 of the Act under certain conditions.[157] Also, Akira Inoue argues that the *per se* illegal rule was only subject to those cartels that substantially restrained competition contrary to the public interests.[158] Additionally, the originally prohibited provision of 'unfair methods of competition' was amended to 'unfair trade practices'. Moreover, the provision on economic concentration of power was deleted. Therefore, this amendment was a relaxation of the strict enforcement under the AMA prohibitions on cartels and monopolies that the US had forced on Japan immediately after the war.

The second amendment of the AMA occurred in 1977 after public criticism against price manipulation in private industry during the 1973 Oil Crisis. Accordingly, there were two significant amendments. Firstly, the JFTC introduced surcharges, where cartels were required to pay an administrative fine for violating the law. Secondly, the JFTC also required that companies provided justification that included production cost and customer lists for price increases. The requirement of price report was an effort of the JFTC to control the simultaneous price increases in oligopolistic markets.

The US-Japan Structural Impediments Initiatives (SII) negotiations began in 1989 to solve the imbalance in trade between the US and Japan, including the AMA enforcement. The US complained that the cross shareholding and the *keiretsu* (business affiliation) system made it difficult for foreign companies to enter the Japanese market.[159] In response to this issue, the Japanese government strengthened the AMA and strengthened its enforcement. Accordingly, the JFTC implemented criminal penalties more actively in 1991.[160] Kazuo Sato pointed out that the JFTC imposed criminal penalties on cartels because of its malicious effect.[161] Additionally, the amount of surcharges applicable to cartels was also increased from 2 per cent to 6 per cent of illegal turnover and the maximum fine of cartels was increased from one million to 100 million yen. Furthermore, the JFTC supported the private litigation by providing supporting documents to

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[157] Hiroshi Iyori, *Antimonopoly Legislation in Japan* (Federal Legal Publications, 1969), 19–21.
[158] Inoue, *Japanese Antitrust Law Manual*, 4.
[159] Oda, *Japanese Law*, 329.
[160] Inoue, *Japanese Antitrust Law Manual*, 120.
[161] Sato Kazuo, Kawai Katsuyamato, and Jitosho Itsuo, *Text: Anti-monopoly Act [テキスト独占禁止法]* (青林書院, 2006), 332.

plaintiffs to claim for damage compensation.[162] Thus, the SII negotiations created an opportunity for Japan to open up its markets, to reform its distribution system and to strengthen the AMA enforcement. Japan implemented various regulatory reforms including the amendment of the Act on the Adjustment of Business Activities of Retail Business at Large-scale Retail Stores and the more effective enforcement of the AMA.[163] Significantly, bilateral Agreements on Competition Cooperation between Japan the US and the European Union were signed in 1999 and 2003, respectively. The agreements became useful tools to jointly cooperate and share the information about international cartels.

In short, the historical review of the AMA shows that from the starting point of encouraging the cartel formation and no perception about competition before the Second World War, Japan introduced its first competition rule under the strong influence of the US antitrust laws to strictly control cartel activities. However, Japan became independent in enforcing its competition policy to support the industrial policy and economic growth following the first amendment of the AMA in 1953. Following this first amendment of the AMA, the JFTC amended this act approximately 20 times to reflect the Japanese economic conditions, using policy to "weaken" and "strengthen" its competition rules to match the needs of the nation's economic development and to control the anti-competitive effects.

3. Goals of the Japan Anti-Monopoly Act

This sub-section will briefly explore the original and current goals of the AMA to understand what problems arose in the implementation of the AMA and how the Japanese government resolved them. As mentioned in the previous part, the original goal of the AMA was to prohibit the industrial monopoly. To do so, there were various adopted measures such as the demolition of the *zaibatsu* system, a reduction in the concentration of economic power and the abolition of control associations.[164] The most significant point in the AMA is that although the AMA was the result of pressure from the U.S. and legal transplantation from the U.S. Antitrust law, many foreign and

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[162] Mitsuo Matsushita, "The Antimonopoly Law of Japan," 155.

[163] Nakagawa Junji, *2011-2012 the Japan Institute of International Affairs Research Project: Policies Needed to Ensure Japan's International Competitiveness - Chapter 5: Regulatory/Systemic Reforms for Maintaining/Enhancing Competitiveness: The Importance of Developing a Multi-Tiered Strategy*, 118.

[164] Masako Wakui, *Antimonopoly Law: Competition Law and Policy in Japan* (Arima, 2008), 7–8.

Japanese scholars agree that Japanese negotiators had a deeper understanding of US Antitrust principles and history than subsequent foreign or Japanese commentators.[165] Professor First also stated that Japan proactively responded to the AMA draft by the US regarding the concept of conducts, structural provisions and institutions.[166]

During the process of drafting the AMA, there was a controversial debate about the establishment of an economic system that centered on free competition among medium and small enterprises.[167] There were concerns that the smaller firms would be unable to capture economies of scale, essential if Japan were to regain its pre-War position in the international economy. In addition, by giving democratic access to the market for all kinds of enterprises, the possible loss of the efficiencies of large-scale enterprise could also occur. To deal with this problem, Japan learnt from the experiences from the case *United States v. Trans-Missouri Freight Association*.[168] Japan wanted to promote smaller enterprises and give them an opportunity to compete.[169] In other words, one of the goals of AMA was to protect the smaller firms.

On the other hand, according to the Edwards Report, which was made by the US Special Survey Committee to assess the conditions of the Japanese economy and to propose the relevant drafting provision for the AMA, a free market would work if the Japanese government actively enforced the competition rules as a supervisor to eliminate the collusive and exclusionary behaviors.[170] Significantly, apart from promoting the economic welfare and consumer welfare, the goals of the AMA also reflect the support for fostering the technology innovation of entrepreneurs to contribute to the economic development.

As a result, it took one and a half years to finalize and enact the AMA. And the above-mentioned intentions were consolidated in the AMA. Pursuant to Article 1, the goals of the AMA

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[165] Tony A. Freyer, "Antitrust and Bilateralism: The US, Japanese and EU Comparative and Historical Relationships," in *Competition Policy in the Global Trading System* (Kluwer Law International, 2002), 24.

[166] Harry First, "Antitrust in Japan: The Original Intent," *Pacific Rim Law & Policy Journal* Volume 9, no. No. 1 (February 2000): 41–68, https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/802/9PacRimLPolyJ001.pdf?sequence=1.

[167] See Tokuko Omori, Introduction 2, Special Survey Committee, Ministry of Foreign Affairs, Japan, Postwar Reconstruction of the Japanese Economy, September 1946, at xv (Saburo Okita 1990).

[168] In 1897, 18 railroad companies agreed to form an association to set freight rates. The US government sued and declared the agreement unlawful. The Court held that smaller companies could not survive because of the price-fixing agreement.

[169] Harry First, "Antitrust's Goals: Theories of Antitrust in the United States and Japan," in *Competition Policy in the Global Trading System* (Kluwer Law International, 2002), 187.

[170] Ibid., 70.

are to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.[171] In order to achieve these goals, "this Act prohibits the private monopolization, unreasonable restraint of trade and unfair trade practices, prevents excessive concentration of economic power and eliminates unreasonable restraint of production, sale, price, technology… and all other unjust restriction on business activities through combinations, agreements."[172]

However, the fact is that Professor Shuya Hayashi states that the definition and what elements included in the concept of fair and free competition were still controversial.[173] In addition, Toshiaki Takigawa also argues that the goals of the AMA were not clear because they included many objectives of 'consumer surplus', 'national economy' and 'national income' without priority.[174] Furthermore, he elaborated that the goals were not mentioned during the enforcement because the JFTC and the Courts always referred to the illegal conduct.[175] Recently, regarding the business combination, the terms of efficiency was referred in the decisions of the JFTC and the courts as well as in the Business Combination Guidelines in 2007. In order to make the objectives of the AMA clearer, Takigawa suggests that the consumer surplus should be the top priority.[176]

In terms of the enforcement authority, to follow up the above-mentioned goals to invigorate the economy and enhance consumer interest by promoting fair and free competition, the JFTC clearly set the follow-up actions plan to positively implement the competition policy. Firstly, the JFTC prioritized strict action against price-fixing cartels and bid-rigging, which have detrimental anti-competitive impacts while promoting a leniency program. At the same time, the competition enforcement authority was to strictly and promptly deal with exclusionary conducts

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[171] See Article 1, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947).

[172] Article 1, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).

[173] Shuya Hayashi, "Chapter 3: The Goals of Japanese Competition Law," in *Economic Theory and Competition Law* (Edward Elgar Publishing, Incorporated, 2009), 45.

[174] Toshiaki Takigawa, "Competition Law and Policy in Japan," *The Antitrust Bulletin* Vol. 54, no. No. 3/Fall 2009 (2009): 439–40.

[175] Ibid.

[176] Ibid., 449.

which abuse IPRs or impede new entrants to the market in the public utility sector. Significantly, the JFTC was to continue to apply stringent action against unfair trade practices that disadvantage small and medium enterprises. Secondly, the JFTC was to improve the competitive environment by (i) enhancing the transparency and predictability of enforcement by issuing guidelines and providing consultations to businesses; (ii) follow-up of the market after regulatory reform, review of various acts that deter new entrants, and policy recommendations. Thirdly, the JFTC was to reinforce the competition policy infrastructure by (i) enhancing the JFTC capacities for law enforcement and implementation of competition policy; (ii) fostering the public understanding of competition policy; (iii) promoting the international cooperation.[177]

II. Conduct and Harms Approach in the Japan Anti-Monopoly Act

1. Regulations on Price-fixing Cartels

The concept of horizontal price-fixing agreements (which are known as price-fixing cartels) under the Japanese Anti-Monopoly Act is defined as unreasonable restraint of trade under the (Article 2(6)):

> The term "unreasonable restraint of trade" as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, 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 counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.[178]

In the meantime, the vertical pricing agreements (resale price maintenance) under the Japanese Anti-Monopoly Act are defined as unfair trade practices (Article 2(9)(iv)):

The term "unfair trade practices" as used in this Act means an act falling under any of the following items:

> (iv) Supplying goods to another party who purchases said goods from oneself while imposing, without justifiable grounds, one of the restrictive terms listed below:

[177] "第一　競争政策と独占禁止法 - Grand Design of Competition Policy by the Japan Fair Trade Commission," n.d., http://www.jftc.go.jp/en/policy_enforcement/index.files/grand_design.pdf (accessed February 23, 2017).

[178] Article 2(6) Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).

> (a) Causing said party to maintain the selling price of the goods that one has determined, or otherwise restricting said party's free decision on selling price of the goods.
> (b) Having said party cause a enterprise that purchases the goods from said party maintain the selling price of the goods that one has determined, or otherwise causing said party to restrict said enterprise's free decision on the selling price of the goods.[179]

According to the JFTC guidelines, in terms of a vertical pricing agreement, when a manufacturer restricts the sales price of distributors, the *per se* illegal rule will be applied because the conduct of the manufacturer reduces or eliminates price competition (to cut operation costs and to sell more products as well as to offer a more competitive price to consumers) among distributors.[180] However, when a manufacturer suggests a retail price as a reference price to its distributors, this conduct is not considered illegal because it allows distributors to determine its resale price independently so that they could quickly sell products to customers in a competitive environment with other distributors. This conduct is beneficial to consumers. In order to make transparent the understanding of resale price maintenance, the JFTC issued the *Designation of Unfair Trade Practices* (Fair Trade Commission Public Notice No. 15 of June 18, 1982) and the *Guidelines Concerning Distribution Systems and Business Practices under the Anti-Monopoly Act* (issued on July 11, 1991). These Guidelines were revised recently on May 27, 2016 to reflect the updated circumstances in Japan and around the world for better implementation, to increase the globalization of economic activity, to enhance Japan's international status, and in recognition of the increased need to enrich national life, Japanese distribution systems and business practices for protecting consumers' interests and making the Japanese market more open internationally.[181]

2. Analysis of How the JFTC Examines the Cartels

Under the AMA, Article 3 prohibits the conduct of unreasonable restraint of trade. The full text of Article 3 of the AMA is "An enterprise must not effect private monopolization or unreasonable restraint of trade."[182] In other words, the cartels are illegal. As written in the previous part of the

[179] Article 2(9)(iv) ibid.
[180] Chapter 1, Resale Price Maintenance, Viewpoint, Guidelines Concerning Distribution Systems and Business Practices under the Anti-monopoly Act, Law no. of 1991, (jp).
[181] 2016 Guidelines Concerning Distribution Systems and Business Practices under the Anti-monopoly Act, Law no. of 2016, p. 2 (jp).
[182] Article 3, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947) 2009.

AMA enforcement history, during the period of 1947-1953, cartels were *per se* illegal unless their effects were minor. However, since the first AMA amendment in 1953, the JFTC has taken a rule of reason to examine cartels. Specifically, the JFTC examined the conduct and harms of cartels based on each of five elements stipulated in Article 2(6) on case-by-case basis: (i) conducting an agreement in concert with other entrepreneurs; (ii) whether they mutually restrict business; (iii) an actual conduct to fix, maintain or increase prices; (iv) causing a substantial restraint of competition in the relevant market; and (v) against the public interest.

2.1 Conducting an agreement in concert with other entrepreneurs and Mutually restrict or conduct their business

The term 'entrepreneur' in Article 2(6) is defined as "an entity that engages in business activities in which economic interest of any nature is provided and performance in return is repeatedly and continuously receive."[183] In addition, the term of 'other entrepreneurs' is understood as the existence of the competitive relationship between an entrepreneur with the others in the market or horizontal agreement. Furthermore, "in concert with other entrepreneurs" is interpreted as a communication of intention with each other.[184] In order to accuse entrepreneurs of colluding or making a cartel agreement to raise prices, the JFTC needs to provide evidence. A coincidence of action is not sufficient. The JFTC needs to show a certain correspondence of will. For example, the correspondence of will could be the exchange of information via email, messages or negotiations among the concerned parties. Given these requirements, the JFTC has faced significant difficulty in finding the existence of cartel agreements. At the Hearing Decision on a Mitsubishi Building Technoservice Case on July 28, 1994, the JFTC stated that "although there was a suspicion that the companies had colluded, there was no proof as to when and how the companies developed a consensus on the tariff increase, and the content of the agreement. Therefore, the existence of the cartel was denied."[185]

However, in another instance, the JFTC found eight companies to be involved in a cartel to raise the price of chemicals, including the Toshiba Chemical Company. However, Toshiba rejected the accusation because there was no clear evidence that it joined the seven other

[183] Wakui, *Antimonopoly Law*, 53.
[184] Ibid., 53–54.
[185] Hearing Decision of the JFTC, Mitsubishi Building Technoservice case, Shinketsushuu 41–46 (The Japan Fair Trade Commission July 28, 1994).

companies to raise prices. Toshiba appealed their case to the Supreme Court. Ultimately, the Supreme Court ruled that the conduct of Toshiba Chemical Company was illegal.[186] This is because Toshiba joined the illegal price-fixing cartels and there was no proof that this company terminated this agreement before others raised the price. This ruling created a case law about 'tacit agreement'.

Another significant case reflecting the conduct of business is the Oil Industry Case.[187] In 1973, before consulting with the Ministry of International Trade and Industry (currently, Ministry of Economy, Trade and Industry – METI), the oil wholesalers frequently met to discuss when to raise the price of oil and by how much. Then, after obtaining permission from METI, the wholesalers raised the oil price five times. METI also directed the wholesalers not to raise the price and requested that they reported to METI prior to the price increase. But they ignored it. The wholesalers argued that their agreement and subsequent price rises did not constitute a violation of the AMA because they were simply following the directions of METI and they had obtained permission before raising their prices. The Tokyo High Court rejected their arguments and held that all defendants were guilty.

Disagreeing with the Tokyo High Court, the oil wholesalers appealed to the Supreme Court. But the Supreme Court found that 20 out of 23 of the defendants were guilty. Rejecting the arguments of the oil wholesalers, the Supreme Court ruled that:

> The defendants concluded the agreements by which 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 had an effect of restricting their business once they concluded it. Their argument satisfied the condition of "mutual restrict or conduct the business" and constituted unreasonable restraint of trade stipulated in the Article 3.[188]

In this case, the Supreme Court clearly interpreted the condition of "mutual restrict or conduct the business". The Supreme Court adopted the view that "a strong binding power was not required to meet this condition and that when a price-fixing agreement is concluded this condition would be

[186] *Toshiba Chemical Co. v. Japanese Fair Trade Commission,* No. 906 HANREITIMES 136 (jp The Tokyo High Court September 25, 1995).
[187] *Japanese Government v. Idemitsu Co.,* No. 33 KEISHU 1287 (jp The Supreme Court February 24, 1984).
[188] Inoue, *Japanese Antitrust Law Manual*, 24–25.

automatically met. They do not care about the commencement of action or the real implementation of the cartel agreement. This reasoning is said to be the grounds on which the Supreme Court adopted the *per se* rule in hard-core cartel cases."[189]

2.2 Substantial restraint of competition in any particular field of trade

A substantial restraint of competition refers to the result of a cartel agreement to establish, maintain or control the market.[190] In other words, it is defined as market power. And the term 'in any particular field of trade' is defined as the relevant market which includes the geographic area of the transaction, steps of transactions, counterparties to the transaction, nature of business activities and forms of transaction.

At the early period of the AMA enforcement, in the judgment of *Toho Co. v. Japanese Fair Trade Commission* in 1954, the Supreme Court defined the concept of 'substantial restraint of competition' as an act which makes competition decrease and leads to a situation that a particular firm or firms could control the market by setting the price, quantity and transaction conditions independently from other competitors. [191]

Recently, the concept of substantial restraint of competition was further developed to encompass the power control in the relevant market.[192] Specifically, the Tokyo High Court Judgment on May 29, 2009 defined "substantial restraint of competition in any particular field of trade" as "establishing, maintaining, or strengthening the state in which a certain entrepreneur or a certain group of entrepreneurs can control the market at will by being, to some extent, free to influence price, quality, quantity, and other various conditions after competition itself has lessened."[193] In other words, if the conduct of an entrepreneur aimed at establishing, maintaining or strengthening the market power, it would cause to a substantial restraint of competition. "Even in the case where the prices are not increased in reality."[194]

Specifically, according to the 2009 Guidelines for the understanding of substantial restraint of competition, "the JFTC will not rely on a certain specific criteria but comprehensively

[189] Ibid., 25.
[190] Wakui, *Antimonopoly Law*, 61.
[191] *Toho Co. v. Japanese Fair Trade Commission*, No. 8 MINSHU 950 (Supreme Court May 19, 1954).
[192] Masahiro Murakami, *The Japanese Antimonopoly Law [独占禁止法]* (Hirobundou, 2000), 69.
[193] Basis view of substantial restraint of competition, Guidelines for Exclusionary Private Monopolization under the Anti-monopoly Act, Law no. of 2009, p. 34 (jp).
[194] Ibid.

consider the following factors on a case-by-case basis to assess whether or not competition is substantially restrained."[195] Accordingly, the JFTC examines the following factors:

(i) The position of the alleged entrepreneur and the conditions of the competitors:

- Market share and its ranking of the said entrepreneur: the JFTC doesn't set a specifically collective market share. Instead, the authority considers the larger market share and its high ranking in the market as well as the gap between the alleged entrepreneurs with its competitors.

- Conditions of competition in the market: the JFTC will analyze the competition circumstances arising from the coordinated conduct to increase the price, product quality or variety in the entire market.

- Conditions of the competitors: the JFTC analyses whether the cartels conduct made competitors difficult to sell products.

(ii) **Potential competitive pressure:** The JFTC will define whether market entry is easy or not. Especially, the possibility of a new competitor enters the market in a certain period or influence to the price and other conditions of the products or services:

- Degree of institutional entry barriers: "Where regulations based on legislations serve as en entry barrier, potential competitive pressure is unlikely to work, because the entry will not be possible if the said entrepreneur increases the price of the traded products."[196]

- Degree of entry barriers in practice: "When the scale of capital necessary for entry is large, and an entrant is under less advantageous conditions than those for existing entrepreneurs in terms of location, technical issues, conditions of purchasing raw materials, or sales conditions, potential competitive pressure is unlikely to work."[197]

- Degree of substitutability between the entrant's and the entrepreneur's products.[198]

(iii) **Users' countervailing bargaining power:** the JFTC will identify whether it is difficult for users to switch the suppliers or not.

(iv) **Efficiency:** the JFTC will consider the following elements: the improvement of productivity, technological innovation and improvement of business activities efficiency.

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[195] Ibid.
[196] Ibid., p. 36.
[197] Ibid.
[198] Ibid., pp. 36–37.

(v) **Extraordinary circumstances to assure consumer interests:** the JFTC will consider the circumstances for the purpose of promoting fair and free trade to support the consumers welfare and the national economy.[199]

To identify the particular field of trade or the relevant market, the JFTC defines the relevant product market and the relevant geographical market by examining the following elements: (i) the scope of products to determine whether the suppliers are able to switch the manufacture and sale of one product to another within a short period of time without substantial added cost and risk.[200] In order to identify the scope of products, the JFTC will analyze the usage (external features such as size and form, specific material characteristics such as strength, plasticity, heat resistance, and insulation…), changes in price and quantity as well as the recognition and behavior of users; (ii) Geographical scope to determine the interchange of products for users in a certain area. To do that, the JFTC will consider the business area of suppliers and area for the users to purchase, characteristics of products, means and cost of transportation.[201]

2.3 Against the public interest

Although Article 2(6) specifies one of the anti-competitive effects of cartels contrary to the public interest, the meaning of 'public interest' has various interpretations. Additionally, there is also another understanding about public interest and its connection with substantial restraint of competition. Accordingly, once a cartel has a substantially restrains competition, it is not necessary to examine whether it is contrary to the public interest.[202] However, disagreeing with this interpretation, *Keidanren* (Federation of Economic Organizations) held that the public interest means "a variety of factors such as the interests of consumers and the growth and stability of the national economy."[203] Mitsuo Matsushita criticized this interpretation because cartels would be lawful if they meet the economic objectives.[204]

The third interpretation of 'public interest' was defined in the 1984 Oil Industry Case as the condition of being "against the public interest". Accordingly, the Supreme Court ruled that

[199] Factors for assessment of substantial restaint of competition, Guidelines for Exclusionary Private Monopolization under the Anti-monopoly Act, 2009, pp. 34–40 (jp).
[200] Ibid., p. 32.
[201] Ibid.
[202] Mitsuo Matsushita, "The Antimonopoly Law of Japan," 172.
[203] Ibid.
[204] Ibid.

"judging from the purpose, the keystone and the progresses of the AMA, 'against the public interest' stipulated in Article 2(6), in principle, means against the establishment of free competition which the AMA seeks to accomplish."[205] In other words, it is against the goals of the AMA as stipulated in Article 1. This is because while the government tried to control the price of oil to encourage economic stability and to minimize the burden to consumers, these oil companies tried to increase the price. On the other hand, there is also controversy over the administrative guidance issued by MITI and the price-fixing agreement concluded by oil companies. MITI argued that its administrative guidance was not a legally binding document.[206] Finally, the Supreme Court upheld the legitimacy of the administrative guidance. However, it denied that the price-fixing cartel was reasonable because cooperating with MITI did not cause the price raise. Furthermore, the oil companies discussed and agreed among themselves when and how much to raise the price without any approval from MITI.

Therefore, the JFTC used rule of reason to examine the comprehensive effects of cartels, including price-fixing cartels. To do that, the JFTC developed the principle of 'substantial restraint of competition' which includes the analysis and assessment of the position of the alleged entrepreneur and conditions of its competitors, potential barriers for competition (market entry barrier and exit), whether it is easy to switch to other suppliers or not, efficiency assessment (productivity improvement, technology innovation and business improvement) as well as the benefits or damages to consumers and the whole economy. In addition, the JFTC also takes into account the market share in the relevant market. Furthermore, the JFTC determines the conduct causing the anti-competitive effects, such as whether or not the conduct is in concert with other entrepreneurs, whether or not it mutually restricts competition, and whether or not the actual conduct to fix, maintain or increase prices and the anti-competitive impacts the public.

III. The Anti-Cartel Enforcement

1. The Anti-Cartel Enforcement of the Japan Fair Trade Commission

[205] *Japanese Government v. Idemitsu Co., No. 33 KEISHU 1287 (jp The Supreme Court February 24, 1984).*
[206] Inoue, *Japanese Antitrust Law Manual*, 27.

The hard-core agreements that seriously impact on the public such as price-fixing cartels, bid rigging, or market allocation, as well as unfair trade practices such as abuse of superior bargaining position and unfair price cutting that places small and medium-sized enterprises at an unfair disadvantage are the priorities of the JFTC.[207] The AMA has particularly strict penalties for cartels. Both administrative surcharges and criminal sanctions are imposed simultaneously. When a cartel is found, the JFTC may issue a cease and desist order together with a surcharge order. The surcharge system was first implemented in the 1977 amendment of the AMA to sanction the cartels. The total amount of the surcharge is calculated by multiplying the sale volume of goods or services impacted by the cartel with a particular surcharge rate. The defined period of violation is a maximum of 3 years.[208]

Calculation of the respective surcharges can vary as follows: The surcharge rate corresponds to the operation sales and business categories.[209] For cartel cases, the surcharge rate is 10 per cent for large-sized enterprises, 4 per cent for small and medium-sized enterprises, 3 per cent for retailers and 2 per cent for wholesalers. In the event of any repetition of the violation, or for ringleaders of the illegal conduct, 50 per cent is added to the standard surcharge rate. In the event that the illegal conduct is promptly stopped, 20 per cent is deducted from the standard surcharge rate. And in the event that a person who also has a leading role in the illegal conduct repeats violations, the standard surcharge rate is doubled.

Apart from the administrative surcharges, a cartel is also subject to criminal sanctions for both natural persons and judicial persons. These are typically organizations or corporations. Either fines of up to 5 million yen or imprisonment up to 5 years shall be imposed against individuals. According to the statistics of the JFTC, there were seven criminal accusations during the period of 2003-2009.[210] In addition, depending on the circumstances, the imposition of both imprisonment

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[207] "The JFTC Annual Report Financial Year 2015.pdf," n.d., http://www.jftc.go.jp/en/about_jftc/annual_reports/index.files/AnnualReportFY2016.pdf (accessed April 10, 2017).

[208] Article 7-2(1), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).

[209] Article 7-2(1), (2) and (4), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947) 2009.

[210] Japan Fair Trade Commission, *Report on Summary Activities of the Japan Fair Trade Commission*, 2009, 26, http://www.jftc.go.jp/en/about_jftc/role.files/1009role_all.pdf.

with labor and a fine can be brought upon individuals.[211] For organizations, the maximum fine is 5 hundred million yen.[212] To avoid the double jeopardy rule in the Japanese Constitution, which prohibits imposing sanctions twice for a single incident, the amount of surcharge levied against an organization can be reduced by an amount equivalent to one-half of the amount of the fine imposed.

According to the JFTC, in the financial year 2015, the JFTC investigated 138 suspected violations of the AMA and completed investigations for 123 of these. Specifically, the JFTC implemented legal measures in 9 cases. These cases are classified as follows: 2 cases of price-fixing cartels (the manufacturers selling aluminum electrolytic capacitors and tantalum electrolytic capacitors), 4 cases of market allocation (bid rigging in public demand), 1 case of market allocation (bid rigging in the private sector), and 2 cases of others. In addition, the JFTC issued surcharge payment orders for a total of 8,510.76 million yen. During the period of 2011-2015, the JFTC enforced 21 cases related to price-fixing cartels and 47 bid-rigging cases, both private and public demand, were implemented. This statistic shows that the JFTC paid a higher attention to the anti-competitive effects of bid-rigging than other types of horizontal agreements. Furthermore, the JFTC made a significant effort to prevent bid-rigging. For example, in order to eliminate bid-rigging, the JFTC cooperated with purchasers and organized many capacity building training seminars for procurement personnel at local governments.

2. Development of Case Law in the Japan Anti-Monopoly Act

Like other laws, case law in the AMA is applicable for the jurisdiction of competition violation in Japan. In the US, the previous competition cases set precedent and clarify the rules. Learning from the experiences of the US, Japan applies case law in the enforcement of the AMA. According to Japanese lawyer Arika Inoue in his book titled "Japanese Antitrust Law Manual: Law, Cases and Interpretation of the Japanese Antimonopoly Act, the case law in Japan developed during two periods the period between 1947 and 1955 and from middle of the 1980s until the present day.[213]

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[211] Article 89(1)(i), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947) 2009.
[212] Article 95(1)(i), ibid.
[213] Inoue, *Japanese Antitrust Law Manual*, 9–11.

However, there were no significant competition decisions during the period between 1955 to the middle of the 1980s.

For the first period of case law development, the concept of cartels was misunderstood by the decision of the Tokyo High Court on the Newspaper Distribution Conspiracy Case in 1953.[214] Specifically, the Tokyo High Court held that "concerted practice" was not applicable to a vertical agreement because the conspiracy among the different level of business activities (manufacturers, distribution, wholesaler…) did not constitute a violation of the AMA. In other words, only agreements among direct competitors should be considered be illegal. This understanding is the same as Article 1 of the 1957 Law Against Restraints on Competition of Germany that only prohibits the cartels in the horizontal agreements.[215] Furthermore, the decisions of the Tokyo High Court in Toho-Subaru case and Toho-Shitoho Case have set the rationale for interpretation of "substantial restraint of competition" that were applicable for the regulation of cartel, monopoly and merger.[216]

Regarding the period from the middle of the 1980s until the present day, the case law development became more clear and compatible with common understanding. A significant case which demonstrates this tendency is the Supreme Court decision on the price-fixing of petroleum products by oil companies in 1984.[217] Other effects on competition such as market analysis and market definition have been taken into consideration. As a result, the cartel violation covers both horizontal and vertical restraints. In addition, the *per se* rule is applied to cartels against the public interest. For the vertical restraints, the conduct of vertical price restraints on distributors or dealers is *per se* illegal and the exclusive purchase agreements are unlawful if this conduct causes a barrier to competitors in the distribution channels to customers. More recently, the judgment by the Supreme Court on February 20, 2012 concerning a case wherein an agreement made between multiple general contractors to decide on designated successful bidders and other matters, with regard to civil engineering works of a certain scale (which is known as Tama Dango Case) has

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[214] Asahishinbun K.K. v. Japanese Fair Trade Commission, 4 GYOSAISHU 609 (Tokyo Hi. Ct. 9 March 1953).
[215] Hiroshi Iyori, "A Comparison of US-Japan Antitrust Law: Looking at the International Harmonization of Competition Law," in *Pacific Rim Law & Policy Journal*, Vol. 4 No. 1, 1995, 71.
[216] Inoue, *Japanese Antitrust Law Manual*, 10.
[217] Japanese Government v. Idemitsu Co., 33 KEISHU 1287 (Sup. Ct. 24 February 1984).

been a case law about "unreasonable restraint of trade" as set forth in Article 2, paragraph (6) of the AMA.

Therefore, case law plays an important role in enforcing the AMA. It also reflects the evolution of the competition understanding in Japan. In addition, case law can help to promote the transparency of the AMA. Together with the case law, the guidelines for the AMA are another way to complement the law and help make up for the shortage of cases.[218]

B. The EU Competition Law

I. The Evolution of the EU Competition Law

1. The Political Situation and Judicial System

1.1 The Political Situation

After six years of conflict between Germany and other European countries, the Second World War ended in Europe on May 8, 1945. Like other people in the world, Europeans love peace and try to avoid such a war ever happening again. However, just after the war ended, Europe was faced with a new conflict of ideology. Significantly, the civil war that occurred in Greece during the post war period made the U.S. and its allies concerned over the possibility that communist revolutionaries may try to overthrow the democratic regimes in Western Europe. To deal with such concerns, the Treaty of Brussels was signed on March 17, 1948 between Belgium, France, Luxembourg, the Netherlands, and the United Kingdom for the purpose of dealing with the communist threat in Western Europe and to bring greater collective security to the region.

Gradually, the ideological difference between liberal democracy and communism became tense when the Western block nations (which were supported by the U.S.) set up the North Atlantic Treaty Organization (NATO)[219] on April 4, 1949 for the purpose of forming a collective defense against the Soviet Union. NATO is committed to the principle that an attack against one or several members of NATO is considered as an attack against all.[220] In addition, Peter Haas and

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[218] Jiro Tamura, "Market Access Issues in Japan's Antimonopoly Law," in *Competition Policy in the Global Trading System* (Kluwer Law International, 2002), 144.

[219] The United States and Canada, which are also founding NATO members in 1949, are not located in the Europe.

[220] "NATO - Homepage," 2016, http://www.nato.int/ (accessed September 21, 2016).

John Hird stated that the objective of NATO is to contain the Soviet threat in Europe and to prevent the development of communism in Europe.[221]

In response to this collective defense organization, the Soviet Union at that time and other Eastern European countries (which was known as the Eastern block) set up another organization known as Warszawa[222] on May 14, 1955 to have the same objective as NATO to deal with the perceived threat from this organization. The Soviet Union viewed American support for Western Europe as a threat to their security.[223] As a result, the two military blocks started an arms race based on ideological and military confrontation that divided Europe which was symbolically reflected in the construction of the Berlin wall.[224] East Germany was controlled by the Soviet Union while West Germany became a democratic country with the support and aid of the US. The confrontation between the Soviet Union and the West is known as 'the Cold War' which ultimately resulted in a high degree of political tension between the two. Discussing about the Cold War and the integration process that occurred in Europe during this period, Desmond Dinan observes that the Cold War itself did not make the integration, but it created new policies to foster the Western block to embrace integration and to act together as a viable means to protect itself against the Soviet Union.[225]

When Soviet power and the communist governments collapsed in central and Eastern Europe and in Russia from early 1989 onwards, EU integration reached a newly significant milestone with the completion of the European Single Act which enabled the freedom of movement of goods, services, people, and money. Additionally, the European Union was enlarged with the addition of three more new members: Austria, Finland and Sweden. As a result, inbound travel to Europe has become easier with the 'Schengen'[226] agreements that gradually allow people to travel across Schengen countries without checking their passports at the borders.

In the 2000s, Europe and the EU continued to grow and develop to new heights. The euro has become a new currency for the Europeans. In addition, the boundary of the EU has also

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[221] Peter M. Haas and John A. Hird, *Controversies in Globalization: Contending Approaches to International Relations* (CQ Press, 2012), 502.
[222] The Warszawa ended its operation in 1991 after the Berlin wall collapsed.
[223] Desmond Dinan, *Origins and Evolution of the European Union* (OUP Oxford, 2006), 45.
[224] A barrier to divide Berlin from 1961 to 1989.
[225] Dinan, *Origins and Evolution of the European Union*, 32.
[226] A small village in Luxembourg.

continued to expand with the admission of ten new countries into the EU membership on May 1, 2004, which included: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, and Slovenia. Three years later, Bulgaria and Romania joined the EU on January 1, 2007. And Croatia became the 28th member of the EU in 2013. However, the global economic crisis hit the EU and triggered economic difficulties and challenges that threatened the solidarity, stability, and development of the EU. Greece's debt crisis happened in 2010 and Europe is now facing a massive fleet of refugees seeking asylum.

Significantly, on June 23, 2016, the United Kingdom (UK) organized a referendum that would decide whether or not the nation would remain in the European Union (EU). The result showed that 51.9 percent of those who voted wished to leave the EU, which triggered what is now popularly known as "Brexit".[227] The referendum results showed that there is a great deal of political uncertainty between the EU and UK. Especially, it made the populism trend stronger in the context of some EU countries (France, Germany, the Netherlands…) which are currently in the midst of voting for new leadership.

In short, immediately following the end of the Second World War, Europe was divided into two blocks with Western Europe supported by the US and Eastern Europe influenced by the Soviet Union. Because of the different ideology between liberal democracy and communism, the two blocks started to have confrontations and conflicts with each other in the sphere of politics, military and economics, which are collectively known as the Cold War. As a result, the dichotomy between the block integration of western European countries versus the block integration of eastern European countries began to develop. After that, the evolution of the regional integration in Europe further evolved and ultimately became a solid foundation for the development of the European Common Market (EU). Although the trend of populism in some European countries is currently developing, the basic foundation for the historical integration of Europe has thus far prevailed.

1.2 The EU Judicial System: the Relationship between EU Law and National Law and Case Law Development in the EU:

[227] "EU Referendum Full Results – Find out How Your Area Voted | Politics | The Guardian," n.d., http://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis (accessed August 1, 2016).

The European Courts have two tier court systems, which are the European Union Courts and National Courts. In terms of the Courts of Justice of the European Union, there are also two courts. These include the Court of Justice and the General Court.

The Court of Justice of the European Union was established in 1952 and its office is located in Luxembourg. According to Article 220 of the Rome Treaty, the main mission of the Court of Justice of the European Union is "to ensure that in the interpretation and application of the Treaties the law is observed."[228] In addition, the Court of Justice of the European Union will review the legality of the acts of the institutions of the European Union, ensure that the Member States comply with obligations under the Treaties and interpret European Union law at the request of the national courts and tribunals. The primary sources of law of the Community and Union are the treaties and agreements and the secondary legislations are regulations, decisions, directives recommendations and opinions of its Community and Union.[229]

The organization of the Court of Justice consists of 28 judges and 11 advocates general with a term of office of six years for the judges. The judges and advocates general are appointed by consensus of the governments of the Member States after hearing a panel give an opinion on prospective candidates' suitability to perform the duties concerned. Also, according to the webpage of the Court of Justice of the European Union, the candidates for judges and advocate generals are selected from among independent and competent judicial persons in their respective member countries. After that, all 28 judges of the Court of Justice will elect a president and a vice-president with a renewable term of office of three years. Besides, the responsibility of the advocates general is to assist the Court in presenting opinions to the cases with complete impartiality and independence. Further, the registrar is the institution's secretary general and manages its departments under the authority of the president of the Court. The Court of Justice may sit as a full court, in a grand chamber of 15 judges or in chambers of three or five Judges. Thus, the Court of Justice acts as a judicial review authority of the European Union. The Court of Justice cooperates with the courts and tribunals of the European Union Member States to ensure

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[228] "CURIA - Presentation - Court of Justice of the European Union," 2016, http://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (accessed November 7, 2016).
[229] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013), 29–34.

the uniform application and interpretation of EU law.[230]

The General Court was established in 1988. Since September 1, 2016, the jurisdiction of the Civil Service Tribunal, which was set up in 2004, was transferred to the General Court in an effort to reform the European Union's judicial system.[231] Each member state nominates one judge for the General Court, which is currently composed of 44 judges with six-year terms of office. Like the Court of Justice, 44 judges of the General Court also appoint a president with a term of office of three years and a registrar for a six-year term. Unlike the Court of Justice, the General Court does not have permanent advocates general. The General Court consists of a chamber of five or three judges or in some cases as a single judge. In addition, depending on the complexity of the case, the General Court may sit as a grand chamber with fifteen judges.

The General Court has jurisdiction to hear and determine actions brought by the member states against the Commission or the Council, by natural or legal persons against acts of the institutions, offices or any organizations of the European Union as well as the actions relating to intellectual property brought against the Office for Harmonization in the Internal Market (Trade Marks and Designs) and against the Community Plant Variety Office.[232]

Commenting on the jurisdiction and legal authority that the Court of Justice is based on, Ian Ward stated:

> There is no mention of any general principles of law, no doctrines, no suggestions of the kind of legal system, or principles, that the Court may wish to adopt, or indeed any direction as to its methodology, whether it should exercise a comparative approach, developing Community law from member state traditions, or even member state case law, or whether it should strike out for an altogether more original jurisprudence. That was left to the Court itself to determine.[233]

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[230] "CURIA - Presentation - Court of Justice of the European Union."

[231] Ibid.

[232] "Competences of the Court of Justice of the European Union | EU Fact Sheets | European Parliament," April 2017, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.10.html (accessed June 19, 2017).

[233] Ian Ward, *A Critical Introduction to European Law*, Third Edition. (Cambridge University Press, 2009), 58.

To illustrate the supremacy of the Court of Justice and the development of case law in the European Community law, the case of Van Gend and Loos in 1962[234] and the case of Internationale Handelsgesellschaft in 1970 are good examples of case law. The Court of Justice strengthened its principle of supremacy by stating that:

> In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of the State or the principles of a national constitutional structure.[235]

To make the relationship between the Community law and national law clear, the Court of Justice held that "the national court must always give precedence to Community law over any conflicting domestic law."[236] To prove this viewpoint, the Court of Justice rendered the judgment in the case of Simmenthal in 1978 as follows:

> It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirely and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[237]

In addition, according to the Court of Justice in the Francovich case in 1991[238] and other cases later, the Court developed another fundamental concept which enabled individuals in the

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[234] The transport company Van Gend and Loos had imported goods from Germany to the Netherlands and had to pay customs duties which it considered to be incompatible with the rule in the EEC Treaty prohibiting increases in customs duties in trade between Member States. The action raised the question of the conflict between national legislation and the provisions of the EEC Treaty. The Court decided the question referred by a Netherlands court by stating the doctrine of direct effect, thus conferring on the transport company a direct guarantee of its rights under Community law before the national court.

[235] International Handelsgesellschaft 1970, 1134.

[236] Ward, *A Critical Introduction to European Law*, 59.

[237] Simmenthal 1978, 643-4.

[238] According to the Court of Justice, two Italian citizens who were owed pay by their insolvent employers had brought actions for a declaration that the Italian State had failed to transpose Community provisions protecting employees in the event of their employers' insolvency. On a reference from an Italian court, the Court stated that the directive in question was designed to confer on individuals rights which they had been denied as a result of the failure to act of the State which had not implemented the directive. The Court thus opened up the possibility of an action for damages against the State itself.

European Community to assert a claim for liability to a state for damage caused by a breach of Community law by that state.

Desmond Dinan asserts that "the supranational oversight of the common market was embodied in the European Commission's monitoring role over market integration and sole right of initiative across a range of policy areas, as well as in the European Court of Justice's ruling."[239] Some member states were concerned over the national law and the Community law. The European Court of Justice was established to solve this concern. Joseph Weiler explained further about the two concepts of Albert Hirschman's study on organization decay: voice and exit. The concept of exit is defined as the process of organizational abandonment in the face of unsatisfactory performance.[240] In the context of the European Economic Community (EEC), it is possible that some member states would not abide by European decisions.[241] Regarding the concept of voice, it means the process of intra-organizational correction and recuperation.[242] And applied to the EEC case, Dinan interpreted it as the influence of national government on political decision-making in the Community.

Article 249 (ex 189) of the EC clearly states that the European Parliament acting jointly with the Council and the Commission shall make regulations (which shall be binding in its entirety and directly applicable to Member States), directives (which shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods), decisions (which shall be binding in its entirety upon those to whom it is addressed) and recommendations and opinions (which shall have no binding force).[243] Ian Ward argues that while the member states are bound by the directives, it might be unreasonable to expect individuals to abide by them.[244] In other words, Ward refers to the national law for individuals to comply with it. Disagreeing with this viewpoint, Martin states that "individuals should be as responsible in Community law for their actions, as they are in

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[239] Dinan, *Origins and Evolution of the European Union*, 102.
[240] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970), 21.
[241] Dinan, *Origins and Evolution of the European Union*, 170.
[242] Hirschman, *Exit, Voice, and Loyalty*, 30.
[243] Article 249 of the EC.
[244] Ward, *A Critical Introduction to European Law*, 61.

domestic law."[245] To support this viewpoint, Sacha Prechal asserts that the Community law is now so well developed in the member states that there is no need to worry about whether European legislation is directly effective or not.[246]

To sum up how the Court of Justice applies and interprets the European Community law, Ward stated that there are two steps to ensure compliance. The first step is to ensure the effective supremacy of the Community law, which refers to the Treaties, Agreements, Regulations, and Decisions of the Community. The second step is to develop the doctrine of direct effect, which is when the Court interprets the national law in conformity with the directives of the Community. This subsequently enables European citizens to rely directly on rules of European Union law before their national courts.[247] In addition, the Court of Justice also developed case law to enable individuals who have suffered a loss from a member state's failure in transposing the Community law into the national law to make a liability claim.

Case law in the EU includes selected judgments, opinions, and orders of the Court of Justice, the General Court and the Civil Service Tribunal dating back to the time when these courts were first established. When a European country becomes a member state of the EU, the judgments rendered by the courts will be applied as case law. Accordingly, case law development in the EU is divided into three periods of time with regards to the historical development of cartels. The first period of 1954-1988 includes the judgments of the Court of Justice since it was established in 1952. The authors Christopher Harding and Julian Joshua observed in the 1970s that the 'exploratory' cases of cartels were developed during the first period.[248] The second period of 1989-2004 consists of 948 judgments of the Court of Justice, the General Court, and the Civil Service Tribunal. During the early 1980s, there were more substantial investigations which led to significant legal challenges to and testing of the competence and power of the Commission during the late 1980s and early 1990s.[249] The third period, which includes 2005 to the present, the EU has had 1143 judgments of the Court of Justice and the General Court. In order to make the cases more accessible to EU member states, the EU supported the translation of the judgments into

[245] Martin 1994, 28.
[246] Sacha Prechal, 2000, 1067-9.
[247] Sacha Prechal, *Directives in EC Law* (Oxford University Press, 2006), 115.
[248] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2010), 6.
[249] Ibid.

many different languages. This period marked "a judicial 'recovery' of the Commission's position as a cartel regulator, which led to the enforcement of the leniency program, diversified sanctions, and criminalization of individuals involved."[250] The cartel cases were not only examined on a legal basis but also in terms of a market analysis.

2. Economic Situation and Intergration Process

As written in the previous section, the political situation in Europe was shadowed by the ideological conflict between the two world superpowers, the US and the Soviet Union. Economic integration in Europe was also influenced by the conflict.[251] In terms of the economic situation, Europe was devastated during the Second World War, many European countries were heavily in debt to the United States and could not afford to rebuild.[252] In addition, many European countries had serious shortages of food and raw material; thousands of refugees were still homeless after the war had ended. Furthermore, the unemployment rate was high. Furthermore, the great powers in Western Europe such as the United Kingdom, France and West Germany started competing fiercely with each other for a dominant position of economic and military supremacy. These countries and other countries in Europe imposed tariffs and non-tariff barriers on the goods and services imported into their countries.

To deal with the situation, the European Recovery Plan in the Western block, known as the Marshall Plan, was put into place. Supported by the US, it was implemented in 1948 to rebuild the devastated Western European economies, to remove trade barriers, and ultimately to prevent the spread of communism from Eastern Europe. "The Marshall Plan required a lessening of interstate barriers, a dropping of many regulations, and encouraged an increase in productivity, labor union membership, as well as the adoption of modern business procedures."[253] Thus, the external pressure of the ideological conflict made the Western and Eastern European countries divide into two separate blocks at a faster rate following the war. Many observers, including politicians, intellectuals, and members of resistance movements stressed the need to integrate the

[250] Ibid.
[251] Dinan, *Origins and Evolution of the European Union*, 32.
[252] "The Reconstruction of Europe - EU Learning," 2016, http://carleton.ca/ces/eulearning/history/europe-after-wwii/the-reconstruction-of-europe/ (accessed September 21, 2016).
[253] Anthony Carew, *Labour under the Marshall Plan: the politics of productivity and the marketing of management science* (Manchester University Press, 1987)

whole of Europe. Instead of competition between European states, there was a need for a system of co-operation.[254]

To implement the Marshall Plan, the Organization for European Economic Co-operation (OEEC) was created to distribute American aid money. In 1949, the U.S. government began promoting the economic integration between the OEEC countries and committed to providing more aid if the OEEC countries removed trade barriers. Researchers from the Centre for European Studies at Carleton University Research Centre in Canada, participated in a project concerning EU learning and found that the Americans promoted free trade in western Europe not only to make it easier for American companies to do business there but also to speed up the process of economic recovery and stabilize Western Europe.[255]

Significantly, the Treaty to set up the European Coal and Steel Community (ECSC)[256] was signed in Paris, France on April 18, 1951 and entered into force on July 23, 1952, with a validity period limited to 50 years. As stated in Article 2 of the Treaty, the objectives of the Treaty are to "contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution, in harmony with the general economy of the member States, of a common market as defined in Article 4."[257] As a result, the issues concerning customs duties and quotas were solved and trade flows of coal and steel between the six member states were free.

Dennis Swann points out three significant outcomes of the ECSC.[258] Firstly, it is the earliest successful cooperation model of economic integration and unity just after the war ended. Secondly, it set up many institutions which have continued to exist up to the present in various modified forms. These institutions include the High Authority – a predecessor of the European Communities Commission - a Council of Ministers, a Court of Justice, a Common Assembly (the latter is the European Parliament). Thirdly, the ECSC didn't only drive economic integration, but

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[254] "Europe after WWII - EU Learning," n.d., http://carleton.ca/ces/eulearning/history/europe-after-wwii/ (accessed September 3, 2016).
[255] "The Reconstruction of Europe - EU Learning."
[256] The six original ECSC members are France, West Germany, Italy, Belgium, the Netherlands and Luxembourg.
[257] Article 2 of the Treaty 1951 to set up the European Coal and Steel Community.
[258] Dennis Swann, *European Economic Integration: The Common Market, European Union and Beyond* (Edward Elgar Pub, 1996), 1.

it also promoted the desire for political union. However, the economic integration outcome of the ECSC is limited because it only covers two sectors which include the coal and steel industries.

Although there was reason to fear that the effort undertaken by the ECSC was doomed to fail, the Messina Conference of June 1955 endeavored to add a new impetus to European unification. It was followed by a series of meetings of ministers and experts. A preparatory committee responsible for drafting a report on the creation of a European common market was created at the beginning of 1956. It met in Brussels under the Presidency of P.H. Spaak, the Belgian Minister for Foreign Affairs at the time. In April 1956, this Committee submitted two drafts, which corresponded to the two options selected by the Member States, including (i) the creation of a general common market; and (ii) the creation of an atomic energy community.

European economic integration reached a significant milestone when the Treaties of Rome were signed on March 25, 1957 in Rome, Italy by the six ECSC countries in order to set up two important communities. The first Treaty signed established the European Economic Community (EEC). The second Treaty signed concerned the formation of the European Atomic Energy Community, known as EURATOM, whose mission is to promote collaboration regarding the use of atomic energy for peaceful purposes. These two treaties entered into force on January 1, 1958.

The EEC Treaty, signed in Rome in 1957, brings together France, West Germany, Italy, Belgium, the Netherlands and Luxembourg in a community with the primary aim of achieving economic integration by trade. Accordingly, the EEC proposed the progressive reduction of customs duties and the establishment of a customs' union. In addition, it also proposed to create a single market for goods, labor, services, and capital across the EEC's member states.

The mission of the 1957 Treaty of Rome is stipulated in Article 3 of the Treaty:

> …(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; (d) the adoption of a common policy in the sphere of agriculture; (e) the adoption of a common policy in the sphere of transport; (f) the institution of a system ensuring that competition in the common market is not distorted; (g) the application of procedures by which the economic

policies of Member States can be coordinated and disequilibria in their balances of payments remedied; (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market; (i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living; (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources; (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.[259]

The establishment of the EEC was a significant step for European economic integration. For the first time the six Member States of this organization relinquished part of their sovereignty, albeit in a limited domain, in favor of the Community for greater economic integration.[260] The regional integration modality is unique in international relations.[261] Following up its commitments, in the first years of the establishment of the EEC, many Western European countries have made significant progress. Specifically, the EEC successfully completed the customs' union and implemented the common agricultural policy as well as started implementing the competition policy.[262]

In the 1970s, the EEC started its enlargement with the new membership accessions of Ireland, Denmark, and Norway. The House of Commons approved the terms of United Kingdom (UK) to become a member of the EEC in October 1971, after two failed attempts in August 1961 and in May 1967, respectively. However, although some scholars warned about the possible disintegration of the EEC in early 1980 because of its difficulties of budget, inflation, and the balance of payments, the integration still moved forward with the accession of Greece in 1981, as well as Spain and Portugal in 1986.[263] Furthermore, the collapse of the Berlin wall on November 9, 1989 known as the unification of Germany changed some of the negotiating dynamic at the European level toward a single currency.[264]

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[259] "Treaty of Rome 1957," March 25, 1957, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023 (accessed June 19, 2017).
[260] The economic integration is the process of separate economies to combine into a larger area by removing tariffs and non-tariff barriers for free flows of trade and services.
[261] Dinan, *Origins and Evolution of the European Union*, 108.
[262] Ibid., 170.
[263] Ibid., 187.
[264] Dorothee Heisenberg, From the Single Market to the Single Currency ibid., 239.

Significantly, The EEC members signed the Treaty on European Community, known as the "Maastricht Treaty" on February 7, 1992. And the Treaty entered into force on November 1, 1993 and marked a deeper integration in Europe. The Maastricht Treaty brought the three Communities (EURATOM, ECSC, EEC) and institutionalized cooperation in the fields of foreign policy, defense, police, and justice together under one umbrella, the European Community. The EEC was renamed to become the European Community (EC). Furthermore, this Treaty aims to achieve an Economic and Monetary Union with a single currency, a single monetary authority, and a single monetary policy. At the same time, it put in place new Community policies (education and culture) and increased the powers of the European Parliament (co-decision procedure).

The Treaty of Amsterdam was signed on October 2, 1997. It aims to increase the powers of the Community by creating a Community employment policy, transferring to the Communities some of the areas which were previously subject to intergovernmental cooperation in the fields of justice and home affairs; introducing measures aimed at bringing the Union closer to its citizens and enabling closer cooperation between certain Member States (enhanced cooperation). It also extended the co-decision procedure, qualified majority voting, and simplified and renumbered the articles of the Treaties. In January 1999, the launch of the euro as a single currency in the Community is one the most significant milestones in the history of European economic integration.

Significantly, the Treaty of Lisbon or the Treaty on European Union and the Treaty on the Functioning of the European Union was signed on December 13, 2007. The Treaty of Lisbon makes sweeping reforms. "It brings an end to the European Community, abolishes the former EU architecture and makes a new allocation of competencies between the EU and the Member States."[265] The way in which the European institutions function and the decision-making process are also subject to modifications. The aim is to improve the way in which decisions are made in an enlarged Union of 27 Member States. The Treaty of Lisbon also reforms several of the EU's internal and external policies. In particular, it enables the institutions to legislate and take measures in new policy areas.

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[265] EUROPA, "Treaty Establishing the European Economic Community, EEC Treaty - Original Text (Non-Consolidated Version)," October 26, 2010, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023 (accessed May 16, 2016).

On June 23, 2016, the United Kingdom (UK) held a referendum and the outcome was to leave the EU, known as "Brexit."[266] On March 29, 2017, the British Prime Minister Theresa May formally invoked Article 50 on leaving the EU. The Brexit negotiation process is expected to take place within a two-year period. The Brexit shows that there is a great deal of uncertainty regarding both the political and economic impact on the relationship between the EU and UK.

In short, the political motivations and economic benefits always went together in the European integration process. Starting from the two products of coal and steel and six member states joining the economic integration process, the number of EU member states expanded to 28 countries and the establishment of regional organizations dealing with foreign affairs, economic, justice, and other social issues. The EU's success in regional integration is a good modality for other regional integration in the world, including the current ASEAN Community. However, the existing European Union has experienced its own ups and downs in history. Currently, with the trend of protectionism and populism in Europe, the solidarity and future of the EU is facing many headwinds and uncertainties.

3. EU Competition Law Enactment

3.1 Ordoliberalism – an Influential School of Thought in the EU Competition Enactment Process

The foundation of the EC and the drafting of the competition rules were based on the German Ordoliberalism ideas which are not a just school of competition or economic theory, but they also encompass an entire political and economic philosophy. The leading Ordoliberalism theorists are the economist Walter Eucken and the lawyers Franz Bohm and Hanns Grossmann-Doerth.[267] Ordoliberalism is comprised of the ideas of the Freiburg School which was a neoliberal school of thought that emerged in the 1930s and which played a significant role after World War II in the development of economic policy and competition law in Germany and in Europe.[268]

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[266] "EU Referendum Full Results – Find out How Your Area Voted | Politics | The Guardian."
[267] See further D. Gerber, "Constitutionalising the Economy: German Neo-liberalism, Competition Law" and the "New Europe" (1994): 42, American Journal of Comparative Law 25.
[268] Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press, 1997), 27.

Additionally, Moschel also stated that Ordoliberalism influenced post-war thinking in Germany and created a new relationship between law and the economic system.[269] Moschel also believed that "competition is necessary for economic well-being and that economic freedom is necessary for political freedom."[270]

Alison Jones and Brenda Sufrin also stated that:

> The Ordoliberalism advocates an 'economic constitution' whereby competition and economic freedom are embedded into the law so that there is neither unconstrained private power nor discretionary governmental intervention in the economy. Competition law, it holds, should create and protect the conditions of competition. It follows from this that competition is a value in itself and not just a means by which purely economic objectives, such as efficiency, are to be achieved. An ordoliberalism approach leads to the kind of competition policy already described where competitors and small and medium-sized enterprises are protected for their own sake regardless of the effects on efficiency and firms with market power have to behave 'as if' the market was competitive. Ordoliberalism appraised the freedom of all citizens to be able to enter and compete on the markets.[271]

When defining the ideology of Ordoliberalism, Cseres described it as a 'third way' between a market economy and a command economy which is comprised of an open market with social justice and individual freedom. Additionally, he clarified that "the Ordoliberalism accepted main ideas of classical liberalism, like the central role of competition as the main tool to realize a free society and a wealthy economy and economic freedom as the corollary of political freedom."[272] In comparison with classical liberalism, which was a theory that predated Ordoliberalism, Cseres pointed out that "while classical liberalism strongly opposed any state intervention in the economy assigning the state a minimal 'watchman' role, the Ordoliberalism considered a legal framework essential in order to guarantee individual freedoms."[273] In other words, Ordoliberalism not only attaches importance to the competition in the economy, but it also sets legal principles that the economic policy to purse.

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[269] W. Moschel, *Competition Policy from an Ordo Point of View in A. Peacock and H. Willgerodt (Eds.), German Neo-Liberals and the Social Market Economics* (MacMillan, 1989), 142.
[270] Ibid.
[271] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 2014), 34.
[272] Sauter, *Competition Law and Industrial Policy in the EU*, 84.
[273] Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law International, 2005), 84.

Valentine Korah pointed out a concern of the Ordo Liberals that “cartels have to exclude outsiders from the market if they want to raise prices, so usually they erect entry barriers restricting the freedom of others to enter the market.”[274] However, Cseres argued that the Freiburg School’s model of thought did not suffice as an analytical model, which had to be sought from somewhere else and which were found in the ideas of the Harvard School.[275] During 1960s, Harvard School ideas became influential in Europe and provided proper economic analysis. Scholar Cseres also stated “Harvard School still influenced until today in the practice and policy of the European Commission despite the fact that these insights have been contradicted by other economic theories and therefore have become partly outdated by now.”[276] The fact of the matter is, EC competition policy has become locked into these insights and has resulted, in certain cases, in a formalistic decision-making process which has given the impression of a rigid competition system.

3.2 Development of the Competition Rules in the European Union Treaties

The first regulations on EU competition were stipulated in Articles 65 and 66 of Chapter VI (Agreement and concentrations) in The Treaty establishing the European Coal and Steel Community (Paris, April 18, 1951). Accordingly, the conduct of price-fixing, restricting or controlling production, technical development or investments and allocating markets, products, customers or sources of supply are prohibited. In other words, the European Coal and Steel Community applied the *per se* illegal rule to the harmful impact on the competition. However, there were also some exceptional cases in the first regulations if the agreements satisfied some conditions. For example, the agreements contribute to a substantial improvement in the production or marketing of the products; and not impose any restriction not necessary for that purpose; and not susceptible of giving the interested enterprises the power to influence prices, or to control or limit production or marketing of an appreciable part of the products in question within the common market, or of protecting them from effective competition by other enterprises within the common market.[277]

[274] Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (Hart, 2004), 52.
[275] Cseres, *Competition Law and Consumer Protection*, 82.
[276] Ibid.
[277] “Treaty Constituting the European Coal and Steel Community - Treaty Constituting the European Coal and Steel Community.pdf,” n.d.,

To draft the EU Competition Law, the Spaak Report Committee[278] was set up. Member States agreed to highlight the value of free competition in principle.[279] In addition, they agreed with the draft of the Spaak Report in which the agricultural and transport sectors were excluded from the rules of competition in EU. The 1957 Treaty of Rome put into place competition rules which were more detailed and had broader application to undertakings as regulated by Articles 85 and 86. Significantly, the primary objective of the competition regulations was to protect the common market. In addition, apart from the prevention, restriction or distortion of competition, the EEC also included a new consequence of "may affect trade between Member States" as one of the benchmarks to justify the anti-competitive conduct. Accordingly, Article 85 stipulated that the *per se* illegal rule would be applied to the conduct of directly or indirectly fixing purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Furthermore, Article 85 also allowed for exceptional cases, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

Article 86 of the 1957 Treaty of Rome also prohibited the abuse of dominant position to directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions; limit production, markets or technical development to the prejudice of consumers; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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https://www.consilium.europa.eu/uedocs/cmsUpload/Treaty%20constituting%20the%20European%20Coal%20and%20Steel%20Community.pdf (accessed June 19, 2017).

[278] An Intergovernmental Committee set up by the Foreign Ministers of the six Member States of the European Coal and Steel Community (ECSC) as a result of the Messina Conference of 1955.

[279] Rein Wesseling, *The Modernisation of EC Antitrust Law* (Hart Publishing, 2000), 14.

To fully comply with Articles 85 and 86, the Contracting Members of the 1957 Treaty of Rome agreed to adopt an appropriate regulation or directive within three years of the entry into force of this Treaty. Specifically, the regulation stipulated the provisions in details about fines and periodic penalty payments to ensure compliance with the prohibitions laid down in Article 85(1). In addition, it needed to simplify administration to the greatest possible extent on the other in exceptional case regulated in the Article 85(3), to define the respective functions of the Commission and of the Court of Justice as well as to determine the relationship between national laws and the provisions on competition rules.

Although Article 87 stipulated that within three years the ECC would enact a regulation to give the guidelines to the enterprises, Regulation 17 was issued four years later by the Council of the EEC on February 6, 1962 and came into effect on March 13, 1962. Regulation 17/1962 was the first implementing regulation in the field of ECC competition law, setting out the process of notifications, procedural instruments for the enforcement of competition law, and vesting the European Commission with the powers, for example, investigation, punishment of infringements by undertakings, and exemption of agreements under Article 81(3) of the EC Treaty. The objective of Regulation 17/1962 was "to ensure the uniform application throughout the common market of Articles 85 and 86 of the Treaty of Rome and to empower the Commission to address to companies or associations of companies decisions designed to bring any infringements of those Articles to an end."

The competition rules were contained in the 1957 Treaty of Rome which formed the legal basis for the European Economic Community. Scholar David Gerber stated:

> Form the inception of this process, there seems to have been little doubt that the Treaty would have to include provisions aimed at combating restraints on competition. Not only had such provisions been included in the ECSC treaty, but there seems to have been general agreements that the elimination of tariff barriers would not achieve its objectives if private agreements or economically powerful firms were permitted to be used to manipulate the flow of trade.[280]

[280] David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press, 1998), 343.

Articles 85 and 86 of the 1957 Treaty of Rome govern the competition restriction agreements and the conduct of dominant abuse position, respectively to replace the previous provisions in the European Coal and Steel Community Treaty of 1951. There were many debates to include and policy pressures to exclude the provisions in the treaty. David Gerber stated that "the controversial arguments were persuasively accepted to include it rather than slavishly adopt the Sherman Act model based on section 1 and 2." [281] Thus, the provisions reflected a distinctly European approach concerning anti-competitive acts.

Commenting on how the European countries learnt best practices from the previously enacted competition laws, David Gerber also argued that the European approach to anti-competitive conduct is different from the American Sherman Act. Colino also agreed with the viewpoint by stating that "in particular, the German ordo-liberals are cited as a key influence in the determination of the European policy."[282] However, some scholars have objected to that viewpoint asserting that European Union competition law practices have been influenced by American anti-trust practices.

The European competition law is a product of the European competition law tradition and has been influenced by the same historical experiences, political and legal concepts that have formed national competition laws. However, although the Treaty of Rome came into force in 1958, many Member States did not have a competition regime at all or did not consider the regulation of competition as law at the time EC competition rules were drafted.[283] In most Member States, competition law was regulated by an economic regulatory framework that often stood in the way of its effective enforcement.[284] These competition laws were often marginal elements of general economic policy, because they were rarely backed up by relevant economic, political or intellectual resources.[285] David Vaughan stated that by adopting Regulation 17/1962, the competition rules in Europe were beginning to be put in force in 1962.[286]

[281] Mark Furse, *Competition Law of the EC and UK* (Oxford University Press, 2006), 6.
[282] Sandra Marco Colino, *Competition Law of the EU and UK* (OUP Oxford, 2011), 6.
[283] Cseres, *Competition Law and Consumer Protection*, 92.
[284] Ibid.
[285] Gerber David, "The European Competition Law Story: Some German Roles," *Festschrift for Wolfgang Fikentscher* (2000): 655.
[286] David Vaughan, *EU Competition Law: General Principles* (OUP Oxford, 2006), 1.

To answer the question why EC law and economics were not introduced after the 1957 Treaty of Rome, Hertig clarified three reasons. Firstly, the EC's powers were restricted to those that are laid down in the Treaty of Rome. Those powers were quite broad, but it is still contestable whether they reach into certain typical areas of law and economics, like the harmonization of contract law. Secondly, the tight political constraints in the EC to achieve a consensus required approval from most of the Member States. Thirdly, economists in the EC were not concerned with macroeconomic problems nor economic policy and its implementation.[287]

Gradually, the prominent role which European competition law has achieved, and the impressive economic performance associated with the strict German competition regime, has earned a great deal of attention from other Member States and led to the transfer of Ordoliberal ideas to other national legal systems.[288] From the 1970s onward, many countries turned to Germany for legal advice on their own competition law decisions.[289] These successes encouraged many Member States to harmonize their competition regimes with the European set of rules. Accordingly, in the 1980s and early 1990s, many Member States introduced competition law for the first time, like Italy, or revised and reinforced existing competition laws to resemble the European model, like France and the Netherlands.

Additionally, there was a movement towards greater unity in Europe: to remove barriers to enforcement of law across national borders and to harmonize legal rules of Member States. In the harmonization process, economic analysis of law can provide the common language among different legal cultures that can help to translate the different legal institutions into the universal language of economics.[290]

Next, Articles 85 and 86 of the 1957 Treaty of Rome were replaced by Articles 81 and 82 of the EC Treaty, which was signed on February 7, 1992 and entered into force on November 1, 1993. Phedon Nicolaides stated that although EC competition law has been successful over the years, by the end of the 1990s it was strongly criticized for being too formalistic and too

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[287] Hertig Gerard, "The European Community," *International Review of Law and Economics* 11, no. 3 (1991): 335.
[288] Cseres, *Competition Law and Consumer Protection*, 92.
[289] Gerber David, "The European Competition Law Story: Some German Roles," 656.
[290] Posner A. Richard, "The Future of the Law and Economics Movement in Europe," *International Review of Law and Economics* 17, no. 1 (1997): 6.

centralized.[291] The EC started to consider replacing Regulation 17/1962 by enacting Regulation 1/2003 on December 16, 2002, which came into effect on May 1, 2004. Furthermore, Nicolaides stated that the new regulation is significant because of the following reasons.

> Firstly, for the first time, the EC empowered the national courts to have full judgment power concerning the application of Articles 81 and 82. Secondly, the regulation of prior notification will be abolished for undertakings to obtain the exemption. In other words, the enterprises will have to reply on their own analysis and assessment of the legality of the agreements. The abolition of the notification procedure made the Commission avoid the heavy workload.[292] Thirdly, also for the first time, the national competition authorities shall be required to apply the competition rules on the basis of regional EU competition regulation because the cross border trade is affected to other member states. Fourthly, the national competition authorities shall consult with the Commission before they apply the prohibition. Fifthly, it is required that the national courts shall send its copied rulings to the Commission. Finally, the Commission shall have the right to be present at the national courts.[293]

Additionally, Cseres stated that the new regulation is significant because the Commission affirms its commitments to intensify the fight against hard-core cartels through increasing its inspection and enforcement powers.[294] Furthermore, a comprehensive leniency program was introduced to provide a complete immunity from fines for the first party who provides sufficient evidence committed to a cartel agreement under the Article 81(1) of the EC Treaty. Hence, the new regulation 1/2003 enabled the Commission to focus on monitoring the hard-core infringement and effectively implementing its enforcement work. Together with the enactment of Regulation 1/2004, the EC started reforming the implementation of EC competition rules by enacting Regulation 773/2004 and six other new notices. There are two notices on substantive issues, two notices on relations with certain stakeholders, and two other notices on cooperation with the other enforcers. As a result, it provides greater transparency for enterprises to implement the competition rules effectively and efficiently.[295]

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[291] Phedon Nicolaides, "Development of A System for Decentralised Enforcement of EC Competition Policy," *Intereconomics* 37, no. 1 (2002): 2.
[292] Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law International, 2005), 106.
[293] Phedon Nicolaides, "Development of A System for Decentralised Enforcement of EC Competition Policy," *Intereconomics* 37, no. 1 (2002): 41–51.
[294] Cseres, *Competition Law and Consumer Protection*, 105.
[295] Ibid., 106.

Regarding the relationship between Articles 81 and 82 of the EU Competition Law and national competition laws, the EU competition law will be applied in case there is a conflict between laws. In addition, the Member States may not apply stricter rules to bi- or multilateral restrictions of competition.[296] The report on competition policy by the European Commission reiterated as follows:

Although National Competition Authorities and national courts can continue to apply national competition rules to agreements, decisions of associations of undertakings or concerted practices which may affect trade between Member States, they are obliged to apply Articles 81 or 82 of the EC Treaty at the same time, and the application of national competition rules may not produce an outcome which deviates from that resulting from the application of Article 81 of the EC Treaty. The resulting convergence of the rules applicable to transactions falling under Article 81 of the EC Treaty, the so-called level playing field, will facilitate doing business in Europe and will be central to completion of the single market and to consistent application of EU competition law once the Commission has given up its monopoly of granting exemptions under Article 81(3) of the EC Treaty.[297]

The European Commission also stated that "national courts also have the power to decide whether a particular agreement complies with EU competition law or not. Companies and consumers can also claim damages if they have suffered as a result of illegal behavior restricting competition."[298] In other words, the Court of Justice delegated the power to the national courts to decentralize the enforcement of the competition rules and firms and consumers can appeal the private litigation for damage compensation in anti-competitive cases.

The competition rules in Articles 81 and 82 of the EC Treaty of 1992 have not affected the Treaty of Lisbon, the Treaty on European Union, and the Treaty on the Functioning of the European Union which was signed on December 13, 2007, except one of the terms. The concept of 'common market' has been changed to 'internal market.' As a main objective of the 1957 Treaty of Rome, the EC strived to achieve a common market through the removal of quotas, free

[296] Lorenz, *An Introduction to EU Competition Law*, 45.

[297] Office for Official Publications of the European Communities, *European Commission Competition Policy: XXXIInd Report on Competition Policy 2002* (Brussels, Luxembourg, 2003), 26, Brussels, Luxembourg.

[298] "Competition: Opening Markets to Competition - European Commission," n.d., http://ec.europa.eu/competition/general/overview_en.html (accessed July 22, 2016).

movement of citizens and workers, and tax harmonization. However, the free movement of trade and services and the freedom to establish business enterprise in the EC were obstructed because the domestic public authorities among the EC Member States imposed many anti-competitive practices.[299] To tackle this issue, the Single European Act that entered into force on July 1, 1987 set a precise deadline of December 31, 1992 for completion of the internal market. According to Article 26(2) of the Treaty of Lisbon, "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."[300]

Therefore, together with the evolution of the European Community based on historical circumstance, the competition regulation in the EC was also developed to protect the goals of the EC. Parret stated that "the overall purpose of EU competition law is to contribute to achieving the aims of the Union; the issue, therefore, is what objectives competition law pursues in order to do this. It has been pointed out that it is useful to distinguish between ultimate and intermediate goals".[301] In addition, Alison Jones and Brenda Sufrin also stated that "the ultimate objective might be social welfare, consumer welfare, or economic freedom, for example, whereas intermediate goals might be to maintain an effective competitive structure, or protect the process of competition, in order to achieve that ultimate objective.[302]

II. Conduct and Effect Approach in the EU Competition Law

1. Objectives of the Competition Rules and Competition Policy in EU – a Significant Part of the Internal Market

While the competition rules of the EC Treaty are regulated in Articles 81 to 86, and apply to undertakings, Articles 87 to 89 are about aids granted by States. According to David Vaughan, the rules of competition are built to ensure that the objectives of the treaty are effectives and are not

[299] The European Parliament, "The Internal Market: General Principles | EU Fact Sheets | European Parliament," September 2016, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.1.html (accessed November 19, 2016).
[300] Article 26(2), The Treaty on European Union and the Treaty on the Functioning of the European Union.
[301] Laura Parret, "The Objectives of EU Competition Law and Policy," *European Competition Journal* 339 (2010): 340.
[302] Jones and Sufrin, *EU Competition Law*, 35.

distorted.[303] Additionally, he stated that the rules of competition in EC Treaty are "to establish a single market, to ensure the protection of the freedom to provide services, or to avoid the discrimination on the grounds of nationality."[304] To prove the objectives of the competition rules, Vaughan referred to several legal cases which concentrated on promoting the fair competition in a free market economy and the establishment of a single market.[305] Accordingly, the objectives of the competition rules are based on the rulings of the Court of Justice as follows:

> (a) keeping prices down to the lowest possible level and encouraging the movement of goods between Member States, thereby permitting the most effective possible distribution of activities in relation to productivity and the capacity of undertakings to adapt themselves to change; (Case 48/69 *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619 at 660, [1972] CMLR 557 at 627, ECJ)
> (b) interpenetration of national markets and, as a result, direct access by consumer to the sources of production of the whole Community; (Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211, ECJ)
> (c) the establishment of workable competition, that is to say the degree of competition necessary to ensure the observance and the attainment of the basic objectives of the EC Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.[306] The Commission has also often used language referring to the aim of 'effective competition'; (Case 2/76 United Brands v Commission [1978] ECR 207, [1978] 1 CMLR 429, para 65)
> (d) ensuring that structural rigidity is not reinforced. (Case 26/76 *Metro SB-Grossmarkte GmbH & Co KG v Commission* [1977] ECR 1875 at 1905, [1978] 2 CMLR 1 at 34, ECJ.[307]

He also held that "without the rules of competition, numerous other provisions of the treaty would be pointless."[308]

Robert D. Anderson and Alberto Heimler stated that the objective of the EU competition policy is "to ensure that consumers enjoy freedom of choice, low prices, and good value for

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[303] Vaughan, *EU Competition Law*, 1.
[304] Ibid.
[305] Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211, ECJ. Case 22/79 *Greenwich Film Production v SACEM* [1979] ECR 3275, [1980] 1 CMLR 629, ECJ. Case 7/82 *GVL v Commission* [1983] ECR 483, [1983] 3 CMLR 645, ECJ.
[306] Case 26/76 *Metro SB-Grossmarkte GmbH & Co KG v Commission* [1977] ECR 1875 at 1904, [1978] 2 CMLR 1 at 33, ECJ.
[307] Vaughan, *EU Competition Law*, 2.
[308] Ibid., 1.

money, while also serving as an important driver of innovation and productivity improvement."[309] And they clarified that "the competition policy refers to set of laws, institutions and policies through which governments maintain or promote competition."[310] In other words, the competition policy is a selective form of government intervention to justify it when the market fails in operating because of monopoly, cartels, and competition restraint conduct. Further, the European Commission stated that "competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers, and helps reduce prices and improve quality. These are the reasons why the EU fights anticompetitive behaviour, reviews mergers and state aid, and encourages liberalization."[311]

Also, Anderson and Heimler stated that together with the implementation of the 1957 Treaty of Rome, the competition policy in the European Community has helped innovations in constitutional and institutional structures to increase.[312] David Vaughan stated that the EU competition policy was reflected in its annual reports on competition policy of the Commission.[313]

The European Commission explained the five main reasons why it needs a competition policy in the European Community as follows:

> First, low prices for all: The simplest way for a company to gain a high market share is to offer a better price. In a competitive market, prices are pushed down. This is not only good for consumers - when more people can afford to buy products, it encourages businesses to produce and boosts the economy in general; Second, better quality: Competition also encourages businesses to improve the quality of goods and services they sell - to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better service; Third, more choice: In a competitive market, businesses will try to make their products different from the rest. This results in greater choice - so consumers can select the product that offers the right balance between price and quality; Fourth, innovation: To deliver this choice, and produce better products, businesses need to be innovative - in their product concepts, design, production techniques, services, etc; Fifth, better competitors in global markets: Competition within the EU also helps make

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[309] Robert D. Anderson and Alberto Heimler, "What Has Competition Done for Europe? An Inter-Disciplinary Answer*," *Aussenwirtschaft* 62, no. 4 (December 2007): 419.
[310] Ibid., 420.
[311] "Competition: Opening Markets to Competition - European Commission," 1.
[312] Anderson and Heimler, "What Has Competition Done for Europe?," 420.
[313] Vaughan, *EU Competition Law*, 3.

European companies stronger outside the EU - and able to hold their own against global competitors.[314]

Additionally, the completion of "internal market" is a primary objective that the European Commission is striving for. The competition policy is an important tool to achieve a Community-wide market free of internal barriers.[315] Report XVI on Competition Policy further clarified that "it must ensure these barriers are not replaced by divisions of markets resulting from restrictive business practices or protectionist measures taken by the Member States."[316] In addition, the European Commission emphasized the importance of legislative reform with the objective of growing the internal market. According to Report XXIV on Competition Policy in 1994, the EC removed the regulatory trade barriers which were the main obstacles to trade between Member States, based on the fact that some Member States still wanted to subsidize or grant aid to enterprises. Subsequently, the EC opened up some sectors for enterprises to compete. For example, such sectors included energy, telecommunications, and the postal sector. In other words, it created a level playing field for all enterprises. The benefits of an "internal market" for the EU include higher output, growth, and employment.[317] In addition, the concept of "effective competition" has also developed as "the main stimulus to innovation and higher productivity which underpins policies designed to increase economic growth and welfare."[318]

Significantly, in 2005, the European Commission stressed "EU competition policy plays an important role in achieving the competitiveness goals of the Lisbon agenda to make Europe the most dynamic knowledge-based economy in the world. It includes not only antitrust and merger

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[314] "Competition: Opening Markets to Competition - European Commission."
[315] "XVth Report on Competition Policy - European Commission," 1985, Introduction, http://ec.europa.eu/competition/publications/annual_report/index.html#rep_1980 (accessed November 26, 2016).
[316] "XVIth Report on Competition Policy - European Commission," 1986, Introduction, http://ec.europa.eu/competition/publications/annual_report/index.html#rep_1980 (accessed November 26, 2016).
[317] "XXth Report on Competition Policy - European Commission," 1990, Introduction, http://ec.europa.eu/competition/publications/annual_report/index.html#rep_1980 (accessed November 26, 2016).
[318] Ibid.

rules, which are fundamental to any well functioning market economy, but also the application of an efficient and firm State-aid discipline."[319]

Therefore, the objectives of the competition rules and competition policy in the EU are to ensure effective competition, promote consumer welfare by providing more choice of products and better quality, encourage more innovations for better products and services, as well as to create a level playing field for all enterprises. Additionally, the competition policy aims to maintain non-barriers to trade and services in the Member State countries for the internal market.

2. The EU Competition Regulations on Price-fixing Cartels and Some Cases to Understand How the EC Examines the Cartels

Having written in the previous part, although the EU Competition regulations on price-fixing cartels under Article 85(a) of the 1957 Treaty of Rome was replaced by Article 81(a) of the EC Treaty of 1992 and was replaced again with Article 101(a) under the Treaty of Lisbon or the Treaty on European Union and the Treaty on the Functioning of the European Union 2007 (TFEU), the full legal text of regulations on price-fixing cartels did not change, except one word changed from 'the common market' to 'the internal market' when the TFEU was signed on December 13, 2007. The full text of the Article 101(a) is as follows:

> The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;[320]

The scope of Article 101 is applicable to multilateral conduct only. If unilateral conduct is found, it will be considered conduct that constitutes abuse of a dominant position in the market, which is stipulated in Article 102. In addition, the importance of the internal market, in the EU, is clearly emphasized in Article 26(2) of the Treaty of Lisbon. Accordingly, "the internal market shall

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[319] The European Commission, *XXXIII Report on Competition Policy*, 2005, Introduction, 15.
[320] Article 101(a), The Treaty on European Union and Treaty on the Functioning of the European Union, *supra* note 179.

comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."[321]

2.1 The Concept of Undertakings

By reviewing the regulations on cartels and price-fixing cartels, the terms of undertakings are repeated very often as main subjects of the competition law relating to anticompetitive conduct. Furse stated that at the time the competition law came into force, the interpretation of the term "undertakings" was not clear enough.[322] He suggested looking at case law for a more precise definition of the term undertakings as well as a better understanding of the legislative intent behind the regulations.[323] By re-visiting the case of *Hofner and Elser v Macrotron GmbH,*[324] the European Court of Justice (ECJ) defined "the concept of undertakings encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed."[325] In other words, the definition of undertakings is very broad and it refers to every form of enterprise that is recognized by relevant law. The case of *Reuter/BASF*[326] provided a clear illustration of the broad interpretation the EC courts have applied to the term undertakings. In this case an inventor was considered as an undertaking and was subject to Article 81 of the EC. In addition, opera singers were also considered to be undertakings in the case of *UNITEL* 78/516/EEC (1978) OJ L157/39.

With the need for business expansion, many multi-national companies have set up subsidiary companies around the world. Furse stated that the EU Competition Law applied "parent and subsidiary companies may be held to be part of the same undertaking, and not to be their separate legal constituents."[327] In other words, if only the parent companies and its subsidiary companies were involved in a case, they would not be considered to be 'two or more undertakings' as stipulated in Article 81 of the EC. Instead, these parent and subsidiary companies are considered as a single undertaking. In the case of *Bodson v. Pompes Funèbres*, Article 81(a) was

[321] Article 26(2), The Treaty on European Union and the Treaty on the Functioning of the European Union.
[322] Furse, *Competition Law of the EC and UK*, 21.
[323] Ibid.
[324] C-41/90 [1993] 4 CMLR 306.
[325] Hofner and Elser v Macrotron GmbH [1993] Case no C-41/90 (eu.int:cjeu Cour de Justice, 1993) [21].
[326] 76/743/EEC (1976) OJ L254/40.
[327] Furse, *Competition Law of the EC and UK*, 22.

not applied. The ECJ held that "if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings."[328] As a result, the agreements between enterprises or undertakings, which are in the same group, may not be subject to the scope of Article 81(1).

Similarly, the case of *Viho Europe BV v Commission of the European Communities*,[329] provided a clear example of the Court of Justice's viewpoint concerning a parent company and its susidiary's conduct and how the provisions of prohibited cartels are applied:

> When a parent company and its subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company which wholly controls them, the fact that the parent company's policy, which consists essentially in dividing various national markets between its subsidiaries, might produce effects outside the ambit of the group which are capable of affecting the competitive position of third parties cannot make Article 85(1) applicable, even when it is read in conjunction with Article 2 and Article 3(c) and (g) of the Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application were fulfilled. [330]

However, the Commission held that Article 81(1) might be applied where companies are part of a corporate group and they gain a certain level of freedom to define the market power. According a 2008 decision by the Commission relating to a proceeding under Article 81 [EC][331] and Article 53 of the EEA Agreement,[332] the Commission found that the applicants, RWE AG and RWE Dea AG (together 'RWE') had, with other undertakings, infringed Article 81(1) EC and Article 53(1) of the Agreement within the European Economic Area (EEA) by participating in a cartel relating to the paraffin waxes market in the EEA and the German market for slack wax.[333]

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[328] Corinne Bodson v. Pompes Funèbres des Regions Libérées SA, (1988) Case 30/87 ECR 2479 (Cour de Justice).
[329] (1995) Case C-73/95.
[330] Viho Europe BV v Commission of the European Communities, (1995) Case C-73/95 ECR I 5457 (Cour de Justice).
[331] Decision C (2008) 5476 final of October 1, 2008
[332] Case COMP/39.181-Candle Waxes.
[333] Case C-294/98 P, Metsa-Serla et al v. Commission [2000] ECR I 10065, para 27.

Additionally, according to the EC Commission, non-profit organizations are also considered undertakings. The seminal case on the matter is the EC Commission's 1992 decision concerning *Distribution of package tours during the 1990 World Cup* [1992][334] in which the 1990 Football World Cup organizations infringed Article 85(1) of the EC's anti-competition regulations at that time. It shows that "undertakings or organizations did not have to be profit making as long as they were engaged in economic activity."[335]

FIFA, the FIGC, the local organizing committee Italia `90, CIT SpA, Italia Tour SpA and 90 Tour Italia SpA have infringed Article 85 (1) of the EEC Treaty as regards the provisions of the contracts of 26 June 1987 and 11 February 1988 concluded between the local organizing committee Italia `90 and CIT SpA and Italia Tour SpA, on the one hand, and 90 Tour Italia SpA, on the other, which provided for the exclusive supply at world level to 90 Tour Italia SpA of ground entrance tickets for the purpose of putting together package tours to the 1990 World Cup. Such tickets formed part of a general system for the distribution of ground entrance tickets developed and implemented by the local organizing committee Italia `90 in accordance with the instructions of the FIGC and FIFA, after approval by FIFA, a system which prohibited the sale of tickets for the putting together of such package tours, thus making it impossible for other tour operators and travel agencies to find sources of supply other than 90 Tour Italia SpA. [336]

To affirm the definition of an economic activity, *Italy v. Commission*[337] clearly expressed that an activity of an economic nature means any activity, whether profit-making or not, that involves economic trade. However, there are also exceptional cases that involve economic activity that has a social function under the close supervision and control of the State. In the case of *Cisal v INAIL*,[338] INAIL, an organization to manage a scheme to provide insurance against accidents at work and occupational diseases, was under the supervision of the State.[339] The European Court of Justice didn't define INAIL as an undertaking for the purpose of EC competition law.

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[334] Case no 92/521/EEC OJ L326/31.
[335] Furse, *Competition Law of the EC and UK*, 22.
[336] Distribution of package tours during the 1990 World Cup [1992] Case no 92/521/EEC OJ L326/31 (ec.int EC Commission, October 27, 1992).
[337] Case 41/83 of March 20, 1985.
[338] Case C-218/00 [2002] 4 CMLR 24.
[339] Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), (2002) C-218/00 4 CMLR 24 C-218/00 4 CMLR 24 (Cour de Justice) [21].

Furthermore, in the case of *Federacion Nacional de Empresas de Instrumentacion Cientifica, Medica, Tecnica y Dental (FENIN) v Commission*,[340] the Commission found that an organization acting as a monopolistic purchaser in the market was not defined as an undertaking applicable to Articles 81 and 82 of the EC.

An organization which purchases goods — even in great quantity — not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.[341]

The concept of undertakings and public undertakings is also defined in Article 106 of the Treaty on European Union and the Treaty on the Functioning of the European Union.[342] Accordingly, the EU stipulated that,

> Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.[343]

The public undertakings also include state-owned enterprises that are under the scope of the EU Competition Law.[344] In addition, the EU also clearly asked the Member States not to grant any special or exclusive rights to public undertakings and undertakings contrary to the Treaty rules.[345]

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[340] Case T-319/99 [2003] 5 CMLR 1.
[341] Federacion Nacional de Empresas de Instrumentacion Cientifica, Medica, Tecnica y Dental (FENIN) v Commission [2003] Case no T-319/99 5 CMLR 1 (eu.int:cjeu, 2003) paras 36-37.
[342] 2012/C 326/01.
[343] Article 106(2) of the TFEU.
[344] Organisation for Economic Cooperation and Development, *Roundtable on the Application of Antitrust Law to State-Owned Enterprises*, Working Party No.3 on Cooperation and Enforcement (Organisation for Economic Co-operation and Development, September 28, 2009), Para. 3-4.
[345] Article 106(1) of the TFEU.

In summary, the Courts of the European Union developed the concept of an undertaking that is understood as designating an economic unit even if in law that economic unit consisted of several persons, natural or legal.[346] In addition, the Court also clearly defined the scope of state-owned enterprise applicable to Article 81(1). Significantly, the Courts have emphasized that, for the purposes of applying the rules on competition, the formal separation between two companies resulting from their separate legal personality is not conclusive, the decisive test being the uniformity or otherwise of their conduct on the market. Thus, it may be necessary to establish whether two or more companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market.[347]

2.2 The Concept of Agreements between Undertakings, Concerted Practices and Decisions of Associations of Undertakings

The concept of agreements between undertakings in the EU competition law is very broad. Normally, it could be defined as a written contract. However, it sometimes didn't require a formal agreement. One of the prominent cases regarding this issue is *ACF Chemiefarma NV v. Commission*.[348] In this case the cartel parties entered into a contract to fix prices and quotas for supplying the pharmacy product known as quinine. At the beginning, the sphere of action of price-fixing cartel agreements was applied outside of the common market. However, the cartel parties committed verbally to extend it to the common market. The Commission's viewpoint was that the agreement was defined as a concerted practice which infringed Article 81(1).

Another applicable case, *BP Kemi*, involved cartel parties that did not sign a written contract. However, they implemented the contract together. From the Commission's point of view "there were two separate contracts, one signed and the other implemented, each dependent on the other, formed part of the same agreement. It is thought, but not established, that when a later contract is dependent on the first but the first is made without any assurance that the second will be made, they form separate agreements: that an option and its exercise, for instance, are not parts

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[346] See the Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11; *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 55 and the case-law cited; and Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124.

[347] Se the Case of *Imperial Chemical Industries* v *Commission*, paragraph 25 above, paragraph 140; Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85; and *General Technic-Otis and Others* v *Commission*, paragraph 26 above, paragraph 54.

[348] (41/69) [1970] ECR 661, paras 110-114 and 163-169.

of the same agreement."[349] Hence, the formality of a contract or an agreement is not considered necessary to create a legally binding contract in civil law. Any agreed coordinated conduct or concerted practices of at least two parties is condemned and violates Article 101(1).

The EJC defines the concept of concerted practices in Article 101(1) as "… A form of coordination between undertakings which, without having reached a stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."[350] The concept was further developed by the EJC in the case of *Suiker Unie v. Commission*,

> . . .the concerted practices must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market… Any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[351]

In other words, the concept of concerted practices is understood as the relationship between the conduct of cartel members by meeting and exchanging information for purposes of determining their behavior on the market.

Concerning the concept of decisions by associations of undertakings, the industry associations are under the governing scope of Article 81. The recommendations by a trade association to its members also infringed the competition law without taking into consideration whether it is a binding agreement or not. In the case of *Vereeniging van Cementhandelaren v. Commission*, the ECJ held that:

> The fixing of prices, even those which merely constitute a target, affects competition because such target prices enable all the participants in a cartel to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be… An agreement extending over the whole of the territory of a member state by its very nature has the effect of reinforcing the compartmentalization of markets on a

[349] [1979] 3 CMLR 684, para 45.
[350] Case 48/69, *ICI v. Commission (Dyestuffs)* [1972] ECR 619, para 64.
[351] Cases 40/73 etc, Suiker Unie v. Commission, [1975] ECR 1663, para 173 and 1974.

> national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production. [352]

In addition, the case of *Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geimporteerd fruit "Frubo" v. Commission* concerned two trade associations that were involved in an agreement and asked their members to comply, the ECJ determined:

> Article 85(1) applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers… A clause in an agreement restricting the freedom of the undertakings who are party to it to import direct into a member state is liable to interfere with the natural movement of trade and thus to affect trade between member countries.[353]

Hence, the European competition law not only considered the formality of the agreement, but also the nature of the agreement and whether it restricted competition and caused bad effects on trade. In addition, it is clear from the two cases mentioned above that even if the agreements were not enforceable, an agreement between undertakings existed, and the ECJ held in both cases that such agreements constituted infringement under European Competition Law.

2.3 Having Object or Effect, the Prevention, Restriction or Distortion of Competition

According to the Guidelines on the Applicability of Article 101 of the 2011 Treaty on the Functioning of the European Union concerning horizontal cooperation agreements, the objects of horizontal agreements are understood as price-fixing, output limitations, market sharing, or customer allocation intentions, all of which are within the scope of Article 101(1).[354] Since the apparent restrictions of competition by the objects, the Commission will not examine "the actual or potential effects of an agreement on the market once its anti-competitive object has been established."[355] To prove an anti-competitive purpose, the case law of the Court of Justice of the European Union revealed that the Court analyzed the content of the agreement, the objectives that

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[352] Vereeniging van Cementhandelaren v Commission of the European Communities [1972] Case no 8–72, ECR 977 (eu.int:cjeu Cour de Justice, October 17, 1972) paras 18-22.

[353] Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geimporteerd fruit "Frubo" v Commission [1975] Case no 71–74, ECR 563 (eu.int:cjeu Cour de Justice, May 15, 1975) paras 28-32.

[354] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, C 11/1, para 24-25 (Official Journal of the European Union 2011).

[355] Ibid., p. para 24.

the horizontal agreement aimed at achieving, and a full analysis of the economic and legal context in which the horizontal agreement was made. Such analysis was done by the Court in order to identify the actual conduct and behavior of the related parties, with regards to the market, so that the Court could assess whether the agreement had an anti-competitive object or not.[356] Furthermore, the Commission may take into account the cartel members' intentions in its full analysis; however, this is not a decisive factor in determining whether it has an anti-competitive object or not.[357]

Specifically, the Commission strictly stipulates that:

> … any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place.[358]

In addition, the European Commission also clarifies "to this end, the Commission will take into account whether the information exchanged, by its very nature, may possibly lead to a restriction of competition."[359] Furthermore, the Commission clearly explains that information exchanged between competitors concerning individualized data about intended future prices or quantities is considered a restriction of competition by object and are subject to being fined as cartels because they have the object of fixing prices or quantities.[360]

However, in some exceptional cases, the public authorities allow certain enterprises to enter into horizontal cooperation agreements in order to achieve a public policy or public interest objectives by way of self-regulation. The Commission further classifies that "… however, companies remain subject to Article 101 if a national law merely encourages or makes it easier for

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[356] See, for example, Joined Cases C-501/06 P and others, GlaxoSmithKline, paragraph 55; Case C-209/07, BIDS, paragraph 16; Case C-8/08, T-Mobile Netherlands, ECR [2009] I-4529, paragraph 29 et seq.; Case C-7/95 P, John Deere, paragraph 77.

[357] See, for example, Joined Cases C-501/06 P and others, GlaxoSmithKline, paragraph 58; Case C-209/07, BIDS, paragraphs 15 et seq.

[358] Ibid.

[359] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, para 72.

[360] Ibid., p. para 74.

them to engage in autonomous anti-competitive conduct."[361] In other words, the fact that public authorities encourage a horizontal co-operation agreement does not mean that it is permissible under Article 101. It is only permissible if the anti-competitive conduct is required of companies by national legislation, or if the latter creates a legal framework which precludes all scope for competitive activity on their part, that Article 101 does not apply. In such a situation, the restriction of competition is not attributable, as Article 101 implicitly requires, to the autonomous conduct of the companies and they are shielded from all the consequences of an infringement of that article.[362] Each case must be assessed on its own facts according to the general principles set out in the guidelines.[363]

Even if the horizontal agreement did not have an anti-competitive object, an agreement, decision, or concerted practice, it may still violate Article 101(1) if it has a restrictive effect on competition. In this case, the Commission will not only examine the actual effects but also potential effects of that conduct.[364] In order to identify the restrictive effects on competition, the Commission states that "… an agreement to have restrictive effects on competition within the meaning of Article 101(1) must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties."[365] It means that the agreement must make the concerned parties dependent on the market conduct and have a negative effect on competitive prices and harm consumers. And the Commission will make an economic analysis to develop the definition of relevant market. The Commission's approach to examining the cartels is reflected in recent judgments of the Court of First Instance in the *European Night Services* case. Accordingly, the Court ruled "it must be borne in mind that in assessing an agreement under Article 81(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings

[361] See judgment of 14 October 2010 in Case C-280/08 P, Deutsche Telekom, ECR I not yet reported, paragraph 82 and the case-law cited therein.
[362] At least until a decision to non-apply the national legislation has been adopted and that decision has become definitive; see Case C-198/01, CIF, paragraphs 54 et seq.
[363] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, para 22.
[364] Ibid., p. para 26.
[365] Ibid., p. para 27.

operate, the products or services covered by the agreement and the actual structure of the market concerned."[366]

The Guidelines of the Commission clearly regulate:

> . . .28. Restrictive effects on competition within the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.
> 29. The assessment of whether a horizontal co-operation agreement has restrictive effects on competition within the meaning of Article 101(1) must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment). Hence, in order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the agreement. This comparison does not take into account any potential efficiency gains generated by the agreement, as these will only be assessed under Article 101(3).[367]

2.4 Appreciability: the De Minimis Principles

Although Article 101(1) of the Treaty on the Functioning of the European Union prohibits cartel agreements which may affect trade between Member States, the Court of Justice of the European Union has clarified that that provision is not applicable where the impact of the agreement on trade between Member States or on competition is not appreciable.[368] In order to give clearer guidelines to the enterprises, courts, and competition authorities, in 2014, the Commission issued a Commission Notice concerning agreements of minor importance which do not appreciably

[366] Case T-374/94 etc European Night Services [1998] ECR II 3141, para 136.
[367] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, para 28-29.
[368] The European Union, *Commission Notice on Agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*, *Official Journal of the European Union* (Official Journal of the European Union, August 30, 2014), para 1, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0830(01).

restrict competition under Article 101(1). According to the Commission Notice, the Commission refers to market share thresholds, and the circumstances in which agreements may have as their effect the prevention, restriction, or distortion of competition within the internal market because they are not capable of appreciably affecting trade between Member States. To quantify the concept of appreciability, the Commission used the combination of a 5 percent market share threshold and a EUR 40 million turnover threshold which does not affect the trade within member states. Hence, the cartel agreements with the above-mentioned threshold will be exempted from Article 101(1) even if they have as their object the prevention, restriction, or distortion of competition.

In case of agreements between undertakings, which are actual or potential competitors in any of those markets (agreements between competitors), the relevant market threshold of combined market share held by the parties must not exceed 10 percent. In the case of agreements between non-competitors, the relevant market share must not exceed 15 percent. Additionally, the Commission states that if it is difficult to classify the agreement, as either an agreement between competitors or an agreement between non-competitors, the 10 percent threshold is applicable. However, the safe harbor provision is not subject to the hard-core agreements (the fixing of prices when selling products to third parties; the limitation of output or sales; and the allocation of markets or customers), which have as their object the prevention, restriction or distortion of competition within the internal market.

In addition, the Commission states that it is necessary to define the relevant market when calculating market share. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.[369] Furthermore, concerning some specific horizontal agreements, the Commission applies the Block Exemption Regulation, for example, a Research and Development agreement is allowable if the combined market share does not exceed 25 percent; a Production agreement is permissible if the combined market share not exceed 20 percent in the relevant market; and the Commercialization agreement and

[369] Ibid., para 12.

Purchasing agreement are acceptable if the combined market share does not exceed 15 percent, no market power and the article 101(3) could be fulfilled.

2.5 Effect on Trade between Member States

There is a cross border trade effect when a two tier law systems exist in the EU, especially when the flow of goods and services moves across the region. In order to address the effect on trade between Member States, the Commission highlights the relationship between the regional competition law and national competition law. According to Council Regulation No.1/2003, Article 3 clearly stipulates the application of the EU competition law and each of the member states' national competition law. Accordingly, Article 3(1) of Council Regulation No.1/2003 states that agreements in a national territory that affect trade between Member States are governed by Article 101(1). Additionally, Council Regulation No.1/2003 provides that "the national competition authority may not lead to the use of prohibited agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which either do not restrict competition within the meaning of Article 101(1) of the Treaty or are exceptional in the Article 101(3) or are subject to the block exemption regulation."[370] In other words, the national competition authority cannot apply a looser regulation than the EU Competition Regulation.

In order to give clear guidelines on the concept of effect on trade, the Commission issued a Notice to guide the competition authorities and courts to apply the rule. Firstly, the concept of "trade between EU countries" contains two meanings. The concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity including business establishment. This interpretation is consistent with the fundamental objective of the TFEU to promote free movement of goods, services, persons and capital. Additionally, according to settled case law the concept of "trade" also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be

[370] Article 3, The Council of the European Union, *Council Regulation (EC) No.1/2003 on the Implementation of the Rules on Competition Laid Down in Article 81 and 82 of the Treaty* (Official Journal of the European Union L 001, December 16, 2002), http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R0001.

subject to the Community competition rules. When an undertaking is or risks being eliminated the competitive structure within the Community is affected and so are the economic activities in which the undertaking is engaged. Next, the requirement that there must be an effect on trade "between EU countries" implies that there must be an impact on cross-border economic activity involving at least two EU countries.[371] The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national.

Secondly, the notion "may affect" is to define the nature of the required impact on trade between EU countries. According to the standard test developed by the Court of Justice, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU countries. In cases where the agreement or practice is liable to affect the competitive structure inside the EU, EU law jurisdiction is established.[372]

Thirdly, the concept of "appreciability" means the effect on trade criterion incorporates a quantitative element, limiting EU law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. According to Guidelines on the Effect on Trade Concept Contained in Article 81 and 82 of the Treaty, appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned.[373] The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned.[374] In its notice on agreements of minor importance, the Commission states that agreements between small and medium-sized enterprises rarely affect trade between EU countries to a significant degree. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between

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[371] Para. 19-22, Guidelines on the Effect on Trade Concept Contained in Article 81 and 82 of the Treaty (Official Journal of the European Union C 101 2004).
[372] Para. 23-43, ibid.
[373] See e.g. paragraph 17 of the judgment in Javico cited in footnote 19, and paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.
[374] Paragraph 45, Guidelines on the Effect on Trade Concept Contained in Article 81 and 82 of the Treaty.

EU countries when the following cumulative conditions are met. The threshold of aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed five percent or EUR 40 million is calculated on the basis of total EU sales, excluding tax, during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded. In order to apply the market share threshold, it is necessary to determine the relevant market.[375]

Therefore, the Guidelines on the Effect on Trade Concept Contained in Article 81 and 82 of the Treaty indicates that

> …the Commission will apply a negative presumption to the application of the concept of affecting trade to all agreements, including agreements that by their very nature are capable of affecting trade between EU countries, as well as agreements that involve trade with undertakings located in non-EU countries. Outside the scope of negative presumption, the Commission will take account of qualitative elements relating to the nature of the agreement or practice and the nature of the products that they concern. Furthermore, the positive presumption relating to appreciability in the case of agreements also takes into account whether and how agreements and practices cover several EU countries, and whether they are confined to a single EU country, or part of a single EU country. Agreements and practices involving non-EU countries are also addressed. In the case of agreements and practices whose object is not to restrict competition inside the EU, it is normally necessary to proceed with a more detailed analysis of whether or not there is any amount of cross-border economic activity inside the EU, and thus patterns of trade between EU countries, are capable of being affected.[376]

In summary, in dealing with either horizontal or vertical agreements, the Commission assesses the conduct and the effect of the agreements under Article 101, which consists of two steps. The first step, under Article 101(1), is to assess whether there is an agreement between undertakings (must be more than one undertaking involved in the agreement). Then, the Commission needs to identify whether the agreement is capable of affecting trade between Member States, has an anti-competitive object, or has actual or potential restrictive effects on competition. If the cartels have

[375] Paras. 44-57, ibid.

[376] Para. 58-60, Anne-Marie Van den Bossche et al., *Sourcebook on EU Competition Law* (Uitgeverij Larcier, 2015).

the object of restricting competition, it is not necessary to demonstrate that they have an anti-competitive effect.

To analyze the anti-competitive effects, the Commission will devise a definition of market structure and specify the relevant market to examine, and determine whether it acts as the main competition restriction on the other parties. In addition, the Commission will also rely on the economic criteria such as the market power of the relevant parties and other factors relating to the market structure, which forms a key element of the assessment of the market impact likely to be caused by the detected agreement. Furthermore, the Commission calculates the market share of the relevant parties to identify whether it is applicable to the Block Exemption Regulation.

The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3). Accordingly, the pro-competitive effects are understood to contribute to improving the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit.

The assessment of Article 101(3) will be based on four elements, which are known as two positive and two negative effects. "Firstly, the assessment will focus on **the efficiency gains** by pointing out that the agreements can lead to pro-competitive effects in the form of cost savings, better production technology, and increase product variety. Secondly, the restrictions must be **indispensable to the attainment of those objectives**, that is to say, the efficiency gains. Thirdly, **consumers must receive a fair share of the resulting benefits**, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice; for the purposes of these guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement. Finally, the agreement must **not afford the**

parties the possibility of eliminating competition in respect of a substantial part of the products in question."[377]

Based on the above-mentioned analyses on legal and economic context, the Commission will apply Article 101(2), which stipulates that the agreement shall be automatically void if the pro-competitive effects do not outweigh a restriction of competition. In other words, the agreement may not be allowable because it has more negative effects than positive effects. The Commission may allow the cartel agreement if it is not concluded between competitors, involves companies with only a small combined share of the market and the agreement is necessary to improve products or services, develop new products, or find new and better ways of making products available to consumers.[378]

III. Cartel Detection: A Top Priority for the European Commission

Because of the harmful effects that anti-competitive practices have on trade, competition, and consumer welfare, the European Commission took strict enforcement measures against cartels and recognized cartel detection and punishment as top priories. European Competition Statistics show that during the period of 2013 to March 2017, 130 undertakings were detected and subject to Commission decisions.[379] The undertakings were either horizontal or vertical agreements that included entities not fined such as immunity applicants. The Commission scrutinized 53 undertakings in the year of 2014 alone. To deter the cartels from reaching anti-competitive agreements, the Commission imposes heavy fines of up to 10 percent of the total turnover in the preceding business financial year on cartel members. According to the Commission's Cartel Statistics, from 2010 to March 2017, the Commission imposed over EUR 12.6 billion in fines. The case which had the highest fine was the trucks cartel case in 2016 with EUR 2.9 billion for

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[377] Kirsty Middleton, Barry Rodger, and Angus MacCulloch, *Cases and Materials on UK and EC Competition Law* (OUP Oxford, 2009), 236.

[378] The European Commission, "Anti-Competitive Agreements – European Commission, Companies Conclude Agreements Everyday. Are They All Illegal?," n.d., http://ec.europa.eu/competition/consumers/agreements_en.html (accessed April 6, 2017).

[379] "The European Commission Cartel Statistics," n.d., http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (accessed April 8, 2017).

concerned cartel members. And the separated entity fines in the trucks cartel case was Daimler Company with more than EUR 1 billion.[380]

Additionally, according to the Commission Cartel Statistics, from 2013 to March 2017, the Commission decided 28 cases total, 10 of which were decided in 2014.[381] And the price-fixing cartels and other hard-core cartels were strictly punished administrative fines. Accordingly, the Commission fined 14 international groups, consisting of air freight forwarding companies, EUR 169 million for fixing prices and other trading conditions in 2012; three producers of washing powder over EUR 315 million for price fixing in 2011; six liquid crystal display panel producers over EUR 648 million for price fixing in 2010; 11 air cargo carriers over EUR 799 million for price fixing in 2010; two gas energy incumbents over EUR 1 billion for market sharing in 2009; car glass producers over EUR 1.3 billion in 2008; four members of a lift and escalator cartel over EUR 990 million for bid rigging, fixing prices, and allocating projects to each other, sharing markets, and exchanging commercially important and confidential information in 2007. The strict sanctions against the hard-core cartels shows that the Commission did not tolerate the cartel agreements. However, the Commission recognizes the possible economic benefits from some horizontal cooperation agreements that are permissible with certain conditions, for example, research and development, production, commercialization and purchasing agreements, the Commission has become more flexible and focused on the economic justification of cartel agreements.

C. Enforcement Issue

I. What is the Leniency Program?

According to the International Competition Network, the definition of a leniency program is a scheme to implement the partial or total exemption from the penalties that are applicable to cartel members if they report the organization of cartel members and provide information about the

[380] "European Commission - PRESS RELEASES - Press Release - Antitrust: Commission Fines Truck Producers € 2.93 Billion for Participating in a Cartel," July 19, 2016, http://europa.eu/rapid/press-release_IP-16-2582_en.htm (accessed June 19, 2017).
[381] "The European Commission Cartel Statistics."

related cartel to the competition enforcement authorities.[382] Some jurisdictions use other terms such as: leniency, immunity, and amnesty. However, these terms are defined in a differently. For example, under the United States leniency program, it refers to the terms of "corporate amnesty" and "corporate leniency" which means a complete immunity from criminal conviction and fines. For other jurisdictions, "leniency" refers to reduction immunity from fines up to 100 percent.[383]

The competition authorities often obtain the disclosure of information about possible competition infringements from three main sources.[384] The first one is to analyze and monitor the actual market developments in the relevant market. Due to the market diversity, this way is very costly and creates a greater workload for the competition authorities. The second source is to collect the information from third parties who are affected by the prohibited conduct. The reporting parties benefit from the information report because they facilitate the punishment of their competitors and consolidate their market position. Apart from the cartel members, customers of the related cartel members are also interested in reporting the anti-competitive conduct because such conduct adversely affects them. Anti-competitive conduct not only limits the amount of choice they have in terms of what they can buy, they also pay higher prices because manufacturers incur more expenses in their production cost from the anti-competitive conduct. Finally, the competition authorities use the reported information from enterprises to force the alleged companies involved in the anti-competitive practices to provide relevant evidence with a warning of financial punishment or a granting of privileges to get the evidence in return. This is the most efficient way for the competition authorities to enforce the law.

The benefit of the leniency program is to save costs of investigation for the competition authorities because the alleged enterprise recognizes the infringement and accepts the penalty. In addition, this program makes it easier for the enforcement authorities to obtain the information and evidence of secret cartels that are very secretive and extremely difficult to discover. Furthermore, the leniency program makes cartel members increase the uncertainty because it grants immunity to reported cartel members. As a result, the leniency program improves the level

[382] International Competition Network, *Chapter 2: Drafting and Implementing an Effective Leniency Policy, Anti-Cartel Enforcement Manual* (International Competition Network, 2014), 4, http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf.
[383] Ibid.
[384] Lorenz, *An Introduction to EU Competition Law*, 352–53.

of compliance and makes enterprise practices more consistent with the competition law through the increased detection of cartels. More cartel detection will lead to more competition with lower prices, and more innovative and efficient companies with a better service, which ultimately will bring more benefits to consumers. The leniency program outcome is consistent with the competition agencies' objectives.[385]

II. Why is the Leniency Program Applicable for Japan and the EU?

1. Japan:

The Japan Fair Trade Commission (JFTC) was set up after the AMA came into force in 1947. This agency is an independent administrative body like the US Federal Trade Commission.[386] The JFTC is vested with quasi-legislative and quasi-judicial power. For example, the JFTC has the power to promulgate the designation of unfair trade practices in Article 2(9) and publishes it publicly as a part of its enforcement measures. In addition, the JFTC has the power to implement administrative proceedings, which are stipulated in Article 76. The JFTC also has the power to determine violations of the AMA. This decision is equivalent to the first instance court. If the respondent firms appeal, the case will be judged at the Tokyo High Court as the second instance court.[387] The relevant parties have the power to appeal their case to the Supreme Court if they do not agree with the judgment of the Tokyo High Court.

In terms of structure, the JFTC is under the Cabinet Office.[388] The JFTC is composed of a Chairman and four Commissioners appointed by the Prime Minister with the approval of the Diet. The Chairman and Commissioners exercise their authority independently and cannot be fired or have their compensation reduced without their consent.[389] Currently, there are 799 staff members working at the JFTC, of which there are 456 investigators.[390]

In terms of investigatory powers, the JFTC can conduct administrative investigations. The JFTC utilizes a remedy system. The remedy system in the AMA starts with an administrative

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[385] International Competition Network, *Chapter 2: Drafting and Implementing an Effective Leniency Policy, Anti-Cartel Enforcement Manual*, 5.
[386] Oda, *Japanese Law*, 331.
[387] Ibid.
[388] Article 27, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).
[389] Inoue, *Japanese Antitrust Law Manual*, 103.
[390] The Japan Fair Trade Commission, "Staff and Budget," *Japan Fair Trade Commission*, 2013, http://www.jftc.go.jp/en/about_jftc/statistics.html (accessed October 8, 2013).

warning and ends with a surcharge and criminal sanctions. The administrative warning issued by the JFTC requests a firm to take corrective measures voluntarily. The JFTC can file an accusation to the Public Prosecutor's Office, which is responsible for prosecution.[391] But the JFTC can, without getting the consent from the relevant parties, investigate, search and seize the evidence upon having a writ from the court. If the Public Prosecutor's Office refuses to prosecute a case at the JFTC's request, the Public Prosecutor General must submit a report stating the relevant facts and reasons for the denial to the Prime Minister.[392]

A Leniency program was implemented in 2006. The concept of leniency is that cartel violators may enjoy a reduction or exemption from surcharges if they report their illegal activity and submit the relevant documents before or after the JFTC starts their investigation. The purpose of the Leniency program is to increase the number of cartel members reporting their illegal actions to the enforcing authority and to give cartel members an incentive to cease their illegal activity voluntarily.[393]

A summary of the JFTC Leniency program is as follows. Before the JFTC starts an investigation, the first organization to disclose evidence and information regarding cartel activity may be granted immunity from surcharges with the condition that this corporation terminates any illegal activity on or after the investigation begins. The second cartel reporter can enjoy a 50 per cent reduction of surcharges prior to an inspection by the JFTC. The third, fourth and fifth cartel members to report can enjoy a 30 per cent reduction on surcharges before a JFTC investigation. After the JFTC investigates a case, a maximum to 3 cartel reporters can receive a 30 per cent surcharge reduction.

From the outset of the leniency program, there was an objection by the business community because loyalty is highly valued in Japan. But the JFTC received many applications at a later stage. According to the statistics of the JFTC, there were 623 applications during the fiscal year 2006-2012.[394] Among these applications, the JFTC granted leniency in 126 cases involving

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[391] Inoue, *Japanese Antitrust Law Manual*, 103.

[392] Article 74(3), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947) 2009.

[393] Inoue, *Japanese Antitrust Law Manual*, 113.

[394] "Japan: Cartels - The Asia-Pacific Antitrust Review 2013 - GCR - Global Competition Review," 2013, http://globalcompetitionreview.com/reviews/51/sections/175/chapters/1974/ (accessed November 25, 2013).

price-fixing cartels and bid-rigging. Therefore, this program helps the enforcing authority fight cartels effectively and efficiently. The reasons for the high level of incentive associated with the leniency program include, immunity, easy acceptance of application, and the burden placed on the leniency applicant to cooperate with the JFTC is not heavy, all of which has made the leniency program in Japan successful. For instance, the JFTC also accepts the submission of applications by fax, which helps the JFTC determine which company's application is submitted first.[395] After receiving the fax, the JFTC will request that the applicants provide more detailed information.

2. The EU Competition Law

The Commission started applying the immunity or reduction of fines of cartel cases by Commission Notice in 1996. Accordingly, the Commission recognized the secret hard-core cartels which aimed at fixing prices, production or sales quotas, sharing markets, and banning imports or exports were the most serious competition restrictions.[396] The restrictions made the prices increase and reduced the consumers' choice. Furthermore, the anti-competitive effects also harmed the European industry and led to inefficient production without investing into innovation and product development. In terms of trade and employment, the effect of the cartels resulted in European enterprises losing competitiveness in global trade and reduce employment opportunities. Significantly, the Commission discovered that the cartel agreements were also easily divided since some cartel members wished to terminate the cartel agreements and report to the Commission about the existence of cartels but were deterred from doing so previously because of the risk of incurring large fines.[397] Therefore, the Commission adopted the implementation of the immunity and reduction of fines for cartel agreements so as to encourage cooperation between cartel members and the Commission in detecting more cartel cases. This objective aligned with the 1993 White Paper on Growth, Competitiveness and Employment. The Commission Notice showed the strong determination of the Commission in combating the cartels.

The 1996 Commission Notice only applied the immunity to the first enterprise to report the existence of the secret cartels, which provided all the documents and evidence necessary,

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[395] Inoue, *Japanese Antitrust Law Manual*, 114–15.
[396] The European Commission, *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases* (Official Journal of the European Union, C 207/04, July 18, 1996), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996Y0718(01).
[397] Ibid., para. 2.

before the initiation of a Commission investigation. The reporting enterprise is granted a reduction of 75 percent of the amount of fines or a total exemption from the fines. Once the Commission undertakes the investigation, the reported enterprises benefit from a reduction of 50 percent to 70 percent of the fines. If an enterprise cooperated with the Commission to provide the related cartel information such as documents and evidence, before the Commission released a statement of objections, the enterprise was given an additional reduction of 10 percent to 50 percent of the fines. The Commission Notice also applied to an enterprise that did not substantially reject the alleged violation of the Commission after receiving the statement of objections from the Commission. And the Commission's Directorate-General for Competition was the empowered organization to grant the fine reduction or waiver of the imposition of the cartels sanctions. Also, the Commission clarified that the reduction of fines or immunity provided to the violating cartels by the Commission would not protect such enterprises from civil litigation, and therefore they must compensate for any damages resulting from the consequences of the illegal cartel agreements.

Five years after the implementation of the leniency program, European enterprises have positively responded to the benefits of the program. However, the program has had some shortcomings, specifically concerning the criteria used to justify the quality of the evidence provided by the cartel member seeking leniency, and leniency allowance only for the first enterprise who reports anti-competitive cartel agreements. In order to make the leniency program more transparent and effective, the Commission amended the program in 2002 to require the reporting enterprise to provide more sufficient evidence that created more value added[398] to what the Commission had in its investigation. In addition, the benefits of the program were open to other reporting enterprises. Accordingly, the first reporting enterprise must provide value added information or evidence to evidence already in the Commission's possession, and it must terminate the illegal cartel agreement before the submission of evidence that will result in the reduction of 30-50 percent of fines. With the same conditions, the second reporting enterprise will benefit by a reduction of 20-30 percent of fines assessed against it. And any subsequent reporting enterprises that come forward will enjoy fines reductions of up to 20 percent. As a result, there

[398] Refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question

were 167 applicants (87 were requests for immunity and 80 were requests for reduction in fines) to the 2002 Leniency Program. The leniency applicants were from a wide variety of sectors including agriculture, steel, construction, chemicals, transport, services, the paper and forestry industry, as well as graphite products, and electrical appliances.[399] Especially, during the period of 2002-2005, the Commission has made formal decisions in five cartel cases with a total amount of fines of EUR 1,131 million in which undertakings co-operated with the investigations. The 2002 Leniency Notice was more effective than the 1996 leniency notice with 80 leniency applicants only.

The cartel agreements became more and more sophisticated and difficult to detect. In 2006, the Commission amended the Leniency Notice to improve the implementation of the program. Accordingly, the enterprises are not only required to submit pre-existing documents, but reporting enterprises may also provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme.[400] The Commission also provided more detailed conditions necessary for acquiring immunity. For example,

> …the first enterprise in a cartel must submit information and evidence which enables the Commission to (i) carry out a targeted investigation; (ii) to find an infringement of Article 101. The alleged cartel must provide a corporate statement that composes of the following information: detailed description of the alleged agreements, names and addresses of the undertakings involved and all other relevant evidence. Furthermore, the applicant to the Leniency Program must (i) extend a full cooperation with the Commission; (ii) terminate the cartel involvement right after the submission of information or evidence; and (iii) not destroy, falsify or conceal any kind of relevant information prior to the submission time of the leniency application to the Commission.[401]

[399] "European Commission - Press Release - Competition: Commission Proposes Changes to the Leniency Notice – Frequently Asked Questions," September 29, 2006, http://europa.eu/rapid/press-release_MEMO-06-357_en.htm?locale=en (accessed April 16, 2017).

[400] The European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (Official Journal of the European Union, C298/17, December 8, 2006), para. 6, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208(04).

[401] The European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*.

Regarding the applicants ability to participate in fine reduction, the Commission gave itself more detailed discretion to promote the acquisition of more value added evidence, provided by the applicants, in comparison with the information already obtained by the Commission. The level of fine reduction remains 30-50 percent for the first reporting enterprise, 20-30 percent for the second and up to 20 percent for subsequent applicants. Therefore, the 2006 Leniency Program guidelines are useful for the effective investigation and termination of cartel infringements as well as requiring the alleged cartel members to provide more detailed information for effective private enforcement.

Also in 2006, the Commission amended the guidelines concerning the method of setting fines, which lead to fines for cartels being significantly higher than they had previously been, in an effort to deter the cartel agreements. The penalties for companies that breach the competition rules can be very severe. For cartel infringements, the largest fine imposed on a single company is over EUR 896 million; the largest fine imposed on all members of a single cartel is over EUR 1.3 billion.[402]

Apart from the Leniency Program, the Commission is utilizing other effective tools to address the illegal cartels. Since 2008, if enterprises are alleged to be part of an illegal cartel, they can settle the case with the Commission by acknowledging their involvement in the cartel and receive a smaller fine in return under the Commission Regulation regarding settlement procedures in cartel cases.[403] In addition, the Commission also introduced the whistle-blower program in 2017 to encourage individuals with inside knowledge to report to the Commission about anti-competitive conduct and to contribute to the success of the Commission's investigation.

D. Conclusion

In the 1930s, the Japanese government was supportive of cartels in some major industries by enacting the Law on the Control over Key Industries in 1931 and the National General Mobilization Law in 1938. As a result, the government controlled and instructed these cartels and associations to mobilize resources for wartime production purposes. However, after the Second

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[402] "About the Cartel Leniency Policy - European Commission," n.d., http://ec.europa.eu/competition/cartels/leniency/leniency.html (accessed April 16, 2017).

[403] The European Commission, *Commission Regulation (EC) No 622/2008 of June 30, 2008 amending Regulation (EC) No 773/2994, as regards the conduct of settlement procedures in cartel cases*, *Official Journal of the European Union* (Official Journal of the European Union, June 30, 2008).

World War, with the enactment of the Anti-Monopoly Act (AMA) under the pressure of the Allied Forces to democratize the political, economic and judicial system, anti-cartel enforcement was considered the top priority of the AMA, including dissolving the cartels and any associated organizations set up before the war.

When the occupation period ended in the early 1950s, Japan loosened the enforcement of the AMA. After that, to stimulate the economic development, MITI played a significant role in making industrial policy and incentive measures for Japanese enterprises. As a result, Japan recorded great achievements of economic development with a high growth rate. In the 1980s, the JFTC took a proactive role to protect the goals of the AMA, which include the promotion of fair and free competition for market players, including the small and medium size enterprises, to promote efficiency and to protect the consumers' interests.

Currently, one of the priorities in the JFTC's action plan is to detect and sanction the anti-competitive detriments of price-fixing cartels and bid-rigging. The concept of cartels under the AMA is separately defined. Accordingly, the horizontal cartel agreements are defined as unreasonable restraint of trade under Article 2(6) of the AMA. And the vertical cartel pricing agreements (resale price maintenance) are categorized as unfair trade practices set out in Article 2(9)(iv) of the AMA. In order to examine the cartels, instead of the per se illegal rule in 1947, a rule of reason was introduced to identify the conduct and harms of cartels. Accordingly, the JFTC examines five elements on case-by-case basis such as:

(i) conducting an agreement in concert with other entrepreneurs;

(ii) whether they mutually restrict business;

(iii) an actual conduct to fix, maintain or increase prices;

(iv) causing a substantial restraint of competition in the relevant market; and

(v) against the public interest.

And to justify the effects of substantial restraint of competition in the relevant market, the JFTC emphasizes the examination of the position of the alleged entrepreneur and the conditions of its competitors, potential competitive pressure, users' countervailing bargaining power, efficiency and extraordinary circumstances to assure consumers' interests. Additionally, the Japanese Supreme Court has held that a tacit agreement was also illegal in the case of *Toshiba Chemical*

Company v. Japanese Fair Trade Commission in 1995. The case law has an important role as a reference source in enforcing the AMA.

Similar to Japan, Europe also promotes strong anti-competitive regulations to ensure equity in the business marketplace. In Europe, the regional economic integration has been quickly progressing. Together with the promotion of a common market in the European Coal and Steel Community, the first prohibited cartels provision was introduced in 1951. After that, the provision was amended with the addition of a new concept, undertakings, in 1957. Accordingly, the European Commission applied the per se illegal rule to anti-competitive conduct. This rule covered price-fixing cartels, and endeavored to ensure effective competition, promotion of consumer welfare with a greater choice of products of better quality, and encouraged more innovations for better products and services, as well as to creating a more level playing field for all enterprises.

Unlike the meaning of “entrepreneurs” under the AMA, which not only includes commercial entities but also governmental agencies, the definition of undertakings under EU Competition law is interpreted with a broader meaning. Accordingly, the agreements between undertakings, which are in the same group, are considered internal company agreements and are not subject to Article 101(1). Specifically, the scope of Article 101 is applicable to multilateral conduct only. If unilateral conduct is found, it will be considered conduct of abuse of a dominant position in the market, which is stipulated in Article 102. In addition, the EU attaches importance to trade in the internal market which is defined in Article 26(2) of the Treaty of Lisbon when justifying the cartel effects.

When a cartel is discovered, the European Commission examines the conduct and any effects arising from the cartel agreements under Article 101, which consists of a two-step process.

The first step is to assess whether the agreement between undertakings (must be more than one undertaking involved in the agreement). Then, the Commission needs to identify whether the agreement is capable of affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition or not. Significantly, the EU Commission adopted the approach of “object or effect the prevention, restriction or distortion of competition” to examine the cartels. If a cartel has such an object, the EU Commission will not need to examine

the anti-competitive effects. Instead, the Commission will immediately conclude that the agreement violates the Article 101(1). To assess the anti-competitive effects, the European Commission will define the market structure and the relevant market to examine whether it acts as the main competition restriction on the other parties or not. In addition, the Commission also calculates the market share of the relevant parties to identify whether it is applicable to the Block Exemption Regulation or not. Significantly, the price-fixing cartels are not subject to the Block Exemption Regulation.

The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine whether the agreement has the pro-competitive benefits to improve the production or distribution of goods or to promote technical or economic progress or any benefits to consumers or not. Like the JFTC, the tacit agreements or coordinated conducts are also considered infringement under Article 101(1). In addition, the case law is also applicable in the EU. And when a new member state joins the EU, the selected judgments of the court are applied as binding case law in the courts of the new Member State.

To effectively combat the cartels, the EU and Japan have introduced the Leniency Program in 1996 and 2006, respectively. Both competition jurisdictions received many cartel reports through the enforcement of the leniency program.

Therefore, the chapter reviewed and analyzed the historical background of the AMA and the EU Competition Law, the concept of cartels and price-fixing cartel regulation as well as the way the enforcing authorities examined the price-fixing cartels cases. The findings in this chapter are very helpful in gaining a thorough understanding of the practices of Vietnam's Competition Law through the comparative lens of Japanese and EU law.

Chapter IV:
Comparative Analysis on the Examination of Price-fixing Cartels Between Vietnam Competition Law, the Japan Anti-Monopoly Act, and the EU Competition Law

This Chapter explores the reasons why Japan, the EU and Vietnam each follow a different approach regarding price-fixing cartels. In order to answer that question, the Chapter will analyze and compare the regulation on price-fixing cartels under the AMA, the EU Competition Law and the VCL. Firstly, this Chapter will review and analyze the different conditions and history of cartels between Japan, the EU and Vietnam. Secondly, by illustrating several practical cases, it will compare how the VCA examines the price-fixing cartels with the way that the JFTC and the European Commission conduct the legal and economic analysis on price-fixing cartels. Finally, it will propose the most relevant approach or principle for Vietnam to detect and combat the cartels effectively and efficiently.

I. Comparative Analysis of the Conditions and Evolution of Cartels in Japan, the EU and Vietnam

1. Vicissitude History of Cartels in Japan

Following the Meiji Restoration in 1868, in an effort to catch up with Western countries, the Japanese Government carried out economic reforms which abrogated feudal domains and barriers, liberalized land trade, and established various institutions such as the company and currency system, securities exchange and the legal system.[404] Scholar, Kanazawa Yoshio stated that the institutional changes represented a free economic system.[405] Following these significant institutional reforms, the government privatized most of the stated-owned enterprises, including steel, shipbuilding and spinning plants, which ultimately led to *zaibatsu* cartelization.[406] As a result of such cartelization, horizontal coordination has become a traditional business practice.

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[404] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," *Washington University Global Studies Law Review* Volume 1, no. Issue 1 Symposium: APEC Competition Policy and Economic Development (2002): 36.

[405] Yoshio Kanazawa, The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power, in Law in Japan: The Legal Order in a Changing Society, 482 (Arther T. von Mehren ed., 1963).

[406] Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 36.

Elanor M. Hadley argued that despite such traditional practices, before the 1920s Japan did not have an explicit regulation on cartels. Instead, the practices that exhibited cartel-like activity were described as a 'cordial oligopoly' that dominated the economy at that time.[407] Due to the economic concentration that resulted from the *zaibatsu* cartelization, there were three kinds of dominant agreements at that time: 1) price agreements, 2) supply agreements, and 3) production agreements. After a gradual start, the cartels developed rapidly following sharp price adjustments resulting from the post-World War I recession, the financial crisis of 1927 and the Great Depression, large scale expansion into East Asia, and military preparations in the lead up to World War II.[408]

In the 1930s, the Japanese Government encouraged cartels as an instrument to serve Japan's expansion and later its war efforts. The government achieved this through two laws, the Export Society Law and the Major Export Commodities Industrial Association Law. Through these regulatory controls, the government had full discretion over the kinds of cartels it would allow to be established, and those it would consider illegal. Kanazawa described:

> The first law authorized the establishment of cartels of traders; the second permitted cartels of producers. These cartels could fix prices, establish quotas, curtail production, and allocate markets. Furthermore, the minister having jurisdiction over the particular trade in question was authorized to order firms not party to the cartel agreement or association to observe the terms of the agreement. These laws are considered the first in modern times to provide for compulsory adherence to cartels. In them the Japanese government moved affirmatively to support and strengthen the cartels which had independently arisen throughout Japanese economic society without formal government sanction… The success of the cartels under the early laws led the government to extend the policy of statutory government support of cartels to almost all major industries in the economic depression of the 1930s… [The Major Export Commodities Industrial Association Law, broadened through amendments in 1931 and renamed the Industrial Society Law, included] production of important industrial goods, whether for the domestic or export markets. In 1932 the Mercantile Society Law authorized cartels among wholesalers and retailers. The most extensive of these laws, however, was the Law Concerning the Control of Important Industries of 1931, which authorized support of cartel agreements (called "control agreements") among producers generally.[409]

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[407] Eleanor M. Hadley, *Antitrust in Japan* (Princeton University Press, 2015), 358–62.
[408] Ibid., 363.
[409] Yoshio Kanazawa, Regulation of Corporate Enterprises, 483.

The Major Industries Control Law empowered the Ministry of Commerce and Industry at that time to justify whether or not cartels were legal. The key highlights of the Law were:

> Wherever a scheme for controlling output and prices or for the allocation of market and sales quotas has been agreed to by half of the producers in an industry designated as a "major industry" by the appropriate Government authority, then the provisions of that scheme together with information about the capacity, annual output and sales of the constituent firms must be reported to the Ministry of Commerce and Industry (Article I). If more than two-thirds of the members of an association recognized under this Law make application, then the Minister may, if he thinks fit, require all the producers in the trade to abide by the regulations imposed under the scheme (Article II). On the other hand, the Minister can require that agreements be modified or abrogated if they are found to be detrimental to the interests of the industry in question or to those of other industries and of the public.[410]

In other words, Japan enacted the Major Industries Control Law in order to promote the cartelization of major industries. Subsequently, together with the enactment of various control laws, the Japanese government built a regulatory framework which restricted the entry of new competitors and controlled prices of goods and services. As a result, the legislative environment supported the creation of big enterprises such as Japan Steel and Mitsubishi Heavy Industries that monopolized the economy. The government also allowed these enterprises to form associations or groups that were known as *zaibatsu*. During World War II, while the government managed and controlled the pricing, production and sales allocations of machines, airplanes, steels, oil, cars, lumbers, agricultural and sea products of the *zaibatsu* through administrative order, government policy was in fact implemented by authorized private associations.[411]

Under the occupation policy of the Allied Forces, the Anti-Monopoly Act (AMA) was drafted under the strong influence of the antitrust laws of the United States and was subsequently enacted in April 14, 1947.[412] The regulation of cartels was stipulated for the first time in Japan, with the primary objective of dissolving the *zaibatsu* groups. Under the AMA, cartel agreements

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[410] G. C. Allen, in E. B. Schumpeter, ed., The Industrialisation of Japan and Manchukuo, 687, Cf. Appendix II for cartels formed under this law.

[411] The Japan Fair Trade Commission, *The Japan Anti-Monopoly Act Policy Fifty Years History*, 1997, 21–22.

[412] See Harry First, *Antitrust in Japan: The Original Intent, 9 Pac Rim L & Pol' y J 1* (2000).

were strictly prohibited with the application of a *per se* illegal rule during the period of 1947-1952. The full text of original Article 4 of the Japanese Anti-Monopoly Act of 1947 provides that:

> Enterprises shall not jointly act in accordance with one of the following respective items.
> 1. Determine, maintain or raise the price;
> 2. Restrict production quantity or sales quantity;
> 3. Restrict technology, products, sales channels or customers;
> 4. Restrict the establishment or expansion of equipment or adoption of new technology or new production method.
>
> The provisions of the preceding paragraph shall not apply if the impact of such collaborative acts on competition in certain trading fields does not reach a problematic level.[413]

The first amendment of AMA took place in 1953 with a relaxation of the AMA prohibitions on cartels and monopolies, and accordingly, Article 4 was deleted. In addition, three of the leading corporations, for example, Mitsui, Mitsubishi and Sumitomo reorganized themselves in a looser structure, which was known as keiretsu.[414] During that period, three other keiretsu also emerged Fuji, Dai-ichi and Sanwa.[415] The government also introduced exemptions for "depression cartels"[416] and "rationalization cartels"[417] under certain conditions after obtaining approval from the JFTC.[418] Following these changes, anti-competitive effects of cartels were analyzed and justified on case-by-case basis and consequently, the *per se* illegal rule was only applied to cartels

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[413] Article 4, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947)

[414] Keiretsu-type business groups play a significant role in the economies of most developing countries.

[415] Michael E. Porter and Mariko Sakakibara, "Competition in Japan," *The Journal of Economic Perspectives* 18, no. 1 (2004): 29.

[416] According to Article 24(3), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), the "depression cartel" is a concerted activity of producers of a specific product (or their trade association) which will be implemented if the price of the product becomes lower than the average cost of its production, the continuation of the major part of the producers' business will be difficult and if the circumstances make it difficult for them to overcome the situation by their efforts to rationalize their business.

[417] According to Article 24(4), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), the "rationalization cartel" is concerted activity by the producers of a specific product (or their trade association) for the purpose of limiting technology or specific items of the product, or moves with respect to utilization of facilities for raw materials of the product, or for delivery thereof or utilization or purchase of by-products, refuse or waste, under circumstances where such concerted activity is especially necessary for effecting technical promotion, quality improvement, cost reduction, increases in efficiency and other enterprise rationalization activities.

[418] Hiroshi Iyori, *Antimonopoly Legislation in Japan* (Federal Legal Publications, 1969), 19–21.

agreements which were considered to result in anti-competitive effects that were against the public interests.

During the 1960s, the JFTC focused mainly on unfair trade practices and its enforcement of cartels was weak. Yoshikawa Seichi, prominent lawyer specializing in competition law, pointed out five factors causing to the weak enforcement of the AMA.[419] Firstly, Yoshikawa argues that the Japanese business culture was one of cooperation or harmonization rather than competition, and thus joint action with competitors was not considered a crime. Secondly, cartel formation has a long history, and has existed since the 1868 Meiji Restoration as a tool of industrial development. Thirdly, Japanese businesses lacked flexibility in adjusting volume production in accordance with market conditions. Fourthly, for political reasons, the Liberal Democratic Party has favored MITI policy over the JFTC. And finally, the five commissioners appointed to govern the JFTC were in fact ministry officials (Ministry of Finance, Ministry of International Trade and Industry, one official from Ministry of Justice, Ministry of Foreign Affairs and the Bank of Japan), rather than judges, lawyers or legal professionals.

The JFTC shifted its focus towards enforcement as the result of oil companies engaging in activities to raise the oil price and large newspaper firms engaging in price manipulation in 1973. Such activities triggered criticism by the opposition parties and consumer organizations. The Vice-Minister of MITI also condemned such actions, suggesting that the oil companies as the cause of all evils.[420] These events triggered action by the JFTC, which in 1977, the JFTC led the strengthening of cartel regulations by introducing surcharges for cartels agreements. The JFTC also required that companies provided justification for price increases.[421] Furthermore, Matsushita stated that the JFTC collected a database about production cost and customers lists to make an analysis and reported it to the National Diet as an effort to control the price raising simultaneously in oligopolistic market.[422]

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[419] Seichi Yoshikawa, "Fair Trade Commission vs. MITI: History of the Conflicts between the Antimonopoly Policy and the Industrial Policy in the Post War Period of Japan," *Case Western Reserve Journal of International Law* Volume 15, no. Issue 3 (1983): 495–97, http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1816&context=jil.
[420] Ibid., 498.
[421] Ibid., 501.
[422] Mitsuo Matsushita, "The Antimonopoly Law of Japan," in *Global Competition Policy* (Peterson Institute, 1997), 155.

Despite these changes, the horizontal keiretsu groups were considered barriers to the foreign acquisition of Japanese firms and impeded foreign direct investment.[423] The US-Japan Structural Impediments Initiatives (SII) negotiations began in 1989 to review the AMA and its enforcement. The strengthening of the enforcement of the competition law was one of the top priorities that both countries put forward as a way of reducing trade barriers and to rectify competition rules.[424] The JFTC subsequently issued the Guidelines Concerning Distribution Systems and Business Practices under the Anti-Monopoly Act on July 11, 1991 and adopted 'illegal in principle' approach regarding price-fixing cartels and other hard-core cartels.[425] To further disincentive cartel activity, in 1991, the enforcement of the AMA was strengthened with the inclusion of criminal penalties against hard-core cartels, and the surcharge was increased from 2 percent to 6 percent of illegal turnover.

From the 2000s, more cartels cases, especially those engaged with bid-rigging were detected by the JFTC. To deal with such cases, the JFTC was empowered to investigate cartels by issuing a cease and desist order in 2005. Additionally, surcharges for cartels increased from 6 percent of turnover to 10 percent. In 2006, for the first time in the history of anti-cartels, the JFTC introduced a Leniency Program as a means to detect cartels more effectively. According to statistics published by the JFTC, there were 61 leniency applicants in the 2014 financial year, 50 leniency applications in the 2013 financial year, and 102 leniency applications in the 2012 financial year. Further, as of March 31, 2015, the total number of leniency applications since implementation of the leniency program in January 2006 was 836.[426] The anti-cartels enforcement was further strengthened in 2009 when the JFTC increased the criminal penalty for individuals from the maximum of three years imprisonment to five years.[427]

The Japanese case demonstrates how the Japanese government has used competition policy to "loosen" and "strengthen" enforcement of anti-cartel activity under the AMA according

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[423] Hiroshi Oda, *Japanese Law* (Oxford University Press, Incorporated, 2011), 329.

[424] Toshiaki Takigawa, "Competition Law and Policy in Japan," *The Antitrust Bulletin* Vol. 54, no. No. 3/Fall 2009 (2009): 456.

[425] Ibid.

[426] Yusuke Nakano, Atsushi Yamada and Takahiko Itoh, "Cartel Leniency in Japan: Overview | Practical Law," May 1, 2016, https://content.next.westlaw.com/2-517-3216?transitionType=Default&contextData=(sc.Default)&__lrTS=20170521123132324&firstPage=true&bhcp=1 (accessed June 3, 2017).

[427] Article 89(1)(i), Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).

to economic development goals and in response to external pressures. Significantly, it shows the central role of MITI in promoting industrial policy in the enforcement of the AMA during Japan's rapid postwar economic growth. More recently, the Japanese case shows that the central role has shifted to the JFTC, which prevails as a powerful competition enforcer to supervise and punish the cartels' anti-competitive effects in a free and fair competition environment.

2. Cartel Formation in Europe

2.1 Industrialization and Emerging Cartels (1870-1945)

Europe has had a longer cartel history than Japan. As early as the 1800s, France had already provided for the prosecution of "those who ... by means of concerted action or coalition of the main holders of the same good or food product... will have caused its price to rise or fall... above or below the price level that would have been determined by natural and free trade competition" in its Penal Code of 1810. [428] During the late 19th and early 20th century, Germany exhibited traits of emerging business cartelization, which was typical for European countries at that time.[429] The first German economic analysis of cartels (*kartells* in German), which was written by Fredrich Kleinwachter in 1883, described cartels as an extension of medieval guilds.[430] In the 1930s, Robert Liefmann, in contrast illustrated the function of *kartells* as being supply and demand adjustments to stabilize an industry and a hindrance to the single producer.[431] David Landes suggests that the use of cartels to control price and output stemmed from the 17th century, following a period of severe depression. Landes observes that cartels were common in the industries of coal, iron, and chemicals, where the homogeneity of production facilitated the specification of quotas and prices, the number of competitors were small, and market entry was difficult.[432] Landes describes Germany as being effective country in Europe in its imposition of tariff protections,

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[428] French Penal Code of 1810, C. Pen. art. 419 (Author trans.); see THE PENAL CODE OF FRANCE Art. 419 (Evans trans. 1819) (presenting full translation of Code Penal).

[429] Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2010), 65.

[430] Peter Z. Grossman, *How Cartels Endure and How They Fail: Studies of Industrial Collusion* (Edward Elgar Publishing, 2004), 130.

[431] Robert Liefmann, *Cartels, Concerns and Trusts* (Arno Press, 1932).

[432] David S. Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (Cambridge University Press, 2003), 245.

entrepreneurial psychology, the structure of industry, legal institutions, which all combined to promote cartels agreements.[433]

Germany can be considered a typical case for a country that promotes cartels. This is because the nations broad economic trends included industrialization, economic downturn and overproduction, certain types of market, the political context with national ambition (a resurgent sense of national identity and imperial expansion), protectionism, and a business and regulatory culture.[434] All of these elements make a nation ripe for cartels formation.

While Germany became a leading economic and industrial power in Europe, rivaling Britain, it was a relative late-starter. Germany started only commenced its industrial transformation process in the latter half of the 19th century, however the nation's pace of industrialization was rapid and much was achieved. The average annual national income, for example, increased from 15,100 million marks in 1871-1875 (or 364 marks per head of population) to 47,300 million marks (716 marks per person) in 1911-1913.[435]

However, this rapid industrialization had its drawbacks; although heavy industry, manufacturing and processing industries developed rapidly, the nation suffered from a short-term economic downturn resulting from the social dislocation associated with its industrial transformation. The economic turndown caused an uncontrollable volatility within the German economy, which led to government intervention to maintain stability.[436] The government implemented several measures, including tariffs and private industrial self-regulation. Banks also strongly supported the development and emerge of specific industries encouraged the use of cartels as a tool for economic growth. In this way, the German government viewed cartels as a useful and reliable partner in the development of national industrial and trading policy.[437]

Thus, while France had already commenced the development of a regulatory framework to limit the formation of cartels, David Gerber suggests that cartels were not only significant as a matter of economic fact, they were also perceived as a natural and sensible arrangement in the

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[433] Ibid.
[434] Harding and Joshua, *Regulating Cartels in Europe*, 66.
[435] W. O. Henderson, The Industrial Revolution on the Continent 1800-1914 (Frank Cass, 1967), 74.
[436] Harding and Joshua, *Regulating Cartels in Europe*, 67–68.
[437] Ibid., 68.

context of German industry and market.[438] Indeed, at that time Germany was the 'Land of the Cartels'.

Like Japan, cartels in Europe are positively considered as vehicles for economic order and market stability in the context of economic downturn and overproduction.[439] This perception was supported by the German government in the late 19th and early 20th centuries to develop military power, economic growth and social policy. Also like the Japanese government, an alliance between government and cartels was set up for mutual benefit and to serve the objectives established by government. The first cartel case of Saxon Wood Pulp that was filed by one of the cartel members decided by the Reichsgericht in 1897 shows the court interpretation of cartels at that time. The court protected the cartels as an organization in terms of public welfare objectives to prevent suppliers from bankruptcy and to avoid overproduction.[440] In additional to this interpretation, the court held that the objective of securing the individual freedom of the cartel members would be jeopardized if the cartel excluded its members out of the market permanently.

As analyzed in the previous chapter, the influential German Ordoliberalism is known as a school of competition theory. In 1923, Germany issued the Cartel Regulation which empowered the Minister of Economics to take action against cartels if it impacted general welfare. This regulation also prohibited boycotts of non-cartel members.[441] A number of other European countries enacted cartel regulations which followed this practice. For example, the Dutch Law of 1935 was the same as the German Cartel Regulation. The Danish Law of 1937 learnt from the Norwegian Trust law. The Italian Law of 1932 also allowed the government to establish cartels for the purposes of production and competition.[442] In short, during the 1930s, many European countries shared a similar perception of cartels and developed cartels regulations that enabled them to perform as vehicles to control overproduction issue and promote recovery from economic downturn. Further, it was common for governments to use administrative orders to coordinate with cartels.

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[438] David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press, 1998), 75–76.
[439] Harding and Joshua, *Regulating Cartels in Europe*, 69.
[440] Reichsgericht, Declaration of February 4, 1897, 38 RGZ 155.
[441] Harding and Joshua, *Regulating Cartels in Europe*, 75.
[442] Ibid., 81.

2.2 Different Perspectives on Cartels after the Second World War

Despite the active use of cartels as a vehicle for controlling economies, the European governments also became aware of the harmful effects of cartels to the general welfare and the rights of the business freedom. Following the end of the Second World War, governments that supported cartels in Europe reviewed their cartelization policy. In a similar way to the approach taken by the Allied Occupation in Japan, policies of decartelization were introduced in occupied Germany in parallel with the programs of denazification.[443] In 1947, more than one thousand cartel agreements in the sectors of coal and steel production, banking, motion picture, and chemicals were dissolved and a widespread trend of decartelization began in 1950.[444] The UK and France in particular considered cartels as excessive concentrations of economic power and introduced administrative fines.

Harding and Joshua argue that while the French government issued a new regulation about cartels, it did not prohibit them. Rather, it enabled the enforcing authority to examine the harms of competition restriction behavior.[445] Edwards suggests that European countries changed their perception of cartels due to a better level of information about the behavior and impact of cartels on governments. A major concern in the post-war period was price inflation and there was a strong belief that the regulation of cartels could solve this problem and that the removal of barriers to international trade would be in the mutual interest of all parties. This perception was also influenced by the position held by US that anti-competitive practices affected productivity.[446]

Gradually, the anti-competitive effects of cartels were given significant attention by international organizations such as the International Trading Organization, the United Nations Economic and Social Council, and the General Agreement on Tariffs and Trade. Significantly, with the establishment of the European Economic Community in 1957, the Council of Europe drafted a provision to strictly prohibit cartels agreements in Article 65. Harding and Joshua stated that the American Sherman Act influenced the provision drafting. Furthermore, the cartel prohibition provision was stipulated in a regional agreement and empowered to a supranational

[443] Ibid., 87.
[444] Ibid., 89.
[445] Ibid., 88–89.
[446] Corwin D Edwards, *Control of Cartels and Monopolies: An International Comparison* (Oceana Publications, 1967), 9–13.

authority to supervise the enforcement which continues to operate effectively.[447] The establishment of this regional competition provision was influenced by a perception of cartels and domestic regulations within member states. European states that enacted competition regulations in the 1950s and 1960s include Austria, Belgium, Denmark, Finland, France, Germany, Ireland, the Netherlands, Norway, Spain, Sweden, Switzerland, and the UK.[448]

From the 1970s until today, the Commission actively engaged with cartel investigations in collaboration with the respective national competition authorities. In addition, the EU also set up a network to exchange information on the implementation of EU competition rules through the European Competition Network. This is because although a cartel agreement is committed in a country, the effects of illegal behavior may impact many countries across the EU and thus adversely impact the growth of the internal markets.

Attitudes and understanding regarding the policy to regulate cartels are now fully standardized across the EU.[449] In the 1990s, the conduct of cartels to fix the price, to share the market, to allocate the customers… became classified as hard-core cartels. This standardization was further reinforced in 2005, when the Commission set up a specialized Directorate on cartels.

Like the JFTC, the Commission is empowered to not only investigate but also to make binding decisions and impose substantial fines. Furthermore, the Commission can investigate any company that violates or could potentially violate the competition rules.[450] In other words, the Commission can make an action either before or after the alleged cartel violates the competition rules, in order to protect a free and fairly competitive market for all enterprises. As an outcome of the Commission's investigations, it can make decisions to prohibit a certain conduct, require remedy action or impose a fine on a case-by-case basis in accordance with the seriousness of the effects of the case. The Commission's decisions are binding on both companies and national authorities that violate the rules, but the decisions can be appealed to the EU's General Court and further (on points of law) to the Court of Justice. It is thus not uncommon for companies and EU

[447] Harding and Joshua, *Regulating Cartels in Europe*, 96.
[448] Corwin D Edwards, *Control of Cartels and Monopolies: An International Comparison*, 25–26.
[449] Harding and Joshua, *Regulating Cartels in Europe*, 142–43.
[450] "Competition: Opening Markets to Competition - European Commission," n.d., http://ec.europa.eu/competition/general/overview_en.html (accessed July 22, 2016).

governments regularly lodge appeals against Commission decisions, and some of these appeals are indeed successful.[451]

In this way, the Commission acts as a competition enforcer to supervise and punish competition violations. The EU competition laws are directly applicable in all countries in the EU. Furthermore, national competition authorities can apply EU rules in addition to their own competition laws.[452]

3. Enhancing the Perception of Cartels Agreements in Vietnam

Like the Japanese culture, Vietnam is influenced by Confucian values. Vietnamese enterprises often share a business culture of cooperation, and a tendency to unify as a group rather than to compete.[453] Traditionally, the Vietnamese business community followed an old adage of "you must start up a business with friends and do business with a guild." However, unlike the market economies in Japan and the EU, before the *Doi moi* policy of 1986, Vietnam was a centrally-planned economy, with only two economic forms - state and collective ownership. The concepts of business rivalry and competition did not exist at that time, with Vietnamese enterprises obeying the business plan set by the government.[454]

As a result of the *Doi moi* Policy, Vietnam transitioned from a command economy to a market economy. Although State-Owned Enterprises (SOEs) still dominate key industries, the economic forms diversified with the establishment of private companies and foreign invested enterprises. The reforms meant that Vietnam also attracted investment by many multinational companies. With the introduction of new technology and business management practices, the private sector became more effective and efficient than SOEs. This competition between the private sector and the SOEs became increasingly fierce. Significantly, the competition gradually changed the perception of harmful cartels among the business community and the government

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[451] Ibid.

[452] "Competition: Opening Markets to Competition - European Commission," n.d., http://ec.europa.eu/competition/general/overview_en.html (accessed April 20, 2017).

[453] Nguyen Anh Tuan, "A Review of Ten Years of Enforcement: Challenges and Prospects of the Vietnamese Cartel Regime," in *Cartels in Asia: Law & Practice* (Wolters Kluwer Law & Business, 2015), 211.

[454] Nguyen Nhu Phat and Bui Nguyen Khanh, *Heading to Build Law on Competition in the Condition of Transition into the Market Economy, [Tiến Tới Xây Dựng Pháp Luật Cạnh Tranh Trong Điều Kiện Chuyển Sang Nền Kinh Tế Thị Trường Ở Việt Nam]* (Công An Nhân Dân Publisher, 2001), 128.

authorities.[455] As a result of such change in perception, there is an increasing need for a regulatory framework for competition.

Although Vietnam was under pressure to introduce the competition regime by the WTO member states during the accession negotiations, the enactment of the Vietnam Competition Law on November 9, 2004 marked a significant milestone in enhancing the perception of cartels in Vietnam. This is the first time that a cartel regulation has been stipulated in the law. In 2009, the Vietnam Competition Agency (VCA) decided the first case of price-fixing cartels, which related to car premium insurance. Further, there are two more on-going investigation price-fixing cartels cases, relating to the roofing panel market in the North and Central Vietnam and the passenger hydrofoil market on the Ho Chi Minh – Vung Tau route. These cases are good examples to advocate the harms of cartels that endanger consumer welfare and public interests.

Furthermore, these cases also demonstrate that the perception of the public, enterprises and the state management bodies have been enhanced. The VCA subsequently proposed to apply a stricter sanction against cartels. In response, in 2014 the Vietnamese government increased the administrative sanctions against cartel from 5 to 10 percent of the total revenue of the preceding year.[456] In addition, the VCA also proposed to apply criminal sanctions for hard-core cartels during discussions relating to the amendment of the Criminal Code in 2015.[457] According to this amendment of the Criminal Code, in addition to existing administrative penalties, price-fixing cartels may face incarceration up to two years as set out in Article 217(1)(c).[458]

When comparing the perceptions of cartels between Japan and the EU, Etsuko Kameoka suggests that the wording of cartel (*karuteru*) in Japan once had two different.[459] The first is understood as *dango* in Japanese. Accordingly, *karuteru* could be an open and public cartel and

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[455] William E. Kovacic, "Capitalism, Socialism, and Competition Policy in Vietnam," *American Bar Association* Summer 1999, Vol. 13, No. 3 (1999): 57, http://www.americanbar.org/content/dam/aba/publications/antitrust_magazine/summer_1999_toc.authcheckdam.pdf.

[456] Article 8(1), Decree No. 71/2014/ND-CP issued on July 21, 2014 by the Government on Detailing the Competition Law on Imposition of Violation Penalties against the Competition Law [Nghị định số 71/2014/NĐ-CP ngày 21/07/2014 của Chính phủ về quy định chi tiết Luật cạnh tranh về xử lý vi phạm pháp luật trong lĩnh vực cạnh tranh] (2014).

[457] Vietnam Competition Authority, "Consider to Apply the Criminal Sanctions for the Violations of the Competition Law in the Amendment of Criminal Code," April 27, 2015, http://www.vca.gov.vn/NewsDetail.aspx?ID=2959&CateID=371.

[458] Article 217(1)(c), Criminal Code 2015 No. 100/2015/QH13 dated November 27, 2015 (2015).

[459] Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing, 2014), 53.

may be exempted and tolerated as a legally authorized cartel. The second meaning is defined as *yami-karuteru*. *Yami* means 'secret' or 'unauthorized' and it is understood illegal. According to Kameoka, the enforcement of the AMA since 1947 resulted in the rapid enhancement of the awareness of illegal cartels and nowadays there is no difference in meaning between *yami-karuteru* and *karuteru*.

In contrast, in the EU, the cartel is only understood as horizontal agreements with no different meanings like in Japan.[460] However, as described in the previous Chapter, the EU has a provision for cartel exemption under Article 101(3) or block exemption of minor effects with certain conditions not to create market power. Such exemptions include, the Research and Development agreement, the Production agreement, the Commercialization agreement and the Purchasing agreement.

Therefore, from a centrally planned economy with state intervention in all business activities before 1986, Vietnam gradually integrated into the region and the world. Unlike Japan and the EU, which were supportive of cartels for the objectives of economic development before the Second World War but have since transitioned to a system in which economic components are now operating in the market economy with a free and fair competition status, Vietnam is following a socialist-oriented economy with multi-economic components and the SOEs privileges.

Learning successful lessons from Japanese *Keiretsu* and Korean *Chaebol* modalities, in November 2009 Vietnam attempted to set up State Economic Groups by enacting Decree No. 101/2009/ND-CP. According to the Decree, the Vietnamese government restructured the business operations of large State-Owned Enterprises and General Corporations by assembling them into State Economic Groups that had the capital and specialized expertise to drive innovation and compete with other multinational companies around the world. However, due to a lack of management ability and faced with the need to diversify the businesses in order to increase their dominant market presence, the State Economic Groups did not work effectively and efficiently. The result of this restructure was significant financial loss and debt for the government.[461] To deal

[460] Ibid.
[461] Asian Development Bank, *State-Owned Enterprise Reform in Vietnam: Lessons Learnt and Future Directions*, July 2015, 3.

with these issues, the State Capital Investment Corporation and the Debt and Asset Trading Corporation have since been set up by the government to tackle the outstanding debts of SOEs.

Many scholars continue to express concern over the privileges granted by the government to the SOEs. Specifically, SOEs are allowed to access state funds, to enjoy tax incentives with real estate rental as well as enjoy other favorable treatment.[462] In some monopolistic industries such as transportation, aviation and telecommunications, SOEs are granted the priority to use existing infrastructure that has been subject to direct investment by the State. These SOEs are also able to enjoy loans from commercial banks without being subjected to strict corporate disclosure requirements and government supervision. SOEs are also eligible for supplementary capital, debt rescheduling, debt waiving, and even payment of their outstanding obligations by the government.[463]

Notably, while the Japanese government had to both "loosen" and "strengthen" its policy on cartels enforcement in accordance with specific periods of history, the perception of cartels in Europe has progressively developed from their general support to a focus on the potential harms of cartels and a policy of regulating against such behavior. Although Vietnam introduced the competition rules much later than Japan and the EU, cartel perception among Vietnamese scholars, lawyers and government authorities has developed significantly over the 12 years of competition rule implementation. Also, like Japan and the EU economies, the Vietnamese economy is striving to operate under the principle of a market economy and to create a level playing field for all kinds of businesses. As a result, the Vietnamese Competition Authority has started detecting more anti-competitive conducts of cartels.

II. Why Do the JFTC and the European Commission Follow the Principle of Conduct and Effect to Examine the Cartels?

1. The Application of the Effect-based Principle by the JFTC

1.1 Application of Rule of Reason to Examine the Comprehensive Effects of Anti-competitive Conduct

[462] Nguyen Anh Tuan, *Neutralising the Advantages of State-Owned Enterprises for a Fair Playing Field* (ERIA Discussion Paper Series, November 2015), 8.
[463] Ibid.

Under the AMA, the cartel agreements are defined under Article 2(6), which describes the concept of unreasonable restraint of trade and clearly identifies the conduct and harms of cartels. As written in the previous chapter, the conduct of unreasonable restraint of trade is prohibited under Article 3, which clearly stipulates that "No entrepreneur shall effect private monopolization or unreasonable restraint of trade."[464] However, the JFTC examines the conduct and harms of cartels based the five criteria stipulated under Article 2(6) on case-by-case basis. These criteria are: 1) whether a business is conducting an agreement in concert with other entrepreneurs; 2) whether they mutually restrict business; 3) an actual conduct to fix, maintain or increase prices; 4) causing a substantial restraint of competition in the relevant market; and 5) against the public interest. Furthermore, the JFTC will assess the scope of influence by the related trade, depending on factors such as the objects, regions, and conditions of the conduct and trade and determine the degree to which competition is substantially restrained.

1.1.1 Conduct of Cartels

To provide proof of violating conduct, the JFTC attempts to find agreements in writing or explicit agreements. However, it is not easy for the JFTC to uncover such written cartel agreements. As alternative evidence, the JFTC must thus also review the exchange of intent. The price cartel of paper phenol copper clad laminates, or the "Toshiba Chemical Case" in 1995 is one of the prominent cases with which we can consider the idea of "tacit agreements". Accordingly, the Tokyo High Court had the following three pieces of evidence to accuse Toshiba Chemical Corporation and seven other cartel members of committing a price-fixing cartel:

Firstly, there was existence of a previous exchange to their information and opinions among eight cartel members. An OECD Competition Committee document to study the price cartel of paper phenol copper clad laminates in 2006 showed that the cartel members consisted of the Japan Thermosetting Plastics Industry Association, which comprised of manufacturers of thermosetting resin, and the Committee of Laminates with the participation of executive officers in charge of the laminates in each company.[465] At the meeting of Extraordinary Operations Committee which is under the Committee of Laminates, on May 21, 1987, eight company

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[464] Article 3, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).

[465] OECD Competition Committee, "Cartel Case Studies Submitted by Japan: Price Cartel of Paper Phenol Copper Clad Laminates," January 11, 2006, 2, DAF/COMP/GF/WD(2006)21.

members started exchanging their opinions about raising the sales price of the paper phenol copper clad laminates in Japan after the gradual raising of its export price, and then subsequently agreed to the policy. Thus, after reviewing the record of the statement of participants in the meetings and Committee's participant list, the Tokyo High Court concluded that there was clear evidence of an exchange of information and opinions between the eight companies.

Secondly, the Tokyo High Court also found out that the content of the above-exchanged information and opinions were about the price raising of paper phenol copper clad laminates. Specifically, after the agreed raising of the export price of paper phenol copper clad laminates, three leading companies expressed their intention to raise the rate of increase in the price for domestic customers. Subsequently, the other five companies followed suit. Furthermore, the Tokyo High Court showed the record of the statement of participants in the Committee meeting around 1:30 p.m. on June 10, 1987, which demonstrated that the five companies did not reject, the request of the three larger companies.[466] Thus, the Court held that the subject of the exchanged information and opinions were related to the price rising of paper phenol copper clad laminates.

Thirdly, the Court held that the eight companies followed up the discussions by increasing the price of paper phenol copper clad laminates for their domestic customers in a concerted act based on the outcome of the discussions or exchanged information and opinions. Therefore, the Tokyo High Court developed a case law about the definition of "tacit agreement" when Toshiba Chemical Corporation tried to overturn JFTC's decision in the judgment issued on September 25, 1995 as follows:

In order to prove that the act of the plaintiff corresponds to "concerted actions," which is prohibited by Section 3 of the Antimonopoly Act as Unreasonable Restraint of Trade ("business activities, by which any entrepreneur, with other entrepreneurs, by concerted actions, mutually restrict or conduct their business activities in such a manner as to fix prices, etc., thereby causing a substantial restraint of competition in any particular field of trade" (Section 2(6)), it is necessary to show that "liaison of intention" among entrepreneurs existed at the time of price-raising by these entrepreneurs.

[466] Ibid., 3.

The said "liaison of intention" means that an entrepreneur recognizes or predicts implementation of the same or similar kind of price-raising among entrepreneurs and accordingly, intends to collaborate with such a price-raising. In order to prove "liaison of intention," it is not sufficient to show the recognition or acceptance of an entrepreneur's price-raising by another entrepreneur. However, explicit agreement to bind upon the related parties is not necessary to prove "liaison of intention." In other words, "liaison of intention" can be proved by showing mutual recognition of other entrepreneurs' price-raising and tacit acceptance of such a price-raising of another. (It is called "liaison of intention" by a tacit agreement.)

By the nature of such an agreement, when companies make an agreement considered as "Unreasonable Restraint of Trade," they usually try to prevent them making such an agreement explicitly to the public. If we interpreted that explicit agreement is necessary to prove "Unreasonable Restraint of Trade," the entrepreneurs could easily slip through the meshes of the law and therefore, it is obvious that such an interpretation is not appropriate to the realities.

We should consider recognition and intention of the entrepreneurs by examining various circumstances before and after the price-raising and then, evaluate whether there is a mutual recognition or acceptance among entrepreneurs regarding the price-raising or not.

In that point of view, if an entrepreneur exchanges information of price-raising among other entrepreneurs and accordingly, takes the same or similar act with others, it is unavoidable for us to presume that the parties had a relationship to expect the concerted act each other and therefore, the said "liaison of intention" exists unless there is a special occasion to show that the price-raising was implemented individually by a company's own decision that the price-raising is capable of meeting price competition in the relevant market and there is no relationship between that company's price-raising with other companies.[467]

1.1.2 Analyzing and Proving Harms of Cartels

To assess the harms of cartels that cause a substantial restraint of competition in any particular field of trade, the Guidelines for Exclusionary Private Monopolization under the AMA issued by the JFTC on October 28, 2009 was developed. Accordingly, to examine the harms of unreasonable

[467] Toshiba Chemical Co. v. Japanese Fair Trade Commission, No. 906 HANREITIMES 136 (jp The Tokyo High Court September 25, 1995).

restraint of trade, the JFTC will identify whether or not the alleged cartels agreements restrict competition in a particular field of trade. According to the Guidelines for Exclusionary Private Monopolization under the Anti-monopoly Act, "a particular field of trade is defined based on the scope where the Exclusionary Conduct causes a substantial restraint of competition."[468] And to identify the scope, "…the JFTC will assess the scope influenced by the related trade depending on factors such as the objects, regions, and conditions of the conduct and trade and determine the scope where competition is substantially restrained."[469]

To determine a particular field of trade pertaining to Exclusionary Private Monopolization, at the time of assessing the scope influenced by the trade pertaining to Exclusionary Conduct, the JFTC will consider the scope of products that substitute for the traded products or the geographical scope for users (or suppliers), as necessary.[470] In other words, the JFTC will assess whether or not the alleged conduct harms competition in a particular field of trade or the "relevant market".

According to the Guidelines for Exclusionary Private Monopolization under the Anti-monopoly Act in 2009:

> …the scope of products is determined mainly from the viewpoint of the substitutability of products for users. The degree of the substitutability of products for users often corresponds to the degree of similarity of utility of the products, and the scope of products is often determined from the degree of similarity of utility of the products. In addition, when the scope of products is determined, besides the degree of the substitutability of products for users, if necessary, the JFTC would consider whether suppliers are able to switch the manufacture and sale of one product to another within a short period of time without substantial added cost and risk. [471]

In other words, the scope of products means the relevant product. To assess the degree of similarity of a product's utility for users, the JFTC will consider the following factors: 1) external features such as size and form; 2) specific material characteristics such as strength, plasticity, heat

[468] Guidelines for Exclusionary Private Monopolization under the Anti-monopoly Act, Law no. of 2009, p. 31 (jp).
[469] Ibid.
[470] Ibid., pp. 31–32.
[471] Ibid., p. 32.

resistance, and insulation; 3) quality such as purity; and 4) technological characteristics such as standards and systems...[472]

The Judgment by the Supreme Court on February 20, 2012 on the Tama *Dango* case concerning an agreement made between multiple general contractors to decide on designated successful bidders in the construction of public sewerage works in the Tama area is a good example for exploring the conduct and effects of "unreasonable restraint of trade" under Article 2(6) of the Japanese Anti-monopoly Act. Accordingly, a summary of the case is set out below.

The Tokyo New Town Development Corporation (hereafter referred to as the 'corporation') is an urban infrastructure construction corporation. The corporation is in charge of construction and maintenance of the public sewerage systems in Tokyo, which has the entrustment of the local government in the Tama area. To construct the public sewerage systems, the corporation chose a designated competitive bidding process. In terms of selecting the bidders, the contractors made an agreement that if only one of the contractors had relevant work or the construction place thereof, or expressed their desire to receive the order for that construction work, that contractor would be appointed as the designated successful bidder. In cases where there were two or more such contractors, the corporation made a ranking to rate the qualifications of the contractors based on the degree of technical difficulty. The designated successful bidder was then decided through negotiations between the contractors, taking into consideration the circumstances of the abovementioned relationships. In terms of bidding price, the designated successful bidder would determine the price and the other entrepreneurs would cooperate by forming a joint venture so as to enable the designated successful bidder to receive the order. As a rule, corporation would set the target price and minimum-bidding price and decide the successful bidder or joint-venture based on the lowest price among the bidding participants that offered a price above the minimum bidding price but below the target price. [473]

Aside from Tokyo New Town Development Corporation, there were 33 other companies dealing with the overall construction business operating throughout Japan. In the Tama area, there were 47 general construction contractors that were assigned with a designated enterprise to carry

[472] Ibid.
[473] Tama Dango Case - To Seek Revocation of the Decision of The Japan Fair Trade Commission, Minshu Vol. 66, No. 2 1 (jp The Supreme Court of Japan February 20, 2012).

out general civil engineering works during the period between October 1, 1997 and September 27, 2000. Among 165 local companies in Tama area that participated in the bidding organized by Tokyo New Town Development Corporation 74 local companies were assigned to cooperate with a designated enterprise for sewerage construction works. In 2002, the JFTC sent out the recommendation, Decision No.1 to No.34, to issue cease and desist and order to stop such anti-competitive conduct and to pay the surcharges. The construction company appealed to the Tokyo High Court to request a revocation of the JFTC Decisions. On March 19, 2010, Tokyo High Court ruled that part of the Decision which ordered the bidding companies to pay a surcharge should be revoked.

Tokyo High Court held that:

> … Sufficient facts should be found to evaluate that there was a substantial decline in competition as a result of the suspension or elimination of free and voluntary business activities by building contractors, but no evidence has been found to find such facts. Instead, it may be reasonable to evaluate that competition expected in the field of trade of this case has properly been made in relation to the receipt of the orders for the Individual Works…. Consequently, no substantial evidence is found to prove the facts forming the basis of the part of the Decision which ordered the appellees to pay a surcharge, and therefore, such part should inevitably be revoked.[474]

However, the Supreme Court dismissed the judgment of the Tokyo High Court. The Supreme Court found out that

> … an agreement where the companies decide the designated successful bidder and the target contract price for the bidding, through negotiations, etc. and provide cooperation to the designated successful bidder to win the bid. Therefore, although the companies designated as the bid participants or main members of the bid participant JVs are originally in a position to decide on the bidding price at their will, it is clear that such an arrangement shall result in the substantial restraint of the business activities of the companies, in that the decision making of such companies shall be restricted by the agreement. Accordingly, the Basic Agreement may well be found to have satisfied the condition to "restrict…their business activities" as set forth in Article 2, paragraph (6) of the Act.[475]

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[474] Tokyo High Court Judgment on March 19, 2000.

[475] *Tama Dango Case - To Seek Revocation of the Decision of The Japan Fair Trade Commission*, Minshu Vol. 66, No. 2 ¶ 4(2).

In other words, the agreement to select a designated successful bidder among bidding participants and to decide the bidding price causes to the substantial restraint of business activities and is considered as anti-competitive effect.

Additionally, the Supreme Court held that the agreement which contained the formation of communication among bidding participants to express the desire to receive the order should be considered as "in concert with other entrepreneurs, mutually".

> … The establishment of the Basic Agreement may be considered to be a formation of a communication of intention among the companies to act in concert with the mutual understanding and acceptance to act based on the abovementioned agreement, and thus, the Basic Agreement may also be found to have satisfied the condition to have acted "in concert with other entrepreneurs, mutually" as set forth in said paragraph. Moreover, in light of the fact that the purpose of the Act is to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers, by promoting fair and free competition (Article 1).[476]

In other words, the Supreme Court interpreted the conduct of mutual agreement undermine the goals of the AMA. Significantly, the Supreme Court had a new interpretation of the "substantial restraint of competition in any particular field of trade," as set forth in Article 2(6) of the AMA. Accordingly, it means that:

> … a situation where the competitive function of the market of the trade in question has been impaired. In cases where competition is restrained by working out an agreement on the basic method and process to arrange the receipt of orders in a certain bidding market, such as the Basic Agreement in this case, it may be construed that such agreement causes a situation where the entrepreneurs who are the parties to such agreement can freely control the decision on the successful bidder and contract price in the relevant bidding market to a certain extent, at their will.[477]

Through the Tama *Dango* Case, the JFTC and the Court identified the conduct of communication among bidding participants (in concert with other enterprises) to select a successful bidder and to coordinate with other contractors to fix the price. Under this agreement, the successful bidding ratio was very high from 89.79 percent to 99.97 percent. Consequently, this agreement results in competition restriction effects. In addition, the JFTC and the Court made a full analysis of the

[476] Ibid.
[477] Ibid., para.4(2).

current construction market in Japan as general and in Tama area in particular to access the effects of the anti-competition conduct to other contractors in the relevant market (substantial restraint of competition in any particular field of trade). The JFTC and the Court also found out that the agreement among bidding participants satisfied the condition of "contrary to the public interest". Therefore, after discovering the alleged conduct, the JFTC mainly applied the rule of reason to analyze and prove the harms of cartels. Although the Tama *Dango* case related to bid-rigging and was classified as one of the kinds of cartels, the coordinated price among designated bidders at a specific area had the same nature as price-fixing cartels.

1.2 A Competition Theory in Japan: From the Promotion of Industrial Policy to a Free and Fair Competition Regime

Harry First, Professor of Law at the New York University argues that although competition theory is not a central focus of the Japan Anti-Monopoly Act (AMA), it is used to guide and interpret the enforcement of the AMA.[478] The actual enforcement of the AMA focused mainly on the investigation and determination of cases of price-fixing, bid-rigging and resale maintenance price. There have been only a few cases of monopolization or predatory pricing and there have been no merger cases to date. Some scholars argue that "…this enforcement has been somewhat consistent with the antitrust theory underlying the Act, even if not consciously so."[479] Other scholars argue that "enforcement in Japan has often been more concerned with the effects on national economic welfare rather than consumer welfare."[480] The fact is that Japan has used market mechanisms to promote economic welfare through various government policies that have been driven by ministries including the Ministry of Finance and the Ministry of International Trade and Industry.[481]

Following the Second World War, Japan's anti-competition legislation was brought into line with that of the United States, but it diverged again soon after Japan's restoration of sovereignty in 1952. The first amendment of the AMA in 1953 demonstrates this divergence, with Japan moving away from the influence of the U.S. Anti-trust laws. Accordingly, the per se illegal

[478] Mitsuo Matsushita and Clifford Jones, *Competition Policy in the Global Trading System:Perspectives from the Eu, Japan and the USA* (Kluwer Law International, 2002), 185–86.
[479] Ibid., 191.
[480] Ibid.
[481] Ibid.

rule was replaced by the concept of "substantially restrains trade contrary to the public interest". In addition, the specific exemption for crisis cartels and rationalization cartels were introduced in the AMA. Furthermore, in support of that policy, several laws were enacted. Specifically, the Export and Import Transactions Law allowed the establishment of commercial associations including export cartels, the Maritime Transportation Law allowed shipping conferences, and the Medium and Small Size Business Organizations Law allowed trade associations with certain restrictive activities.[482]

However, in the late 1950s, when Japan emerged from the difficult post-war period, the Ikeda administration announced in its National Income Doubling Plan that in order to promote the strong economic growth, price-fixing cartels and other illegal agreements should be removed in order to achieve a more efficient economy and to protect consumer interests.[483] Subsequently, the idea of effective competition law enforcement was introduced against vertical price-fixing cartels (resale price maintenance), which was known as a big issue in Japan.[484]

Following US-Japan trade discussions between 1989 and 1992, Japan implemented the Structural Impediments Initiative talks which were triggered by many complaints from businesses about entering the Japanese market. One of the prominent cases was Kodak's complaint about the closed photographic market in Japan. The enforcement of AMA was subsequently strengthened to support national economic policies.[485] First proposes that at this time, the AMA enforcement during that period served the political purpose of managing the trade relationship with the US.[486]

The cases concerning the resale price maintenance overwhelmed other anti-competitive cases. The JFTC was concerned over the power firms to impose competition restraints and impede the business opportunities of other firms.[487] To solve such issues, in 1991, the JFTC issued the Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices, which clearly defined the concept of an 'influential firm'. According to the Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices, "In cases where an influential firm in a market … engages in transaction with its trading partners on condition that the

[482] Kameoka, *Competition Law and Policy in Japan and the EU*, 14.
[483] The Japan Fair Trade Commission, *The Japan Anti-Monopoly Act Policy Fifty Years History*, 127.
[484] Kameoka, *Competition Law and Policy in Japan and the EU*, 15.
[485] Matsushita and Jones, *Competition Policy in the Global Trading System*, 192.
[486] Ibid.
[487] Ibid.

trading partners shall not deal with competitors … and if such conduct may result in reducing business opportunities of the competitors and make it difficult for them to easily find alternative trading partners..."[488] In other words, in 1991 the JFTC defined an influential firm as one with more than 10 percent of the market or among the top three.

However, on May 27, 2016, the JFTC amended the Guidelines to read "…to promote free and fair competition and enable the market mechanism to fully perform its functions. More specifically, to make sure that: (a) firms be not prevented from freely entering a market; (b) each firm can freely and independently select its customers or suppliers; (c) price and other transaction terms can be set via each firm's free and independent business judgment, and composition be engaged in by fair means on the basis of price, quality and service."[489] Significantly, the JFTC increased the threshold of "influential in a market"[490] to exceeding 20 percent.

In short, Japan used the AMA as an industrial policy to achieve its economic growth and to advance the national economic welfare. To promote free and fair competition, Japan effectively developed good economic policy to advance the AMA as a desirable alternative to regulation.[491]

2. Cartelization in the EU

As analyzed in the previous section, during the three decades of the 20th century, Europe went through two major wars. Cartelization had become popular and was considered as an effective tool by the governments in Europe.[492] However, right after the Second World War ended, the decartelization policy was not only applied in occupied Germany, but also introduced in other European countries. Significantly, the European competition regime was enacted in 1957 with a strict provision to prohibit the cartels. The following section presents what competition school of thought influenced the development of the EU competition law and explores how the EU combines the law and economic analysis in determining illegal cartels.

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[488] Guidelines Concerning Distribution Systems and Business Practices under the Anti-monopoly Act, Law no. of 1991, (jp).
[489] 2016 Guidelines Concerning Distribution Systems and Business Practices under the Anti-monopoly Act, Law no. of 2016, p. 2 (jp).
[490] meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors, and which is determined, in principle, in terms of substitutability for users and also, when necessary, substitutability for suppliers.
[491] Matsushita and Jones, *Competition Policy in the Global Trading System*, 193.
[492] Harding and Joshua, *Regulating Cartels in Europe*, 86.

2.1 The European - Developed 'Ordoliberalism' as a Competition School of Thought

The EU competition law developed in accordance with the Ordoliberalism school of thought which was established in the 1930s. This school of thought established a new relationship between the law and the economic system, and stressed that competition was necessary for economic development. Rein Wesseling stated that the EU Competition law has two roles: 1) to promote free competition to shape up one common market by the prohibition of discrimination, and 2) to serve as a means of integrating the economies as well as governing economic processes.[493] In addition, the Spaak Report Committee[494] concluded that a market economy based on free and undistorted competition would form the appropriate economic principle for establishing and governing a common market.[495] These two statements show that in a market economy, competition law plays an important role in governing and punishing anti-competitive conduct, and at the same time it serves to promote economic development.

Japan and the EU share similar histories regarding the establishment of competition law, including the external of the United States. Wesseling argues that "German insistence on the introduction of a competition provision into the EEC Treaty was due to the US influence on Germany's post-Second World War economy. The US identified the big industrial cartels as fundamental parts of Germany's war machine. Therefore it insisted on the decartelization of German industry after the Second World War, of which the US inspired split-up of IG Farben is probably the most well-known example."[496] Furthermore, Wesseling proposes that the decartelization process created a solid foundation to shape the social market economy which governed the relationship between the state and private enterprises supported by the Ordoliberalism school of thought after the 1920s.[497]

Harding and Joshua classify the goals of anti-cartel enforcement in the EU Competition Law into three phases in the development of the EU. The first phase, which was between the 1960s and the 1970s served to strengthen the organization of competition authorities, to develop the administrative system and to prosecute cartels to serve for the elimination of impediments to

[493] Rein Wesseling, *The Modernisation of EC Antitrust Law* (Hart Publishing, 2000), 12–13.
[494] An Intergovernmental Committee set up by the Foreign Ministers of the six Member States of the European Coal and Steel Community (ECSC) as a result of the Messina Conference of 1955.
[495] Wesseling, *The Modernisation of EC Antitrust Law*, 13.
[496] Ibid.
[497] Ibid.

trade. The second phase from end of the 1970s to the first half of the 1980s focused on proactively investigating the cartels with 'dawn raids' inspections. There were many appeals against the decisions of the Commission during this period. The third phase, which continues to the present focuses on the completion of the internal market with a single European Act and Merger Control Regulation.

2.2 Law and Economic Analysis to Prove the Anti-competitive Conduct and Effect

2.2.1 Conduct of Price-fixing Cartel is Considered as Object to Prevention, Restriction or Distortion of Competition

As discussed in the previous section, the perception of cartels has shifted from the support of cartels to an anti-cartel attitude by the competition regulators, enforcers and the enterprises. Harding and Joshua illustrate the perception to cartels as 'delinquency'.[498] And they describe the evolution of 'delinquency inflation' as a progression from consensus regulation to clear prohibition, change to a self-consciously 'bad attitude'.[499] As a result of this change in moral perception competition regulators now strictly sanction cartels through criminal penalties. Harding and Joshua argue that the competition enforcement authorities must identify the conduct and provide proof of the anti-competitive effects of cartels so that the conduct can be penalized.[500] It is for this reason that the principle of 'conduct and effect' is so important for competition enforcers.

The Judgment of the Court of Justice (sixth chamber) on the case of *Montecatini & DSM v. Commission*: Polypropylene - to implement price initiatives and set the target prices in 1999 is a good example to understand how the Commission utilizes the principle of conduct and effect. The summary of the case is as follows:

Before 1977, 10 producers supplied polypropylene, a kind of polymer that is an essential input for the production of plastic packaging. Four of them, Monte, Hoechst AG, Imperial Chemical Industries and Shell International Chemical Company accounted for 64 percent of the market share. After the expiry of the controlling patents held by Monte, new producers entered the polypropylene supply market in 1977. These producers helped increase the real production capacity to meet the increasing demand of polypropylene. Monte was one of the main producers

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[498] Harding and Joshua, *Regulating Cartels in Europe*, 149.
[499] Ibid., 149–50.
[500] Ibid., 150.

supplying the market in 1977 with its market share on the west European market between 14.2 and 15 percent. In 1983, Monte's market share increased to 18 percent when it acquired Enichem Anic SpA.

After investigating several undertakings in the sector, the Commission found that between 1977 and 1983 Monte and other producers concerned had regularly met and set target prices and restricted supply that violated Article 85(1) of the EC Treaty at that time (now Article 101(1)). The Commission subsequently adopted a Polypropylene Decision sent to several undertakings, including Monte. The Commission fined Monte 11 million of ECU. Disagreeing with the Decision, on 6 August 1986, Monte lodged a lawsuit to seek the revocation of the Commission's decision before the Court of Justice.

The Court of First Instance held that Monte and other polypropylene producers regularly participated in meetings to fix the price targets and control sale volumes. Further, the Court had evidence from Imperial Chemical Industries about Monte's participation in the price instructions and the establishment of commencement dates of the target prices.

Regarding the legal analysis, the Court of First Instance held that:

> … In order for there to be an agreement within the meaning of Article 85(1) of the Treaty it was sufficient that the undertakings in question should have expressed their joint intention to conduct themselves in the market in a specific way. The Commission was accordingly entitled to treat the common intentions existing between Monte and the other polypropylene producers, which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 1979 and 1983.[501]

In other words, the Court found the conduct of mutual coordination of the concerned enterprises. For a definition of the concept of concerted practice, the Court of First Instance upheld the Commission Decision by stating that:

> …Monte had participated in meetings concerning the fixing of price and sales volume targets, and including the exchange of information between competitors on the subject, and that it had thus taken part in concerted action the purpose of which was to influence the conduct of the producers on the market and to disclose to each other the course of conduct which each itself contemplated adopting on the market. … Monte had not only

[501] Montecatini & DSM v. Commission: Polypropylene - to implement price initiatives and set the target prices, (1999) Official Journal L 230|1 (Court of Justice (Sixth Chamber)) [39].

> pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings.[502]

In response to the Court of First Instance judgment, Monte argued that the Commission should examine the agreements in the economic context and apply the rule of reason, instead of the per se of the competition rules. This is because the measures taken by the producers had beneficial effects, at the price of very heavy losses for the producers. However, the Court of First Instance stated that the agreement among polypropylene could have blocked the entry into the market for the newcomers.[503] In addition, the Court also held that the price-fixing agreements and concerted practices of polypropylene had an anti-competitive object, so it was not necessary to examine whether these agreements and practices had an effect on the condition of competition. Furthermore, the Court concluded that it is *per se* unlawful for an undertaking to take part in meetings with members of the same sector. In disregard of the right of assembly, freedom to hold opinions, freedom of discussion and of association, it thus created an arbitrary presumption that the meetings between producers, which had, however, never been kept secret, were unlawful.[504]

Concerning the conduct of selling goods below cost price, the Court observed that the conduct might constitute a form of unfair competition where it was intended to reinforce the competitive position of an undertaking to the detriment of its competitors. And the Court concluded that cartel participants, which sought to raise prices from a level below cost to a level at or above cost, could not argue, in justification of their conduct, that the cartel sought to eliminate unfair competition.[505]

Also, the Court of First Instance held that Monte had continued similar conduct including the participation in regular meetings with other produces, target-price fixing, and quota fixing for a single economic aim. Thus, it was determined that Monte would be punished for a number of separate infringements.

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[502] Ibid., para. 40.
[503] Ibid., para. 47.
[504] Ibid., para. 135.
[505] Ibid., para. 49.

Concerning the anti-competitive effects, the Court of First Instance held that in any event the purpose of those meetings was to restrict competition within the common market, in particular by fixing price and sales volume targets. It was thus determined that Monte's participation in those meetings was not free of anti-competitive purpose within the meaning of Article 85(1) of the Treaty. The Court further pointed out that the anti-competitive conduct also had an effect on trade between Member States. The Court referred to the case of *Van Landewyck and Others* v *Commission* and held that the infringement in which Monte had participated had the tendency to affect trade between Member States.[506] In response to this point, Monte argued that at end of the 1970s the market dealt with a situation of overcapacity which was aggravated by a tripling of the price of oil, a point which the Commission had ignored. Monte argued that serious distortions in the polypropylene market were due not to the producers' meetings but to the prices imposed by OPEC and were therefore caused by factors which had nothing to do with the undertakings.[507] To illustrate this point, Monte referred to the judgment in *Suiker Unie and Others* v *Commission.* However, the Court rejected this argument because it was not yet case law and the OPEC activities were not subject to such a case.

Disagreeing with the judgment of the Court of Instance, Monte and DSM appealed to the Court of Justice. And on July 8, 1999, the Court of Justice dismissed the appeal and ordered these two companies to bear the cost of the lawsuit.

The case of *Montecatini & DSM v. Commission* was based on the same collusion agreement to set target prices as that of Tama *Dango* in Japan. Also, the two cases have the same anti-competitive effects to hinder newcomer entry into the market. Furthermore, both the Commission and the JFTC share the same way of examination with certain types of coordinated agreements (fixing price, output restriction, market sharing and bid-rigging) between enterprises that are defined as substantial restriction of competition. However, in this case, the Commission did not have to examine the effects. In other words, the per se rule was applied in that case. In the case of Japan, cartels are deemed illegal if they cause a substantial competition restraint in the relevant market and is against public interest. Additionally, the way that the Commission

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[506] Ibid., para. 44.
[507] Ibid., para. 114.

determines the single continuous infringements of cartels is different from the JFTC. Accordingly, the fines issued by the Commission are based on the continuous infringements. The Commission principle is thus more stringent than the JFTC.

2.2.2 Economic Evidence to Determine the Harms and Pro-competitive Effects of Cartels

Cartels exist and operate in the market for the economic aim of increasing their profit, which is considered as their ultimate goal. Harding and Joshua argue that an economic analysis in the context of the relevant market is necessary to evaluate the harms of cartels and provide the proof that the cartels are illegal.[508] In addition, they also hold that with economic evidence, the competition enforcers are able to apply legal regulation to determine how far the cartels are able to justifiably allow the interests of the cartels to prevail over the interests of competitors or consumers.[509] Furthermore, the economic analysis of cartels effects will help the competition enforcers apply the exemption of cartels were cartels have competitive benefits. In the EU competition law, the qualified cartels will be exempted under Article 101(3).

In addition, the nature of a business cartel is a form of cooperation, restrictive competition, which is different from other forms of joint venture economic enterprise. Harding and Joshua point out that although the EU Competition Law strictly prohibited the hard-core cartels, the definitions and boundaries are not 'hard-and-fast' and there could be defensive arguments to apply for outside the scope of the prohibition.[510] Especially, in the case of an oligopolistic market[511], Jones and Sufrin argue that enterprises automatically compete and make use of the monopoly without any explicit agreement. It means that the enterprises may follow the tacit collusion.[512] Thus, the economic analysis is necessary to draw a line between anti-competitive and pro-competitive effects in the context of a particular market structure.

In the Annual Report on Competition Policy, the Commission referred to 'crisis cartels', in which enterprises are faced with overcapacity and would suffer substantial losses without any prospect improvement in the medium term. In this case, the enterprises need to apply to reduce the production level to minimize social dislocation. The Commission's viewpoint in the case of the

[508] Harding and Joshua, *Regulating Cartels in Europe*, 151.
[509] Ibid.
[510] Ibid., 152.
[511] It means that there are a few producers only.
[512] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 2014), 771.

Synthetic Fibers Cartel in 1985 is a good illustration of when the Commission allowed the formation of cartels under such circumstances. Accordingly, the Commission decided that although the agreement between undertakings had the object and effect of competition restriction and affected trade between member states within the common market, the objective of the agreement was to reduce capacity so that the capacity would be able to remain at a more economic level.[513]

Additionally, the Commission also stated that

> … In a free market economy it ought to be principally a matter for the individual undertaking to judge the point at which overcapacity becomes economically unsustainable and to take the necessary steps to reduce it. In the present case, market forces by themselves had failed to achieve the capacity reduction necessary to re-establish and maintain in the longer term an effective competitive structure within the common market. The producers concerned therefore agreed to organize for a limited period and collectively, the needed structural adjustment.[514]

Therefore, based on the economic analysis of each cartel case, the Commission will decide whether the cartel has pro-competitive effects and is applicable for the exemption under Article 101(3). In addition, the Commission also foresees the possible effects to the concerned enterprises. For example, in the case of the Synthetic Fibers Cartel, the Commission accepted the fact that a capacity reduction agreement might lead to a short-term prices increase to users. However, the Commission suggested the users could switch to other producers in a competitive market if the cartel members offered a high price. This means that although the Commission's viewpoint is that while certain types of coordination between undertakings reveal a sufficient degree of harm to competition, it may be found that there is no need to examine their effects[515] and the Commission may thus allow exceptional cartels based on its own economic analysis on case-by-case basis.

3. Conduct and Harms Approach to Effectively Control the Anti-competitive Conducts in the Oligopolistic Market

[513] The Commission Decision on Synthetic Fibres Cartel, (1984) Official Journal L 207, 02/08/1984 P. 0017 - 0025 [29].

[514] Ibid., paras. 30–31.

[515] Judgment of the Court of Justice of 11 September 2014, Groupement des Cartes Bancaires v Commission, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 49; Judgment of the Court of Justice of 19March 2015, Dole Food and Dole Fresh Fruit Europe v Commission, C-286/13 P, ECLI:EU:C:2015:184, paragraph 113.

Keith N. Hylton, Professor of Law at Boston University defines conscious parallelism as parallel price decisions by enterprises in an oligopolistic market without an explicit price-fixing agreement.[516] Hylton also points out that in such an oligopolistic market, when an enterprise increases the price, it needs the consumers and compares the increased price with the market price. Furthermore, Hylton stresses that firms in oligopolistic industries tend to be interested in taking action in response to their competitors.

James Rahl, legal scholar, argued that a conscious parallel didn't create an agreement.[517] However, Donald F. Turner countered that such a decision did indeed constitute an agreement and that it should be deemed illegal.[518] Turner further described the nature of coordination in the market as four forms: (i) Parallel behavior accompanied by strong evidence of independence, where each producer acts independently in spite of the competitor changing the policy; (ii) Perfect competition; (iii) Real conspiracy; and (iv) Interdependence. Accordingly, sellers maintain a price after a decrease in the price of an important input or after a fall in demand leaves them with excess capacity.

Japan and the EU are free market economies and introduced competition law more than 60 years ago. At the early stages of competition law enforcement, these two competition law traditions prioritized the anti-competitive conduct of cartels. Later, the competition authorities promoted free and fair competition as well as the public interests. With the development of case law, both jurisdictions have been successful in combating cartels, especially tacit agreements and conscious parallelism. Therefore, the approach of conduct and harms is a useful tool to determine the punishment for the anti-competitive behaviors of the enterprises, including in the context of conscious parallelism.

III. Why is the Principle of Market Share Important for Vietnam?

VCL stipulates that an examination of a competition restriction agreement must satisfy three requirements for a cartel agreement finding. First, there should be proof of an agreement among

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[516] Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, 2003), 21.

[517] James A. Rahl, "Conspiracy and the Anti-Trust Laws," *Illinois Law Review, North-western University* 44 (1950): 743.

[518] Donald F. Turner, "The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal," *Harvard Law Review* no. 75 (1962): 655.

the concerned enterprises. Second, a mutual agreement to restrict competition should exist. Third, the combined market share must be 30 percent or more on the relevant market. In order to determine the market share, the Vietnam Competition Authority (VCA) will examine the status of the market and determine the market share of the concerned enterprise or enterprises that are being investigated within the relevant market.[519]

According to Article 3(5) of the VCL, market share of an enterprise is defined as the percentage of turnover from sales of such an enterprise over the total turnover of all enterprises conducting business in such type of goods or services in the relevant market, or the percentage of turnover of inward purchases by such enterprises over the total turnover of inward purchases by all enterprises conducting business in such type of goods or services in the relevant market for a month, quarter or year.[520] To elaborate further, Que Anh, a well-known scholar of competition law in Vietnam stated that in order to examine the market share, the VCA would conduct a full analysis to determine the product definition on the market and to identify the geographic market.[521]

1. How Does the VCA Define the Relevant Market?

1.1 Relevant Product Market

According to Article 4(1) of Decree No. 116/2005/ND-CP, the relevant product market is defined as a market of products or service which are interchangeable in terms of characteristics, intended use, and price.[522] The characteristics of a product or service shall be identified on physical characteristics, chemical characteristics, technical properties, side effects on users and absorbability. And the interchangeability of a product or service shall be considered as interchangeable in characteristic, if they share many similar characteristics with the product or service definition. Additionally, products or services shall be regarded as interchangeable in price if, an increase of over 10 percent in the prices of such products or services is maintained for six

[519] Pham Thi Que Anh, *Competition Law in Vietnam - A Toolkit* (CUTS International Hanoi Resource Centre, 2007), 48.
[520] Article 3(5), Vietnam's Competition Law, Law No. 27/2004/QH11 [Luật cạnh tranh, Số 27/2004/QH11] (Vietnam Competition Authority 2004).
[521] Pham Thi Que Anh, *Competition Law in Vietnam - A Toolkit*, 49.
[522] Article 4(1)-(6), Decree No. 116/2005/ND-CP issued on September 15, 2005 by the Government on Detailing the Implementation of a Number of Articles of the Competition Law [Nghị định số 116/2005/NĐ-CP ngày 15/09/2005 của Chính phủ về quy định chi tiết thi hành một số điều của Luật cạnh tranh] (Ministry of Justice 2005).

consecutive months, or over 50 percent of a random sample of 1,000 consumers living in a relevant geographical area switch or intend to buy other products or services with the characteristics or intended use similar to products or services which they are using or intend to use. Furthermore, in case of necessity, the competition-managing agency or the competition case-handling panel may identify an additional group of consumers living the relevant geographical area who cannot switch to buy another product or service which has characteristics and intended use similar to the product or service they are using or intend to use in case of an increase of over 10 percent in the price of such product or service, which is maintained for six consecutive months.

In practice, the VCA begins with what their investigators have known and consolidated in the file as their own source, what the VCA knew from previous investigations, and what information is available from the media and public sources. After collating that information, the VCA might conduct an initial investigation to identify the undiscovered information. To investigate the concerned product and geographic market, the VCA may start interviewing retail stores to determine what products are considered substitutes by consumers and what enterprises can sell the retailer the supplies, whether the suppliers must have local production facilities or whether the product is produced on a national or international level.

To define the list of concerned enterprises or manufacturers of a product, the VCA may obtain it from the retailers. Then, an interview with the distributors or wholesalers might take place. After that, the VCA may conduct other interviews with other manufacturers in order to have a comprehensive overview about the manufacturing sector or particular product. Finally, if necessary, the VCA may gain information from the concerned manufacturers to determine their revenues and sales in the concerned market and their capacity to manufacture additional products for that market.

When the VCA starts interviewing with the concerned manufacturers, the VCA could face some difficulties in obtaining the information from them because business information is confidential and affects their business. Hence, the manufacturers are hesitant to provide any information. To handle this concern, the VCL requires that the competition authority must keep such information confidential, which is stipulated in Article 56(3) of the VCL. Pursuant to this Article, the investigators, the VCA and the Vietnam Competition Council (VCC) shall maintain

the confidentiality of the business secrets of enterprises and respect the lawful rights and interests of the organizations and individuals concerned.

To specifically illustrate how the VCA investigates the relevant market, this dissertation will analyze the case in which 19 insurance companies fixed the car insurance premiums in Vietnam. Concerning the definition of concerned product or services, the viewpoint of the investigation Panel was that based on Article 7 of the Law on Insurance Business, insurances are defined as life insurance and non-life insurance. According to Article 3(12) of the Law on Insurance Business in 2000, life insurance means "the types of insurance products for cases where an insured person lives or dies."[523] Article 7(1) of the Law on Insurance Business clearly defines six types of life insurance such as: whole life insurance, endowment insurance, term insurance, combined insurance, periodical payments insurance and other life insurance products as regulated by the Government.

According to Article 3(18) of the Law on Insurance Business in 2000, non-life insurance is defined as "the types of insurance products being property insurance, civil liability insurance and other insurance products which are not life insurance."[524] Article 7(2) of the Law on Insurance Business also classifies seven types of non-life insurance, such as: health insurance and human accident insurance, property insurance and damage insurance, land, marine, river, railway and air cargo transport insurance, aviation insurance, motorized vehicle insurance, fire and explosion insurance, hull insurance and ship-owners' civil liability insurance, common liability insurance, credit insurance and financial risks insurance, business loss insurance, agricultural insurance and other non-life insurance operations prescribed by the Government. Thus, the two kinds of life insurance and non-life insurance are totally different and they cannot substitute each other.[525]

The Panel investigator also stated that each non-life insurance business line was bound by a different subject to be insured and different incident to be insured against. Accordingly, the automobile insurance service line is, "the insurance buyer pays an amount of insurance premium so that the non-life insurance companies accept the risks related to the automobile (which is

[523] Article 3(12) Law No. 24/2000/QH10 dated December 09, 2000 of the National Assembly to enact Law on Insurance Business (2000).
[524] Article 3(18) ibid.
[525] Vietnam Competition Council, *Review Report of 10 Years of Implementation of Competition Law by Vietnam Competition Council*, December 23, 2016, 7.

defined as the subject of the non-life insurance) of the insurant and compensate it once there is an incident that may happen."[526] The Panel also referred to the nature of different insurance lines such as: aviation insurance, goods insurance, road transportation insurance, railway and sea transportation insurance. After that, the Panel concluded that each insurance business line of non-life insurance relates to each subject and incident to insure. And the automobile insurance has its own characteristics and nature, which are different from other non-life insurance business line. Thus, "the automobile insurance is not under pressure to compete with other non-life insurance business lines."[527]

The Panel also analyzed the existing regulations about the types of automobile insurance which were categorized into compulsory and voluntary insurance. According to Article 8 of the Law on Insurance Business, compulsory insurance means "a type of insurance which the conditions, premium rates and minimum insurance sum are prescribed by law for compulsory implementation by both the organizations or individuals participating in insurance and the insurance enterprises." Further, automobile insurance is classified as "motorized vehicle owners civil liability insurance" which is stipulated in Article 8(2)(a) for the purpose of protecting the public interests and social safety.

For the voluntary automobile insurance, the non-life insurance companies are allowed to develop the conditions, principles and premium rates to implement the provisions of the Law on Insurance Business in accordance with Article 20(3) of the Decree No. 45/2007/ND-CP, which was issued on March 27, 2007. The voluntary automobile insurance group also has many categories, including motorized vehicle owners civil liability voluntary insurance, accident liability insurance for the people in the car, driver and driver assistant, car accessory insurance, motorbike accessory insurance… etc. Taking into consideration of the purpose and category of the voluntary automobile insurance, the Panel held that each kind of automobile insurance service is developed to serve the purpose of risk insurance against a certain subject where the insurance agent and the insurance buyer enter into an insurance contract prior to such an incident occurring.

[526] Ibid., 7.
[527] Ibid., 7.

To illustrate this argument, the Panel referred to the subject of insurance of automobile accessories, which is defined as a type of insurance for the purpose of automobile accessory damage risk insurance when an automobile incident happens. Unlikely, for the subject to insurance of motorbike, the motorbike insurance services refer to the purpose of motorbike accessory damage risk insurance when a motorbike has accidents. Therefore, the Panel concluded that due to the different purpose of the subject of the insurance and the insurance incident, the insurance buyer was not able to substitute automobile insurance with motorbike insurance.

And the market of automobile insurance services is independent and can't compete with other markets of motorized insurance services. In reality, the competition in the market of automobile insurance services is that of automobile accessory insurance services between companies. During the period of 2005-2007, the insurance companies competed fiercely to gain customers by providing attractive insurance premiums. Thus, the Panel concluded that this was the main reason why 19 insurance companies agreed to fix the insurance premium by signing a collective agreement. Based on the above-mentioned analysis and assessment and Article 4 of the Decree No. 116/2005/ND-CP issued on September 15, 2005 by the Prime Minister to establish guidelines to implement the provisions of the Competition Law, the Panel concluded that the relevant product market in this case was the automobile insurance services market.

In summary, to identify the relevant product market, the Panel took into consideration the definition of product or services concerned, the possibility to replace another insurance service in terms of characteristics, and the purpose and price based on the subject and incident to insure against. Through this process the Panel defined the case as being related to the area of voluntarily automotive insurance, in which case the insurance companies were permitted to develop the terms and conditions as well as the premium.

1.2 Relevant Geographical Market

According to Article 7 of Decree No. 116/2005/ND-CP on September 15, 2005, the definition of relevant geographical market means a specific geographical area where products or services exist which are interchangeable under similar conditions of competition, and which can be considerably

differentiated from neighboring areas.[528] The boundaries of a geographical area are determined on the following grounds:

> (i) A geographical area where a business establishment of another enterprise participating in the distribution of the relevant product is base; (ii) A business establishment of another enterprise is based in a neighboring area sufficiently close to the geographical area defined at paragraph A of this clause for its participation in the distribution of the relevant product in such geographical area; (iii) Transportation costs in the geographical area defined in clause 1 of this Article; (iv) The time of transportation costs in the geographical area defined in clause 1 of this Article; and (v) Barriers to market entry.[529]

Additionally, a geographical area may be considered having similar competition conditions and being significantly differentiated from neighboring geographical areas if it satisfies one of the following criteria which is defined in Article 7(3) of Decree 116/2005: (i) Transportation cost and time will result in an increase of no more than 10 percent in the retail prices of products; and (ii) There exists one of the barriers to market entry.

Dealing with the case of 19 insurance companies, the Panel referred to Article 6(1) of the Law on Insurance Business (2000). This law clearly defines basic principles in insurance activities in Vietnam as "organizations and individuals having demands for insurance may only participate in the insurance at insurance enterprises operating in Vietnam." In other words, the Vietnamese law on insurance business only governs the rights and obligations of organizations and individuals participating in insurance in Vietnam. If any foreign insurance company wishes to offer insurance services in Vietnam, it is required to set up a legal entity in Vietnam.

Further, according to Article 59 of the Law on Insurance Business (2000), there are five types of insurance enterprise which are permissible to operate in Vietnam: (i) State-owned insurance enterprises; (ii) Joint stock insurance companies; (iii) Mutual support insurance organizations; (iv) Joint venture insurance enterprises; and (v) Insurance enterprises with 100 percent of foreign investment capital. Among 19 insurance companies, there are five foreign insurance companies only, with the remaining being Vietnamese insurance companies.

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[528] Article 7(1)-(3), Decree No. 116/2005/ND-CP issued on September 15, 2005 by the Government on Detailing the Implementation of a Number of Articles of the Competition Law [Nghị định số 116/2005/NĐ-CP ngày 15/09/2005 của Chính phủ về quy định chi tiết thi hành một số điều của Luật cạnh tranh] (Ministry of Justice 2005).

[529] Article 7(2), ibid.

Regarding the scope of insurance business, the Law on Insurance Business (2000) clearly stipulates, "the insurance enterprises may not concurrently carry out life insurance business and non-life insurance business, except for cases where the life insurance enterprises conduct health insurance and human accident insurance business operations in support of life insurance." Thus, only non-life insurance companies in Vietnam are permitted to provide automobile insurance to organizations and individuals in the Vietnamese insurance market. This legislation is thus considered an insurance market entry barrier.

Furthermore, the Panel held that at the time of fixing automobile insurance premiums, each region of the Vietnamese non-life insurance market didn't exist the elements of transportation cost, time delivery of insurance services or any market entry barrier to create any boundary to the region or area. In addition, the business network of 19 insurance companies already had their own branches and agents nationwide and competed with each other across the whole territory of Vietnam. Therefore, pursuant to Article 3(1) of the Competition Law, and Article 7 and 8 of the Decree No. 116/2005/ND-CP issued on September 15, 2005 by the Prime Minister to give guidelines to implement the provisions of the Competition Law, the Panel defined the relevant geography in the case of fixing automobile insurance premium was the nationwide market, or the whole Vietnamese automobile insurance market.

2. Market Share and Market Dominant Position

Although the Vietnamese Competition Law doesn't have a definition of market power, the law has a concept of market dominant position based on the market share calculation. According to Article 11(1) of the VCL, an enterprise shall be deemed to be in a dominant market position if such enterprise has a market share of 30 percent or more on the relevant market or is capable of substantially restraining competition.[530] In addition, the VCL provides that a group of enterprises shall be deemed to be in a dominant market position if they act together in order to restrain competition and fall into one of the following categories: (i) Two enterprises have a market share of fifty percent or more in the relevant market; (ii) Three enterprises have a market share of sixty

[530] Article 11(1-2), Vietnam's Competition Law, Law No. 27/2004/QH11 [Luật cạnh tranh, Số 27/2004/QH11] (Vietnam Competition Authority 2004).

five percent or more in the relevant market; and (iii) Four enterprises have a market share of seventy five percent or more in the relevant market.

Article 3(5) of the Competition Law defines the marker share as “an enterprise with respect to a certain type of goods or services means the percentage of turnover from sales of such enterprise over the total turnover of all enterprises conducting business in such type of goods or services in the relevant market or the percentage of turnover of inwards purchases of such enterprise over the total turnover of inwards purchases of all enterprises conducting business in such type of goods or services in the relevant market for a month, quarter or year.”[531] Based on the total revenue of 19 insurance companies dealing with automobile accessory insurance at the time of conducting the fixed premium at the request of the Vietnam Competition Authority by Document No. 280/QLCT-HCCT issued on May 29, 2009, the Panel defined the time at which the violation occurred was 2008. The Panel thus calculated each violating insurance company and concluded that the combined market of the 19 violating insurance companies accounted for 99.79 percent of the total market in Vietnam.

However, at the hearing session, a representative from Bao Viet Insurance Company, which is a State-Owned Enterprise argued that according to the Vietnam’s WTO commitments as of January 01, 2008, Vietnam allowed a foreign insurance company to provide automobile insurance services to foreigners or individuals working in Vietnam without setting up a legal entity in Vietnam and the insurance revenues from this activity should be included in the combined market share. Disagreeing with this viewpoint, the Panel held that based on the definition of market share as stated in Article 3(5) and Article 3(1) of the Competition Law, regarding the concept of relevant geography, these additional revenues did not meet the requirements for relevant geography and should therefore not be included in the calculation of the combined market share. In addition, the Panel also argued that the relevant state insurance management body did not have any detailed guidance regarding cross-border insurance services. Therefore, the Panel decided not to include the revenues from non-legal entities operating in Vietnam in the total revenue of insurance services.[532]

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[531] Article 3(5), ibid.
[532] Vietnam Competition Council, *Review Report of 10 Years of Implementation of Competition Law by Vietnam Competition Council*, 11.

3. Determination of the Substantial Competition Restriction Effect based on the Principle of Combined Market Share

To determine an illegal cartel stipulated by Vietnam's Competition Law, this section analyses the way the VCA determined the anti-competitive conduct of the 19 insurance companies. Firstly, the 19 insurance companies possessed an agreement. The Panel took consideration of the agreement and pointed out the fact that the first page of the agreement, signed on September 15, 2008 stated "… After discussing, the insurance company members of the Vietnam Insurance Association doing automobile insurance business jointly agreed…"[533] Secondly, the Panel pointed out the second and fourth pages of the agreement after the agreed contents, where there was a note to affirm the agreed conduct. The note stated that "… the representatives from the insurance companies attending the 4th CEO Meeting of non-life insurance together signed and committed to implementing the above-mentioned agreement."[534]

Thirdly, based on the agreed actions of the 19 insurance companies, the Panel determined that the insurance company members strictly committed to implementing and agreed to take measures to sanction the violated agreement members. Specifically, for the first violation, the Vietnam Insurance Association was required by the VCA to dispatch the document to remind and compensate for the damage. For the second violation, the Association was to publish the violated commitment of that member on the website and the newsletter of the Vietnam Insurance Association. For the third violation, the Vietnam Insurance Association was to extend a request document to Ministry of Finance to seek administrative punishment in accordance with the competence of the Ministry of Finance. Thus, the Panel concluded that the 19 insurance companies agreed to a plan of actions and showed a strong determination to strictly implement the agreed conducts.

Disagreeing with the Panel's conclusion, a lawyer protecting the legitimate interests and obligations of Petro Vietnam Insurance Company, one of the 19 insurance companies, stated that "the joint signing of the insurance companies was not the agreed conduct to implement the fixed premium, it was an oriented conduct to give a guidelines to the operation of insurance

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[533] Ibid., 12.
[534] Ibid.

companies."[535] Furthermore, a representative from the Agribank Insurance Company held that some contents of the agreement were indeed positive, contributing to the development of automobile insurance companies.

Rejecting these arguments by the two companies, the Panel held that the 19 insurance companies did not only commit to the agreed conduct, but also applied an agreed to a formula to fix the insurance premium of the automobile insurance. By doing so, the insurance companies controlled the insurance market and set a fixed premium, which exterminated competition of insurance premiums among the agreed insurance companies.

Finally, based on the calculation of a combined market of the 19 violating insurance companies, which accounted for 99.79 percent of the total insurance market in Vietnam, the Panel found that this cartel conduct resulted in substantial competition restriction. The Panel concluded that this conduct infringed Article 8(1) and Article 9(2) of the Competition Law and the Article 14(3) of the Decree No. 116/2005/ND-CP.

Through the 19 insurance companies case, the VCA attached importance to the principle of combined market share to examine the market power of the insurance companies in the relevant market.

4. Understanding the Market Share Approach to Make the Market More Competitive

In a perfect competition theory, Whish and Bailey argue that any producer will sell products at the market price and the producer is unable to affect the price if it doesn't impact to the aggregate output that determines the price through the principle of supply and demand.[536] However, the situation is different under a monopoly. Under such circumstances, the monopolist producer will try to maximize profits by reducing the production volume and increasing the price.[537] As a result, a monopoly causes an allocative inefficiency, which social resources allocated in the most efficient way.[538] In addition, the monopolistic producer has no incentive to invest in innovation for to improve products with the aim of attracting more consumers.

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[535] Ibid., 15.
[536] Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2012), 6.
[537] Ibid.
[538] Ibid., 6.

For Vietnam, as analyzed in the previous Chapter, before *Doi moi*, competition did not exist. However, after opening its economy and allowing entry of foreign firms, competition in Vietnam began. Within this context, one of the main purposes of the Competition Law enactment in 2004 was to control monopoly. The first case in the history of Vietnam following the enforcement of the Competition Law was the Vinapco case 2009. This case sent a strong message from the Vietnam Competition Authority that it would punish any monopolistic behavior even that by SOEs.

After more than 12 years of competition law enforcement, Vietnam is now in the process of amending the law. Nguyen Tien Lap proposes that the main purposes of competition law are firstly, to ensure the competitive freedom rights of all economic entities in the market which bring economic benefits to the small and medium enterprises by protecting their start-up and development, and secondly, to protect the social welfare to the consumers by reducing the prices, enhancing the productivity and product quality.[539] Lap also criticized the Competition Law 2004, arguing that it did not meet these objectives.

Vietnamese scholars Le Danh Vinh, Hoang Xuan Bac and Nguyen Ngoc Son analyzed the nature of price-fixing cartels as follows.[540] Firstly, it was possible that the price-fixing cartels could happen with future selling (at a higher price than competitive price) and buying (at a lower price than competitive price) transactions. Secondly, direct or indirect price-fixing cartels may enable cartel members to propose a fixed price for all cartel participants or propose a common formula to fix a particular price. Following such a decision, it would be possible for cartel members to agree upon the way to implement it with all customers or some certain customers. It is the role of the competition authority rather than that of the victims of the cartels to prove that price-fixing cartels exist and that they cause anti-competitive effects. Thirdly, in theory if the enforcing authority did not prevent enterprises from fixing the cartel price, it would threaten the consumers' interests because they would be forced to pay more in comparison with a competitive price. In practice, before the enactment of the Competition Law, in 2000 the taxi association,

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[539] Nguyen Tien Lap, "Vietnam's Competition Law - Need A New and Realistic Approach," *The Saigon Economic Times* (April 24, 2017), http://www.thesaigontimes.vn/159179/Luat-Canh-tranh---can-mot-cach-tiep-can-moi-va-thiet-thuc.html.

[540] Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Competition Law in Vietnam [Pháp luật cạnh tranh tại Việt Nam]* (Judicial Publisher, 2006), 271–75.

which includes 14 taxi companies, unanimously increased the taxi fare from 6 thousand VND for the first kilometer to 12 thousand VND for the first two kilometers. This decision caused harm to consumers. Nowadays, the birth of low cost carrier airlines and new transportation options such as Uber and Grab make it a challenge for the traditional airline and taxi services difficult to compete. Consumers are the biggest beneficiaries from the entry of these new competitors into the market and the adoption of advanced technology.

Famous economist, George Stigler stated that there were two mechanisms through which to monitor a cartel: fluctuation of market share, and reports from buyers.[541] The market share is a useful first indication of the market structure of any particular product or service and of the relative market dominance of the various undertakings operating in the market.[542] However, Whish and Bailey stated that the market share couldn't be determinative about barriers to expansion and entry, nor buyer power.[543] The practical case of *Tan Hiep Phat v. Vietnam Brewery Limited Company* is a good example of market share shortcomings. Therefore, the market share is only one criterion to define the market power of an enterprise or a group of enterprises in the market.

For a country like Vietnam, which has a relatively young competition law that mainly focuses on advocacy, the market share approach may be a feasible option to police cartel activity. This is mainly because the newly hired investigation and competition enforcement team requires to build their capacity by learning from other experienced competition enforcement authorities. In addition, the 30 percent of combined market share threshold means that is not illegal for cartels operate as long as they are below this threshold. This principle could be considered as a means of protecting legal cartels. As discussed in Chapter II, when developing the competition bill the Vietnamese lawmakers intended the market share of 30 percent as a means to prevent the monopolistic position in the market, especially in the context of market and trade liberalization in its WTO commitments. After 12 years of enforcing the competition law, the market share approach has not helped the Vietnamese competition enforcers successfully protect the domestic enterprises from anti-competitive conduct. The VCA's reliance on the market share to identify the

[541] George J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy* 72, no. 1 (February 1, 1964): 44–61.
[542] The European Commission on Article 102 Enforcement Priorities.
[543] Whish and Bailey, *Competition Law*, 45.

market power in the case of *Tan Hiep Phat v. Vietnam Brewery Limited Company* is a good illustration of the limitations of this market share approach in protecting domestic enterprises from foreign firms entering the market. Therefore, to effectively control the monopoly and other anti-competitive conduct, the Vietnam Competition Authority should consider another relevant approach to protect the goals of the competition law.

IV. Why Didn't the Market Share Approach Work Effectively in Vietnam?

1. Lack of Independence and Power of Vietnam's Competition Enforcing Authorities

According to Articles 49 and 53 of the VCL, the Government was to set up two administrative bodies with the power and the accountability to supervise and investigate the competition restriction acts and unfair competitive practices. The first of these two organizations is the Vietnam Competition Authority (VCA), which has the responsibility to supervise VCL enforcement, to investigate unfair competition cases, competition restriction acts and to sanction unfair competition acts.[544] The Head of the VCA is appointed by the Prime Minister at the recommendation of the Minister of Industry and Trade. The VCA office is located in the Ministry of Industry and Trade (MOIT) and has the same function as an agency under MOIT.

The second body is the Vietnam Competition Council (VCC) which has the duty to handle and settle the competition restriction acts, including cartels. The VCC is composed of 11 to 15 members from different ministries, who are appointed by the Prime Minister, on the recommendation of the Minister of MOIT. Under the current structure of the VCC, there are 14 members who are led by a Vice-Minister of MOIT as the Chairperson and two other Vice-Chairpersons holding Vice-Minister positions at the Ministry of Justice and the Ministry of Finance. According to Article 55(2) of the VCL, the terms of office are five years and renewable. Therefore, when dealing with anti-competitive cases, including cartel cases, in accordance with Article 49(2)(c), the VCA will be the organization with responsibility to investigate and submit findings to the VCC for consideration. The VCC will then set up a panel that consists of at least five members of the VCC to organize the hearing and to make a final decision about the case.

[544] Article 49(2), Vietnam's Competition Law, Law No. 27/2004/QH11 [Luật cạnh tranh, Số 27/2004/QH11] (Vietnam Competition Authority 2004).

Unlike the JFTC and the European Commission, the competition authority of Vietnam does not act as an independent organization. The organizational structure of the VCC does, however, reflect a certain degree of independency in judging cartel cases and other conduct of competition restriction. This is the first time that Vietnam has set up an organization like the VCC under the administrative branch and after taking into consideration of the current conditions of Vietnam it was determined to be the best solution.[545] Furthermore, Vietnamese scholars held that the function of the VCC looks like a judicial body to deal with competition restriction cases when the VCC is vested with the power to apply the competition law in competition cases in accordance with the procedural orders set out in the competition law.[546]

The decision of the VCC is reviewed by an administrative court if the concerned parties do not agree with the decision of the VCC in accordance with Article 115 of the VCL. The case of *Vinapco v. Vietnam Competition Council* in 2009 is an illustration of how concerned parties can actively engage in appealing to the court to defend their business interests. In this case, the Vietnam Competition Council issued a Decision No.12/QD-HDCT on June 26, 2009 that Vinapco abused its dominant position to stop providing the fuel to Pacific Airlines on April 1, 2008. Disagreeing with the decision, Vinapco filed a lawsuit to the administrative court under the People's Court of Hanoi City. According to Article 115(1) of the Vietnam's Competition Law and Article 30(3) and Article 32(7) of the Code of Administrative Procedures, the Decision on a competition case is subject to the jurisdiction of the administrative court of the provincial level where the complainant's residence or office is located. However, the court rejected the arguments of Vinapco and protected the decision of the Vietnam Competition Council.

However, since the establishment of the VCC, two Vice-Ministers of the Ministry of Industry and Trade have been appointed as the Chairperson of the VCC. This relationship raises concerns with many legal scholars as the MOIT has more than 11 big corporations and more than 150 state-owned enterprises under its direct supervision. Many Vietnamese legal scholars indeed liken the organization of competition law in Vietnam to someone who has the role of both football

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[545] Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Competition Law in Vietnam [Pháp luật cạnh tranh tại Việt Nam]*, 461.
[546] Ibid.

player and referee at the same time.[547] Therefore, with such an organization, it is not possible for the VCA and VCC to ensure transparency and justice. And the competition law cannot be enforced effectively.

It is also important to note that as Vietnam is a civil law country, case law does not apply in Vietnam, which means that the VCC and the court cannot refer and apply previous cases in an investigation, nor are they able to interpret the competition law. Consequently there is a significant financial cost for enterprises and the process of investigation is time consuming.

While Japan and the EU have long had legal institutions and the capabilities to implement their respective competition regimes, Vietnam lacked both. William E. Kovacic[548] pointed out that there are three shortcomings if a country is not ready to transplant the competition law.[549] First, since a transitional economy government does not fully understand the concept of competition, the enacted law is likely to be misapplied or subject to significant intervention. Second, the enforcing authority will apply the law in a way to limit the law's impact rather than to stimulate the competition. Third, the poor initial conditions, low social awareness and an insufficiently sound set of institutions will prevent a wisely designed provision and measures. To deal with these problems, Kovacic advised that there are two ways to introduce a competition regime. First, is to transplant an entirely Western style competition regime, but it needs to be made clear that time is necessary to complete such transplantation. Second, is to introduce a competition regime in step by step approach, by dividing it into two phases. The first phase is to create the necessary institutions to implement and supervise the enforcement. The second phase is to enact the law and develop advocacy plans. Kovacic proposed that Vietnam should apply the second, gradual strategy, to create the necessary initial conditions for effective legal design and implementation.

According to John Gillespie, professor of law at Monash University, Australia, Vietnam's legal system is dominated by the 3 critical theories: (1) Socialist legality; (2) Democratic

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[547] Magazine of Democracy and Law, "Several Problems Raising from the Current Competition Law [Một Số Bất Cập Của Pháp Luật Cạnh Tranh Hiện Hành]" (January 23, 2013), http://www.moj.gov.vn/tcdcpl/tintuc/Lists/PhapLuatKinhTe/View_detail.aspx?ItemID=369 (accessed October 12, 2015).

[548] A professor at George Washington University Law School. He advised Vietnam on building competition and consumer protection policy under the technical projects funded by United Nations Development Program and the World Bank.

[549] Kovacic, "Capitalism, Socialism, and Competition Policy in Vietnam," 59–60.

centralism and (3) Collective mastery.[550] These three theories have led to four basic principles of socialist law in Vietnam: First, the law originates from the state and it is not higher than the state. Second, the Party and the State own the exclusive use policies rather than law. Third, although the law works, it does not control the state power. Fourth, the personal legal rights should give priority to collective public interests.[551]

2. Insufficient Product Market Definition

As analyzed in Chapter II, the VCA deals with price-fixing cartels firstly by calculating the combined market share of accused cartel members on the relevant market, which is based on the identification and analysis of the relevant product market and the relevant geographical market. The VCA will then verify whether the cartel is illegal or not based on the combined market share. The prominent case of *Tan Hiep Phat v. Vietnam Brewery Limited Company* is a good illustration of how the lack of a product market definition resulted in a calculation of the market share that disadvantaged Tan Hiep Phat Company.[552] While the VCA calculated the market share of the Vietnam Brewery Limited Company (VBL) at 22.4 percent, they based their calculations on the relevant market being the whole country. Based on these calculations, the VCA determined that the market share was below 30 percent and was therefore not illegal. Disagreeing with this decision, Tan Hiep Phat company held that the relevant market should be the limited to the locations of Ho Chi Minh City, Vung Tau City and some provinces in the Mekong Delta River Region. They also argued that the timing of alleged conduct should also be considered. The VCA also did not have a definition of beer when determining the relevant product market and the relevant geographical market. Scholar Nguyen Nhu Phat argued that the exclusion of draught beer from the definition of beer resulted in the market share of VBL being calculated at a lower amount,

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[550] "John Gillespie, Changing Concepts of Socialist Law in Vietnam," n.d., 2, http://lfip.org/laws827/documents/vietlawGillespieSL1.pdf (accessed October 5, 2016).

[551] Nguyen Xuan Tung, Ministry of Justice, "The Socialist Legal Tradition in Vietnam: Some Thoughts - Truyền Thống Pháp Luật XHCN Tại Việt Nam: Đôi Điều Suy Ngẫm," *The University of Procuratorate*, 2013, http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/119/635 (accessed October 1, 2016).

[552] In 2003, VBL signed contracts with its own exclusive agents that include liquor shops, restaurants, bars and hotels and required the agents not to promote, introduce, and sell beer from other companies. After that, THP found out that most big shops, restaurants and distribution agents in Ho Chi Minh City, Vung Tau City and some provinces in the Mekong Delta River Region refused to distribute its Laser brand beer because of the exclusive agent agreements that they had entered into with VBL concerning the distribution of VBL products.

disadvantaging Tan Hiep Phat company.[553] Therefore, the case *Tan Hiep Phat v. Vietnam Brewery Limited Company* showed the shortcomings of the principle of market share in a case where the VCA established the product market definition. As a result, it impacted on the entire judgment of the case and meant that the VCA was not able to punish conduct that caused harm through anti-competitive acts.

Regarding the first price-fixing cartel case, which consisted of the 19 insurance companies, the VCA delineated between the definition of life insurance and non-life insurance services. Further, as these 19 violating insurance companies are leading insurance companies among the 25 insurance companies operating in Vietnam, the VCA determined that the relevant geographic market was the whole nationwide non-life insurance market of Vietnam. This determination made it easier for the VCA to calculate the total revenue of the 19 companies and it was calculated that they had a combined market share of 99.79 percent of the whole non-life insurance market. However, some scholars still criticized the VCAs omission of cross border insurance services that operate without setting up a legal entity in Vietnam in these calculations.[554] If the VCA accepted that these cross border insurance services should be included in defining the relevant geographic market or neighboring geographic area, it is likely that the combined market share of the 19 violating insurance companies would have been decreased. The collection of data on cross border insurance services by the VCA may also have presented challenges.

The second case of the price-fixing cartel which comprised of 12 insurance companies in Khanh Hoa Province reflected a different viewpoint of the VCA in defining the relevant geographic market compared with the *Tan Hiep Phat v. Vietnam Brewery Limited Company*. Although the 12 insurance companies in Khanh Hoa were branches or representative offices of insurance companies, the VCA clearly identified the case as occurring within Khanh Hoa Province and determined that the province was the relevant geographic market. The combined market share of the 12 companies accounted for 99.81 percent of the total market. However, on September 1, 2011, the 12 insurance companies voluntarily terminated their price-fixing cartel conduct and compensated for the consequences caused. The VCA subsequently suspended the investigation in

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[553] Scholar Nguyen Nhu Phat, Vietnam Competition Council, *Review Report of 10 Years of Implementation of Competition Law by Vietnam Competition Council*.
[554] Scholar Nguyen Am Hieu, ibid.

accordance with Article 101(1)(c) of the VCL. As can be seen by these examples, the product market definition and the relevant geographic market are decisive elements in defining the market share.

Keith N. Hylton argues that market power is determined by the factors of market share, demand-side substitution and supply-side substitution.[555] Under the EU Competition Law, the Commission had detailed guidelines on the market definition in 1997. Accordingly, the market definition is considered as an effective tool to identify the boundaries of competition between undertakings and the objective of a market definition is to identify the actual and potential competitors to constrain the competition in the market.[556] Significantly, the Commission stressed the importance of market definition in calculating market shares to assess the market power and the dominant position of the firms for the purposes of applying Article 85 of the EU Competition Law. The underlying principles to define the market definition are based on competitive constraints, demand and supply substitution and potential competition.[557]

The Commission has even gone as far as examining whether different flavors of soft drinks belong to the same market. Specifically, the Commission identified whether consumers of a particular flavor would switch to other flavors when the price of their preferred flavor increases by 5 percent or 10 percent. If a sufficient number of consumers switched to another flavor, the market would comprise at least both flavors.[558] Thus, the Commission collects evidence, analyzes and assesses the market share based on both the product dimensions and geographic dimensions. Firstly, from the perspective of product dimensions, the Commission considers the evidence to define the market by assessing whether or not two products are demand substitutes based on an analysis of elements such as: evidence of substitution in the recent past, quantitative tests that have been specifically designed for the purpose of delineating markets, views of customers and competitors, consumer preferences, barriers and costs associated with switching demand to

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[555] Hylton, *Antitrust Law*, 236.
[556] Para. 2, The European Commission, *Commission Notice on the Definition of Relevant Market for the purposes of Community Competition Law* (Official Journal of the European Communities, December 9, 1997).
[557] Paragraph 13-24, ibid.
[558] Paragraph 18, ibid.

potential substitutes, barriers and costs associated with switching demand to potential substitutes, different categories of customers, and price discrimination.[559]

Secondly, the Commission collects the evidence relating to the geographic market dimension to calculate the market share including: past evidence of diversion of orders to other areas, basic demand characteristics, views of customers and competitors, current geographic pattern of purchases, trade flows/pattern of shipments, and barriers and switching costs associated with diverting orders to companies located in other areas.[560] Thus, in order to calculate the market share, the Commission considers a total market size and market share for each supplier calculated on the basis of their sales of the relevant products in the relevant area.[561] In addition, the Commission relies on the available information from market sources, company estimates, studies commissioned from industry consultants and/or trade associations. Furthermore, the Commission may ask each supplier or the concerned parties in the relevant market to provide their own sales statistics in order to calculate total market size and market share.

Therefore, in the case of the EU Competition Law, the Commission identifies the market share as a "two-stage process" analysis: "first to define the relevant market, and then assess the competition within that relevant market."[562] The Commission will answer two questions such as: what the relevant market is and how the market share is determined. In addition, the Commission will take an additional consideration of secondary market which sets out in the paragraph 56 of the Commission Note on definition of relevant market as spare parts, may result when compatibility with the primary product is important.

For the Japanese experience relating to the identification of the market share, the JFTC carries out the analysis and assessment of market structure and market performance to assess the dominant position in the market.[563] The analysis of market structure helps the enforcing authority to define the same goods, similar goods or interchangeable goods. In addition, the JFTC will assess the barriers for entry into the markets of the same and similar goods.[564] Hence, the JFTC

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[559] Paragraph 36-43, ibid.
[560] Paragraph 44-52, ibid.
[561] Paragraph 53, ibid.
[562] Korah, Cases and Materials on EC Competition Law, Oxford 2006, p. 646.
[563] Hiroshi Iyori and Akinori Uesugi, *The Antimonopoly Laws and Policies of Japan* (Federal Legal Publications, 1994), 188.
[564] Ibid.

and the EU Commission share the same approach to identifying the market relevant and calculating the market share of the concerned firms, which not only focuses on the current competition restraints but also considers the potential competition restriction as well as the market entry conditions of future firms. Unlike the EU Commission and the JFTC, the VCA only focuses on the market share of the concerned enterprises by identifying the product definition and the relevant market (product and geographic market).

3. Insufficient Database to Prove the Market Share

As analyzed in the previous section, the VCA attaches the importance of product market definition and the relevant geographic market to the defining of the relevant market. Further, the market share is calculated on the total sales revenues of the concerned firms. If, however, the enforcing authority incorrectly establishes a product definition or geographic market definition, the entire judgment of the case may be adversely impacted. To define a relevant market, the VCA often requests the concerned enterprises to provide the necessary information about market structure, price of products or services, competitors as well as the sales revenues. However, the fact is that it is very difficult for an enterprise to provide its competitors' information as such information tends to be confidential. As this is the case, it should be up to the VCA to collect the information from its available sources.

In order to set up a database on the main economic sectors in Vietnam, in 2012 the VCA released the competition assessment report of 10 selected subsectors of the Vietnamese economy. The subsectors included in the report comprised of five from the manufacturing sector (truck, detergent, paper, vegetable oil, construction glass) and five from the services sector (pharmaceutical distribution, shipping, life insurance, advertising and pay TV). These were chosen as they were considered possible targets for anti-competitive conduct. The main objectives of this report were to review and assess the elements such as market size, barriers to entry and exit from the market, the structure of the market, the state of competition in the market, and the identification of potential anti-competitive conduct likely to occur in each of the subsectors.[565] The

[565] Vietnam Competition Authority, "The Competition Assessment Report on 10 Economic Sectors in 2012," December 18, 2012, http://www.qlct.gov.vn/NewsDetail.aspx?lg=1&CateID=7&ID=976 (accessed May 29, 2017).

question remains however, how will the VCA deal with a more complicated case while there is no product definition and without a comprehensive database of product and services?

Another related question is how can the VCA enhance the transparency and decision-making process to reach a decision in a competition case? Although a decision on a resolution of a competition case, a summary of the facts of the case, an analysis of the case and the conclusion to solve the case must be sent to the parties concerned with such decision,[566] the fact is that as there is no case law in Vietnam, the full text of the VCA and VCC decisions as well as the investigation of the Panel set up by the VCC are not open to the public. As a result of such practices there is a risk of abuse of the investigation and supervision power by the enforcement authorities.

V. Suggestions for Improvement in the Regulation of Price-fixing Cartels under the Vietnam's Competition Law

1. Promotion of Efficiency Approach

As written in the previous part, Vietnam lacks a comprehensive competition policy. In theory, competition optimizes efficiency by forcing enterprises to produce more with less cost (technical efficiency), and by inducing better resource allocation (allocative efficiency), which in turn attracts more investment into a more profitable sector. At the same time, competition encourages enterprises to actively promote research and development to deliver more advanced technology products.[567]

Competition policy is a set of government measures to enhance competitiveness, to facilitate entry and exit of the administrative procedures, and to deregulate the unnecessary procedures. Significantly, Erlinda M. Medalla argues that the main objectives of competition policy are to promote welfare and efficiency.[568] On the other hand, Moritz Lorenz suggests that the objective of competition policy is to ensure that the market mechanisms are allowed to function smoothly so that the benefits of competing can be gained.[569] This is because market failure may occur and there is a need to intervene to ensure the overall welfare despite the intervention not being optimal from a social perspective.

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[566] According to Article 105 of the Vietnam's Competition Law.
[567] Erlinda M. Medalla, *Competition Policy in East Asia* (Psychology Press, 2005), 4.
[568] Ibid.
[569] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013), 23.

In the meantime, competition law refers to a statute established to prohibit and penalize anti-competitive conducts and to create a level playing field for all kinds of business sectors. In addition, the competition law also prevents the potential anti-competitive acts by prohibiting the abuse of a market dominant position, excluding competitors and mergers that may lead to the significant impediment of competition.[570]

To illustrate the relationship between competition policy and competition law, Hassan Qaqaya and George Lipimile propose that competition policy and competition law are complementary each other; one to promote the principle of market economy without any intervention from the government, the other to remove anti-competitive acts of market participants and thereby maintains and preserves competition in the markets.[571] On the other hand, Lorenz argues that competition policy is often complemented by social, regional, employment, environmental or other policies.[572]

Medalla proposes that a competition policy has two main tasks.[573] Firstly, it ensures that no firm is able to abuse its market power. If the firm abuses its market power, it will be punished. Secondly, where necessary, the competition policy fixes market failure by making it more competitive and prohibiting the restraints of trade. Medalla suggests several follow-up actions to implement competition policy. The first action is to determine whether a firm or a group of firms has the market power or not. The next is to answer the question of how that market power is gained. Following these two actions, there are several possible avenues for action:

> If the market power is attained by the anti-competitive acts, the competition rules will be applied to punish the conducts; If a new market entry is not able enter the market because of firms' market power, the government could consider to intervene. In case the government policy is not justifiable, reforms will be needed to make the market work more efficiently; If the market power is gained by trade barrier, the government needs to conduct a trade policy reform; If the imperfect information about supply and demand causes to the market power of a firm or a group of firms because of asymmetric information between enterprises and consumers, there is a need to promote information and education. In addition, the consumer protection is the best choice.[574]

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[570] Ibid., 2.
[571] Hassan Qaqaya and George Lipimile, *The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects*, 2008, 9.
[572] Lorenz, *An Introduction to EU Competition Law*, 23.
[573] Medalla, *Competition Policy in East Asia*, 5.
[574] Ibid., 6–7.

Furthermore, Medalla highlighted that there are two requirements to build a regulatory framework for an effective competition policy. First, it needs an effective competition regime to govern the anti-competitive behaviors of firms. Second, there is a need to review and assess the government policies impact on competition.

The concept of competition in the EU is described in the following way:

> Competition is a basic mechanism of the market economy which encourages companies to offer consumers goods and services at the most favorable terms. It encourages efficiency and innovation and reduces prices. In order to be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.[575]

According to Lorenz, the core concept is the last sentence, implies that the consumers and suppliers should interact freely, and there should be no coordination between enterprises in the market. Under such conditions, competition will work as a self-regulating mechanism or as an 'invisible hand'[576] to lower the prices so that it benefits consumers and maximizes the social welfare.[577]

As part of the competition policy, the exemption of the EU Competition Law is applied with some sectors such as agricultural products in accordance with the common agriculture policy set out in Article 39 of the Treaty on the Functioning of the European Union (TFEU), military equipment production as set out in Article 346(1)(b) of TFEU, and certain elements of the transportation sector. In addition, collective bargaining agreements between employers and employees can be exempted from the competition rules due to social policy considerations.[578]

For Japan, rather than enforcement of the Anti-Monopoly Act, it was the industrial policy that played an important role in helping Japan gain many economic achievements during the 1960s and 1970s.[579] The primary objective of the industrial policy was to enhance the competitiveness of the Japanese enterprises in the international markets and to catch up with other

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[575] "Antitrust: Overview – Competition - European Commission," 2016, http://ec.europa.eu/competition/antitrust/procedures_102_en.html (accessed February 22, 2016).
[576] The terms of invisible hand was developed by Adam Smith in his book titled *The Wealth of Nations*.
[577] Lorenz, *An Introduction to EU Competition Law*, 1.
[578] Ibid., 39.
[579] Erlinda M. Medalla, "The Evolution of Competition Law in East Asia - by Ping Lin," in *Competition Policy in East Asia* (Psychology Press, 2005), 21.

advanced economies.[580] In order to meet these objectives, Ping Lin stated that the Ministry of International Trade and Industry (MITI) carried out measures against the principle of fair competition.[581] To demonstrate MITI's interference with fair competition, Caves and Uekusa showed that MITI promoted resources movement to some selected industries and encouraged larger enterprises in certain industries to compete with American firms and restricted new entry into certain industries determined by MITI.[582]

Furthermore, the exemption of depression and rationalization cartels was a complementary measure to the industrial policy. Iyori and Uesugi stated that:

> the Stabilization of Specific Small and Medium Enterprise Temporary Measures Act, which authorized depression cartels for specific small enterprises, and the Export Trading Act, which permitted export cartels, were both enacted in 1953. Since that time, many exemption laws intended to prevent excessive competition between small enterprises or to promote rationalization were enacted, revised or strengthened almost every year… Many exemption laws opened the door for approval of cartels not by the JFTC but under the guidance of the ministries in charge of the industries. They also provided for restrictions on the activities of non-members of cartels in order to strengthen cartel activities.[583]

As a result, during the period of 1953 and 1994, there were about 1,379 cartels exempted under the AMA.[584] Consequently, the industrial policy of Japan together with the exemption of the AMA to protect small suppliers proved to be an effective tool to create favorable conditions for domestic enterprises and to enhance their competitiveness. Notably, at a later stage, the enforcement of the AMA and the role of the JFTC were considered more powerful than METI. The Japanese government has not approved a recession cartel since 1989, despite Japan going through what is commonly referred to as the "lost decade" during the 1990s.[585]

According to the World Economic Forum, Vietnam is ranked 56 on the global competitiveness index among 140 countries. In terms of intensity of local competition, Vietnam is

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[580] Ibid., 21–22.
[581] Ibid., 22.
[582] Richard E. Caves and Masu Uekusa, *Industrial Organization in Japan* (Brookings Institution, 1976), 149.
[583] Hiroshi Iyori and Akinori Uesugi, *The Antimonopoly Laws of Japan* (Federal Legal Publications, 1983), 19.
[584] M. Porter, H. Takeuchi, and M. Sakakibara, *Can Japan Compete?* (Palgrave Macmillan UK, 2000), Chapter 2.
[585] Medalla, "The Evolution of Competition Law in East Asia - by Ping Lin," 37.

ranked at 71; the extent of market dominance is at 64; the effectiveness of anti-monopoly policy is at 77.[586] Over the last 10 years, Vietnam's economic growth has in fact slowed down, with the average level of growth during the period 1990 to 2007 being 7.8 percent; which fell to 6.7 percent in the period 2007-2012. Between 2012 and 2017 this growth rate has fallen further to approximately 5.8 percent. Vietnam has thus started exhibiting slow economic growth with weak macroeconomic fundamentals and large public debts.

In the meantime, Vietnam has been actively integrating into the international economy. Economic experts argue that the restoration of a growth rate of between 7 and 7.5 percent is the only way Vietnam will be able to narrow the economic development gap with other countries in the region. These economists argue that Vietnam cannot continue to use demand based policies such as loosening monetary policy, expanding fiscal and state investment… as they will jeopardize the macroeconomic stability of the nation.[587] To deal with this issue, the Vietnamese government has tasked the Central Institute for Economic Research Management to build a comprehensive competition policy in 2017. Many Vietnamese scholars have suggested that the government should create a level playing field between State-owned enterprises and private enterprises to prevent monopoly and ensure fair competition.

The Vietnamese government issued Resolution No. 19-2017/NQ-CP dated February 6, 2017 on main the duties and measures for improving the business environment and enhancing national competitiveness in 2017 and orientation towards 2020. This resolution which reflects a strong determination of the Vietnamese government to simplify the administrative procedures, to reduce costs for the businesses, and to enhance the competitiveness, is the fourth resolution in four consecutive years between 2014 and 2017. These Resolutions task the concerned ministries and agencies to develop an action plan to accelerate administrative reform.

In dealing with the competition law, the Government also tasked the Ministry of Industry and Trade to draft of an amended law on competition that would ensure fair competition, effectively control monopoly and business dominance, punctually address complaints about abuse

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[586] Professor Klaus Schwab, World Economic Forum, *The Global Competitiveness Report 2015-2016* (World Economic Forum, 2016), 367.

[587] Central Institute for Economic Management, "Workshop on Developing and Implementing a Comprehensive Competition Policy: Learning International Experiences and Lessons for Vietnam," 2016.

of monopoly business dominance and centralization and completion restriction agreements, and detect and dealt with violations against laws on competition for submission to the National Assembly before December 2017.[588] Based on this government directive, it can be argued that in terms of political will Vietnam is ready to adopt a comprehensive competition policy to promote the efficiency. This is because Vietnam is embarking on establishing a socialist-oriented market economy. Vietnam started accelerating the 'equitisation' of SOEs and divested its equity in ineffective SOEs to the public. In addition, the private sector is rapidly developing and has started to contribute more to the nation's economic development. The government is also currently considering the enactment of a law on supporting small and medium enterprises to create favorable conditions to enhance their competitiveness, and to enhance the efficiency of SMEs that have the potential to grow in areas selected on the basis of the advantages of the integration process in Vietnam.

2. A Sufficient Concept of Cartels for Vietnam

A cartel is a group of firms that collude in an agreement to increase profits by restricting price and output competition among themselves.[589] In cartel theory, the main purpose of a cartel is to maximize joint profits among cartel members.[590] John M. Connor proposes four predicted factors that may affect the formation of the cartel, including collusive price, duration of agreement, chances of the action being detected and prosecuted, and the cost of penalties.[591] Connor points out that reaching a predicted collusive price is the easiest item among the four factors. Connor also holds that each cartel member would have potentially different opinions and "… the greater the uncertainty and differences, the less likely the cartel will be formed."[592]

In economic theory, Connor stated that economists started analyzing the phenomenon and the impacts of cartels in the early 20th century.[593] Market is understood to play an important role in price-fixing cartels. This is particularly the case in a homogeneous market, as cartel participants

[588] The Prime Minister, *Resolution No. 19-2017/NQ-CP dated February 06, 2017 of the Government on main duties and measures for improving business environment and enhancing national competitiveness in 2017 and orientation towards 2020*, February 6, 2017, 9.
[589] Hylton, *Antitrust Law*, 68.
[590] John M. Connor, *Global Price Fixing: Our Customers Are the Enemy* (Springer Science & Business Media, 2013), 28.
[591] Ibid., 29.
[592] Ibid.
[593] Ibid., 30.

can easily make a price-fixing agreement to maximize profits due to the parties sharing common interests in benefiting from price increases without fearing threats from competitors. As a result, price-fixing cartels help the parties reinforce and dominate the market. Bjarke Fog held that "if concerned parties can agree upon this price, the cartel may be said to have realized a monopoly situation, and the price may be termed a monopoly price."[594]

However, the situation becomes more complicated when the market is not homogeneous. This is because the quality and price of the products are varied. As a result, concerned cartel members will face difficulty in agreeing upon an acceptable price for every member. Hence, "for a heterogeneous market the result may be that some of the members of the industry make an agreement, while the others remain as outsiders."[595] Additionally, Frank H. Easterbrook stated that "it is costly to reach a cartel agreement, and even more costly to detect and punish cheating, markets with many sellers cannot easily be cartelized."[596]

Other significant factors to facilitate cartels are sociological and economic.[597] Specifically, a working characteristic of Japanese business is to coordinate and exchange information. This coordination is also reflected through cooperation between the government and business community during the time of Second World War and the post-war recovery. Furthermore, Japanese business culture requires that employees work very hard and spend their working life with the company. Masako Wakui explained that the Japanese business culture might be leading employees to commit unlawful cartel activities.[598] And many people in Japan accept this characteristic of business. As a result, it creates a justification for cartel agreement.

Additionally, cartel participants also have a conflict of interest in negotiating and making a decision on an acceptable price for all members. Larger companies usually prefer having a long-term policy of business with a lower price. On the other hand, small companies often like a short-term policy with a higher price. Because of these competing interests, cartels will take time to reach a compromise. Furthermore, Bjarke Fog held that "some may prefer to wait and see what the

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[594] Bjarke Fog, "How Are Cartel Prices Determined?," *The Journal of Industrial Economics* 5, no. 1 (November 1, 1956): 19.
[595] Ibid.
[596] Frank H. Easterbrook, "Maximum Price Fixing," *The University of Chicago Law Review* 48, no. 4 (October 1, 1981): 902.
[597] Masako Wakui, *Antimonopoly Law: Competition Law and Policy in Japan* (Arima, 2008), 65.
[598] Ibid.

result will be before they join the cartel, or they may speculate on the possibility that the rest of the industry will form a cartel and then see their advantage in staying outside the cartel and competing against it."[599] Therefore, a cartel will be created and easier to enforce if the number of companies in the market is small.[600]

The most important factor for enterprises to facilitate a cartel agreement is the ability to control market power. Having such a power, a cartel can easily raise the market price without attracting new entrants or expanding the number of non-member companies.[601] In this case, the elasticity of demand curve will show consumer reaction to changes in price. Specifically, the elasticity of demand is "the percentage change in quantity demanded in response to one percent change in price."[602] For example, if the demand curve is inelastic, raising prices should bring about more profits. In other words, if demand still remains unchanged or if demand rapidly increases because of a production shortage, cartel members will benefit from the collective raising of prices. In contrast, if the consumers negatively react to raising prices, cartel members will hesitate to increase them. They are afraid that potential competitors will take the opportunity to expand their market share by producing more goods and selling at a lower price than cartel members.

Therefore, the International Competition Network consolidated the practices of cartels and concluded that there are three main components to form a horizontal cartel agreement.[603] First, when a conspiracy is made, the enterprises will reflect it through an agreement or collusion. Second, that agreement is made by direct competitors. Third, the objective of that agreement is to mutually or in concert with other enterprises to restrict or to distort or to prevent competition in the market. And there are two kinds of cartel agreements such as horizontal and vertical agreements. The definition of cartels could be reflected in both horizontal and vertical pricing agreements as set out in Article 101 of the EU Competition Law. The Japan Anti-Monopoly Act

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[599] Fog, "How Are Cartel Prices Determined?," 21.
[600] Andrew R. Dick and University of California Economics Los Angeles Dept of, *When Are Cartels Stable Contracts?* (Department of Economics, University of California, 1995), 280.
[601] Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (Pearson/Addison Wesley, 2005), 127.
[602] Ibid., 781.
[603] *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties: ICN 4th Annual Conference : Bonn, Germany, 6-8 June 2005* (Office for Official Publications of the European Communities, 2005), 10.

also defined clearly the horizontal pricing agreements as unreasonable restraint of trade set out in Article 2(6) and the vertical pricing agreements as unfair trade practices set out in Article 2(9)(iv).[604] However, as a civil law country like Vietnam without case law application practice, a separate provision about the horizontal and vertical agreements could help the Vietnamese enterprises better understand and strictly enforce it. In addition, the definition of cartels under the Vietnam's Competition Law should include the terms of 'to mutually or in concert with other enterprises' to reflect the nature of cartels. Furthermore, a tacit agreement is also an infringement of cartel regulation.

3. Price-fixing Cartel is One of the Most Harmful Cartels

Harding and Joshua pointed out three areas where the conduct of cartels is considered delinquency: (i) continuously increasing damage from anti-competitive behavior; (ii) a challenge to the policy; and (iii) abuse of power.[605] Firstly, regarding the continuously increasing damage from anti-competitive harms of cartels, in terms of legal impacts, competitors, other market participants and consumers are indeed the victims of cartels. Cartel related offences are comparable with other crimes like theft and fraud. In terms of economic impacts, the consumers are the most impacted as consumers must pay additional 10 percent in comparison with the competitive prices because of the price-fixing cartels. Especially, in the upstream industries such as chemicals or materials that are considered as essential inputs to other downstream industries, a price-fixing cartel could result in a huge loss for end-users. Secondly, in terms of challenge to policy, the harms of cartels must be identified in the background of the global agenda for trade liberalization. The cartel activities raise prices, reduce output, remove choice for customers, transfer the wealth to other large suppliers, and remove pressure to innovate or reduce costs. Significantly, Mario Monti[606] describes cartels as 'cancers of the open market economy'.[607]

Because direct competitors have a strong influence in deciding the price of a product or service to gain supra-competitive power at the consumers' expense, horizontal agreements are

[604] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Japanese Anti-monopoly Act No. 54 of April 14, 1947), Law no. 54 of 2009, (jp).
[605] Harding and Joshua, *Regulating Cartels in Europe*, 272.
[606] EU Commissioner on Competition and a former Prime Minister of Italy.
[607] Mario Monti, "Why Should We Be Concerned with Cartels and Collusive Behaviour?," (presented at Fighting Cartels - Why and how?, Stockholm, 2001), 14.

classified as the most harmful cartels and are considered to be hard-core cartels.[608] Currently, many countries have identified four types of conduct as being hard-core cartels: price-fixing, output restrictions, market allocation, and bid-rigging.[609] Many jurisdictions introduced criminal penalties against price-fixing cartels. For example, both corporations and individuals are subject to the criminal sanctions in the US in 1890.[610] Canada, Japan and 18 European countries are applying criminal sanctions on cartels despite there being no criminal regulation under the European Competition Law.[611]

While Japan is applying the principle of illegal for cartels that cause a substantial restraint of competition and cartels against the public interests, the EU Competition Law strictly prohibits price-fixing cartels by identifying the object to prevent, restrict or distort the competition within the internal market. Although the EU has established a safe harbor for cartels, it is does not apply for the hard-core agreements (the fixing of prices; the limitation of output or sales; and the allocation of markets or customers and bid-rigging), which have as their objective the prevention, restriction or distortion of competition within the internal market.

The fact is Vietnam's Competition Law also applies the per se illegal principle for bid-rigging under Article 9(1). As the characteristics and harms of bid-rigging are the same as price-fixing cartels. The VCA should also apply the per se illegal rule for price-fixing cartels.

4. Considering the Application of the Effect-based Approach to Examine Cartels

In theory, in a market where there is perfect competition, no single firm has a dominant share of market power. In a pure monopoly, on the other hand, one firm has absolute control over the market.[612] Specifically, market power refers to a firm's ability to exercise monopolistic power over raising the price of goods or the ability to have coordinated actions over a period of time and to restrict new entrants into the market.

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[608] Robert H. Lande and Howard P. Marvel, "The Three Types of Collusion: Fixing Prices, Rivals, and Rules," *Wisconsin Law Review* no. 941 (2000): 947.
[609] *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties*, 10.
[610] Keith Jones and Farin Harrison, "Criminal Sanctions: An Overview of EU and National Case Law," *e-Competitions, National Competition Laws Bulletin* no. No. 64713 (n.d.): 1, http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf.
[611] Connor, *Global Price Fixing*, 47.
[612] Whish and Bailey, *Competition Law*, 25.

Market power is defined as "the ability to alter profitably prices away from competitive levels."[613] Competitive levels refers to the prices in a condition of perfect competition which is achieved when:[614]

(1) Scholar Ziegler points out that if a firm makes profit in an industry, more firms will enter and make the production increase. As a result, it makes the prices of the goods go down to the prices equal with costs and no incentive for new entrants. Thus, a firm cannot make long-term profit after a new market participant comes in and the market reaches a competitive level later. However, the Scholar commented that the actual market doesn't happen like that case because every market has barriers to entry.

(2) Firms sell homogenous products making it easy for consumers to switch to buying another product with the same characteristics (or substitute products). However, Ziegler points out that competition does not intend to make firms produce similar products because it limits the choice of consumers.

(3) Firms having a small market share and do not have enough influence to change the overall market price (or oligopoly). If the firms try to increase the prices, consumers will not buy the products. Instead, they will access another competitor. However, if one of the competitors has a substantial market share on the market and the firm is unable to increase the supply to meet the demands from customers, buyers will have to accept higher prices. According to Ziegler, the competition policy goal is to increase the elasticity of demand. To meet the demand from customers, the competitors will produce more and make the prices lower.

The market characteristics of Vietnam have a mixture of monopoly and oligopoly. In January 2013, the VCA conducted a survey about 10 business fields included trucks, buildings glass, detergent, paper, vegetable oil, pharmacy distribution, sea transportation, non-life insurance, advertisement and pay-tv. Among these business fields, the VCA found that five business fields that have the oligopolistic characteristics include detergent, vegetable oil, trucks, insurance and pay-tv. The OECD defines the meaning of oligopoly as "markets characterized by a small number of competitors and barriers to entry such that firms are interdependent, i.e. their strategic decisions

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[613] Andreu Mas-Colell, Michael Dennis Whinston, and Jerry R. Green, *Microeconomic Theory* (Oxford University Press, 1995), 383.

[614] Ales Ziegler, "Economic Problems of Competition Law," *Common Law Review* no. No. 13 Autumn 2014 (March 2014): 4–5.

have a meaningful impact on one another."[615] In the oligopolistic market, few competitors are competing with each other for the same kind of products (perfect oligopoly, common in sugar, petroleum..) and on the product differentiation (imperfect oligopoly, common in garments and telecommunication..). Furthermore, Bruneckienė analyzed the relationship between cartels and markets and concluded that "in oligopolistic markets, firms very frequently start operating in an interdependent manner in order to maximize their profits and thus from cartels."[616]

In order to evaluate market power, defining market share is a necessary step to understanding how much competition exists within the market. However, there are other factors that need to be considered, such as potential barriers to hinder new entrants and buyer power. And the determination of substantial market power should not be based on market share alone. Rather, as suggested by Wish and Bailey a comprehensive analysis of all factors affecting competitive conditions in the market should be undertaken.[617] Therefore, the effect of substantial restriction competition should be considered to apply instead of relying on the market share alone. To make it happen, there is a need to develop a detailed definition and guidelines on the effect of 'substantial restriction competition'.

5. Application of a Leniency Program in Vietnam

Abbot B Lipsky stresses the importance of introducing a leniency program, suggesting that a free market economy cannot exist without an effective tool to deter cartels.[618] Known as the first competition enforcer to introduce a leniency program, the US applied a leniency program in 1978. Accordingly, the program was applied to the cases of horizontal anti-competitive conduct prior to the Department of Justice investigating the case. The program was made it possible for individuals to avoid jail and fines and for corporations to avoid fines if conditional requirements were met.

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[615] Organization for Economic Cooperation and Development, *Competition Enforcement in Oligopolistic Markets*, May 19, 2015, 3, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)2&docLanguage=En.

[616] Jurgita Bruneckienė et al., *The Impact of Cartels on National Economy and Competitiveness: A Lithuanian Case Study* (Springer, 2015), 49.

[617] Whish and Bailey, *Competition Law*, 26.

[618] Abbott B. Lipsky, "Deterring Cartel Behavior: Harmonies and Disharmonies, Problems and Solutions," *Antitrust Law Journal* 60, no. 2 (1991): 563.

However, the Department of Justice received on average only one request for leniency a year, and the leniency program at that time failed to uncover a single international cartel.[619]

In 1993, the US revised the corporate leniency program. Accordingly, leniency is granted to a corporation reporting illegal activity prior to an investigation beginning, if the corporation meets the following six conditions:[620] (i) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; (ii) The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (iii) The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (iv) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (v) Where possible, the corporation makes restitution to injured parties; and (vi) The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

A year later, the US issued a leniency policy for individuals in 1994. Accordingly, leniency would be granted to an individual reporting illegal antitrust activity before an investigation has begun providing the individual meets the following three conditions:[621] (i) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; (ii) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and (iii) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

The Leniency Program has been very successful because the Department of Justice received a twentyfold increase in the number of reported cartels. In addition, the amount of fines

[619] "Leniency Program of the US Department of Justice," n.d., http://www.steptoe.com/assets/htmldocuments/2010%20US%20Leniency%20Program%20Presentation.pdf (accessed May 30, 2017).
[620] Paragraph A, Department of Justice, *The US Corporate Leniency Policy*, August 10, 1993, https://www.justice.gov/atr/file/810281/download.
[621] Paragraph A, Department of Justice, *Leniency Policy for Individuals*, August 10, 1994, https://www.justice.gov/atr/individual-leniency-policy.

significantly increased, exceeding USD 5 billion in fines that could be directly attributed to the Leniency Program since 1997. Furthermore, the Leniency Program has generated 90 percent of the Department of Justice cartel investigations.[622] Scott D. Hammond, Director, the U.S. Department of Justice, Antitrust Criminal Division, argues that three core elements are the indispensable components of every effective leniency program: 1) severe sanctions, 2) heightened fear of detection, and 3) transparency in enforcement policies.[623]

The EU applied the Leniency Program in 1996, after the US demonstrated its effectiveness in detecting more cartels. Many other competition enforcers soon followed suit, introducing the leniency program such as: Korea (1997), Canada, UK and Germany (2000), France and Ireland (2001) and the Netherlands (2002). For the case of Japan, the JFTC successfully applied the leniency program in 2006. At the time of application, many people said that it would not be successful because the Japanese firms have the tendency to cooperate rather than to disclose the agreements. However, after introducing the program, the JFTC received many cartel reports from enterprises.

Regarding strict sanctions against cartels, although the EU Competition Law doesn't have a regional regulatory framework for criminal penalties against cartel activities, the respective European national competition authorities are applying very strict sanctions against cartels. 18 EEA countries currently impose criminal sanctions for antitrust infringements such as: Austria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Malta, Norway, Poland, Romania, the Slovak Republic, Slovenia and the UK.[624] Further, while the AMA and the VCL applying sanctions against both corporations and individuals that infringe upon the cartel regulations, the EU Competition Law only applies the corporation sanctions against cartels on corporations. Recently, the criminal sanctions against hard-core cartels were introduced in the Vietnamese Criminal Code 2015.

Toshiyuki Nambu, Deputy Secretary General for International Affairs of the Japan Fair Trade Commission stated in 2013 that the Japanese Leniency Program is considered as a

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[622] "Leniency Program of the US Department of Justice."

[623] Delivered at the Competition Network Workshop on Leniency Program in Australia in November 2004

[624] Keith Jones and Farin Harrison, "Criminal Sanctions: An Overview of EU and National Case Law," 7.

transparent, certain and substantial program. Also, Nambu pointed out five reasons that the Leniency Program was successful in Japan. Firstly, the applicants enjoy immunity and a substantial reduction of surcharge (the second applicant before investigation sees a 50 percent reduction of the surcharge and the third and following applicants see a reduction of 30 percent of the surcharge). In addition, while bid-riggers are normally debarred from public tendering for a certain period, if they apply for the leniency program, the debarment period can be halved. Secondly, the applicable rates of reduction of surcharge for each leniency applicant in order are transparent before and after the investigation. And the JFTC has no discretion for the leniency applicants. Thirdly, the application process is easy to follow (the JFTC may request additional reports) and not heavy obligation for the leniency applicants to fully cooperate with the investigation team like the US and EU programs. Fourthly, the JFTC accepts all leniency applications based on the submission of Form No. 1 even if evidence of cartel is not yet sufficient. Finally, leniency program is not only applicable for cartels in certain goods, but also for cartels in other goods at the same time.[625]

Thanks to the introduction of the Leniency Program, the JFTC received many applications, many of which were price-fixing cartels and bid-rigging cases. The first leniency application was the bid-rigging for the construction of the tunnel ventilation facilities in September 2006. Accordingly, Mitsubishi Heavy Industry Cooperation was the first applicant before the investigation started. And the company enjoyed 100 percent immunity from surcharges. After the investigation started, Ishikawajima-Harima Heavy Industry Cooperation and Kawasaki Heavy Industry Cooperation were the second and the third leniency applicants and their surcharge payments were each reduced 30 percent.[626]

The differences between the Japanese and the EU leniency programs are as follows. Firstly, while the JFTC has transparent applicable rates before and after the start of investigation, the European Commission has its own discretion to grant the reduction ranging between 30 percent and 50 percent for the second applicant and between 20 percent and 30 percent for the third applicant, and the subsequent applicants are eligible for fine reduction up to 20 percent.

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[625] Toshiyuki Nambu, *A Successful Story: Leniency and (International) Cartel Enforcement in Japan*, *Journal of European Competition Law & Practice* 5, no. 3 (February 3, 2014): 158–63.
[626] Ibid.

Secondly, under the EU Leniency Program, in order to enjoy immunity and reduction of fines, the applicant must not only provide sufficient evidence, but also fully cooperate with the Commission's investigation team. Thirdly, while the JFTC limits the number of leniency applicants to five companies that can enjoy immunity and reduction of fines, the European Commission does not fix the limited number of applicants. Fourthly, the first applicant under the JFTC's Leniency Program is not only exempted the administrative fines, but also receives a criminal exemption.

Unlike other enforcing authorities, the VCA has not introduced a leniency program since its enactment of competition law in 2004, although many jurisdictions have already applied it, and gained significant achievements in detecting more cartel activities. There are three reasons for this: Firstly, the competition law is very new to Vietnamese enterprises, and the priority for the VCA has been to advocate the law and regulations on competition. Secondly, at the time of enacting the competition law, the administrative fines of 5 percent for price-fixing cartels did not deter enterprises from becoming involved in anti-competitive conducts. Additionally, the fines framework of maximum to 5 percent of turnover was vague and could be interpreted as even 0.001 percent of turnover. This framework consequently made it difficult for the VCA to set fines for each case. Thirdly, cartel agreements were not subject to criminal punishment. Thus, as a result of these three reasons, it can be argued that Vietnam was not yet ready to implement a leniency program when the VCL entered into force in 2005.

Thus far, Vietnam has implemented the competition law for 12 years. The capacity of the enforcing authority has been strengthened considerably, and the VCA are dealing with many cartel and anti-competitive conduct cases. Furthermore, the perception of cartels of the enterprises has been enhanced. The sanctions against anti-competitive conduct have also become stricter. In July 21, 2014, the Vietnamese government issued a new Decree No.71/2014/ND-CP to increase the administrative fines of cartels from 5 percent to 10 percent of the turnover of previous financial year. In addition, the Vietnamese government has made a significant step in combatting cartels through the recent introduction of criminal sanctions. It has thus become important for Vietnam to introduce a leniency program, as without such a mechanism, the VCA is likely to face significant

challenges in discovering the complicated illegal cartels that cause harm to consumers and other enterprises' interests.

The European Commission described the benefits of the leniency program as being 'mutual' for the enterprises and the enforcing authority. Accordingly, the leniency program encourages the cartel members to voluntarily report and submit cartel evidence to and enjoy immunity from fines or a reduction of fines that the enforcing authority imposes upon them if the illegal cartels are indeed found. The enforcing authority can also benefit from this approach through obtaining important insights and secret evidence of cartel operations as well as shortening the time and reducing the costs associated with investigations. As a result, the leniency program deters cartels from colluding and destabilizes the cartel operation because it creates distrust and suspicion among cartel members.[627]

Therefore, based on the above considerations, there is a need to introduce a leniency program to the VCA. Given the effectiveness of harsher fines and criminal penalties as disincentives, the scope of the application should include such elements. This is because, in order to make a leniency program effective, there must be a credible threat for cartel members that are also punished without implementation of a leniency policy.[628] If a leniency program were adopted, it would certainly help the VCA to detect secret cartels and reduce investigation times. However, it is also crucial that the VCA make the leniency program transparent to make its application simpler, in turn incentivizing the reporting of such activities. It is also crucial that the VCA encourages Vietnamese enterprises to voluntarily regulate and abide by an internal compliance program or a code of conduct, which prohibits the formation of cartel agreements and anti-competitive conduct. Significantly, the case of the price-fixing cartel of 19 insurance companies shows an understanding and compliance with the VCL by the Vietnamese enterprises. While most of 19 Vietnamese domestic enterprises engaged in the price-fixing agreement, the foreign companies did not sign the agreement because these companies have a good legal and compliance team that deals with internal codes of conducts and are accustomed to competition law regimes in other jurisdictions.

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[627] "About the Cartel Leniency Policy - European Commission," 2016, http://ec.europa.eu/competition/cartels/leniency/leniency.html (accessed March 28, 2016).
[628] Lorenz, *An Introduction to EU Competition Law*, 353.

VI. Conclusion

Japan had a long history of cartels that were managed and controlled by administrative order for the state interest before the Second World War. Anti-cartel enforcement was strengthened when Japan enacted the Anti-Monopoly Act (AMA) in 1947. However, the first amendment of the AMA in 1953 reflected a relaxation of cartel enforcement through the deletion of Article 4 and introducing a provision for the establishment of depression cartels and rationalization cartels. The examination of cartels was conducted on case-by-case basis and MITI played an important role in developing the industrial policy.

During the 1960s and 1970s, cartel enforcement was weak because the Japanese business culture was one of cooperation or harmonization rather than competition. Joint action with competitors was thus not considered a crime. In addition, for political reasons, the Liberal Democratic Party tended to support the policy of MITI rather than the JFTC. However, in the late 1970s, due to anti-competitive effects of price-fixing cartels, the JFTC introduced surcharges to fine cartels. Furthermore, entrepreneurs were forced to provide justification when a price was raised. In the 1980s, the JFTC strengthened anti-cartel enforcement by imposing criminal sanctions and increasing the surcharges from two percent to six percent.

In the 1990s, bid-rigging, an activity that shares the same nature and characteristics as price-fixing cartels, was a major concern for the JFTC because it had a detrimental impact on the economic efficiency and distorted free and fair competition. The role of the JFTC was further strengthened in conjunction with the introduction of Leniency Program in 2006 to effectively detect cartels.

In some European countries like Germany and France, cartels were established and developed the late 19th century for the purpose of industrialization and market stabilization. Like Japan, the European countries also used administrative orders as a tool to control cartels. Also, like the objectives behind the dissolution of *zaibatsu*, the decartelization policy was introduced in Germany and the perception of cartels changed from one of support to one of opposition that considered cartel activities to be ‘delinquency’. Ordoliberalism developed as Europe’s own competition school of thought. For the first time in European history, a regional provision against cartels was enacted in 1951 and then amended in 1957. The anti-cartel provision has remained

unchanged until the present. To effectively combat the cartels, the European Commission introduced the leniency program in 1996 which was influenced by the successful practices of the US Anti-trust.

Although Vietnam shares many cultural similarities with Japan, the perception of cartels only started when Vietnam enacted its competition rules in 2004. Through the decisions of the VCC regarding price-fixing cartels and anti-competitive cases, the cartel enforcement has been strengthened and efforts by the enforcing authority have been acknowledged. This is because stakeholders concerned over the harms of competition restriction cases to the economic efficiency and consumers' interests.

While Japan and the EU competition rules follow the effect-based approach, Vietnam stipulated its competition rules by listing the conducts, and thus follows a 'form-based approach'. In Japan, price-fixing cartels are illegal in principle in Japan and their conduct and harm are examined according to the rule of reason on a case-by-case basis such as. Factors considered in such cases include: the nature of conduct in concert with other entrepreneurs, whether they mutually restrict business, and the actual conduct undertaken to fix, maintain or increase prices, causing a substantial restraint of competition in the relevant market and against the public interest.

The EU Competition Law applies strict sanctions against price-fixing cartels by introducing the per se illegal rule. Accordingly, once the European Commission discovers the anti-competitive object or conduct, it is not necessary to justify the harms or effects of cartels. And like Japan, the EU applies case law within the competition jurisdiction. The approach of conduct and harms analysis is a useful tool to examine the anti-competitive effects, especially in oligopolistic markets.

Unlike the JFTC and the European Commission, the VCA applies the approach of 30 percent market share threshold in the relevant market to determine whether a price-fixing cartel is legal or not. The reason why the VCA chose 30 percent is because it was the threshold stipulated in a telecommunications regulation that controlled monopoly and anti-competitive conducts within that industry. Vietnamese lawmakers also based this threshold on the practices of other countries like Canada and Germany, which also apply the same threshold.

At the time of enacting the competition law in 2004, although Vietnam had been promoting the development of its socialist-oriented market economy and acknowledged the need to ensure a level playing field for all enterprises, the perception of cartels had not yet been fully grasped and the institutional structures remained dependent on government.

Within a "young competition country", advocacy plays a crucial role as it helps to educate enterprises on appropriate conduct. Consequently, advocacy has remained as one of the main priorities of the VCA. However, after 12 years of enforcement, shortcomings in the current competition regime have become apparent, including: a non-independent competition authority, insufficient market data and unclear product definitions. Consequently, these shortcomings have made it difficult for the VCA to identify the market share. It is has also become clear that market share alone is not the most appropriate basis for examining price-fixing cartels.

Vietnam is currently in the process of amending the competition law. The chapter proved that although the nature of bid-rigging and cartels has the same characteristics, the VCL only prohibits the bid-rigging. In addition, the VCL also prohibits the vertical pricing agreements or resale price maintenance. However, since the horizontal price-fixing cartels are more harmful than vertical pricing agreements, amendments to the legislation need to be made to enable the VCA to apply per se illegal principle to such conduct. The fact is that the VCL is already applying the per se illegal to bid-rigging, and thus there is no reason why price-fixing cartels should not be treated the same.

For other kinds of cartels, the conduct and effect analysis is a good option for Vietnam to consider adopting, through the development of a 'substantial competition restriction' effect. In addition, in order to effectively detect cartels, a leniency program should be introduced into Vietnam Competition Law enforcement because Vietnam now has sufficiently strict fines and criminal sanction against cartel to act as incentive for voluntary disclosure. While the harmful perception of cartels has been enhanced, the only challenge that remains is creating a leniency program that is suitably transparent and simple to apply.

Chapter V:
Conclusion

Since Vietnam's Competition Law came into effect on July 1, 2005, the Vietnam Competition Authority (VCA) has investigated eight cases of anti-competitive conducts, in which half of them were price-fixing cartels. This dissertation set out to analyze the principles upon which the VCA examines the price-fixing cartels through a comparative study with the principles applied by the Japan Fair Trade Commission (JFTC) and the European Commission. The research found that price-fixing cartels, which lead to monopolies and inefficient resource allocation, were categorized by many competition legislators as 'hard-core' cartels because of their extremely harmful impact on consumers and the economy. In addition, the dissertation also pointed out key components needed to form a cartel so that lawmakers would be better able understand the concept and therefore more accurately define the meaning of cartel. Furthermore, this research suggested an alternative way to examine cartels and more proactive measures to effectively combat them. As a result, the dissertation findings may be of use to Vietnamese legislators who are currently discussing the first amendment of the Vietnam's Competition Law after 12 years of enforcement. The following sections set out answers to the questions posed in the introduction of the dissertation:

I. What is the Significance of the Threshold Approach of 30 Percent in Vietnam?

1st Question: Why did Vietnamese lawmakers adopt threshold of 30 percent in the relevant market to examine the effects of price-fixing cartels?

The crucial finding to emerge from this study is that the reason why the Vietnamese lawmakers decided to adopt 30 per cent as the threshold while others proposed 40 or 50 percent. The threshold of 30 percent was considered a suitable threshold to gain a market power because more than 96 percent of Vietnamese enterprises were small and medium enterprises. In addition, the threshold was also stipulated in a previous regulation in the sector of telecommunication to supervise and control monopoly and anti-competitive conducts and Vietnamese lawmakers expected that the competition rules would bring about a similar effect. In addition, Vietnamese lawmakers referred to the current similar thresholds used by Canada and Germany.

2nd Question: How does the VCA examine the combined market share of 30 percent in the relevant market?

The dissertation found that in order to determine the market share, the VCA examines the status of the market and calculates the market shares of the concerned enterprise or enterprises that are being investigated on the relevant market, which includes relevant product market and relevant geographical market. Then, in order to identify the relevant product market, the VCA takes into consideration the definition of product or services concerned, and the possibility of replacing that product or service with another product or service based on its characteristics, purpose and price. After that, the VCA inspects the relevant geographical market by identifying a specific geographical area where products or services exist or be interchangeable under similar conditions of competition and is considerably differentiated from neighboring areas.

The study compared the current practices in Vietnam with the regulations of Japan Anti-monopoly Act and the EU Competition Law and found that although price-fixing cartels are illegal in principle in Japan, the JFTC applies the principle of 'rule of reason' to examine the conduct and effects of cartels on case-by-case based on the following elements: to analyze the conduct in concert with other entrepreneurs, whether they mutually restrict business, an actual conduct to fix, maintain or increase prices, causing a substantial restraint of competition in the relevant market and against the public interest. In the meanwhile, the European Commission applies stricter sanctions against price-fixing cartels with the per se illegal rule. Accordingly, once the European Commission discovers an anti-competitive object or conduct, it is not necessary to justify the harms or effects of cartels.

For other types of cartels, the European Commission takes two steps to examine their conduct and effects under the Article 101. The first step is to assess whether the agreement between undertakings (must be more than one undertaking involved in the agreement) existed or not. Then, the Commission identifies whether the cartel agreement affected trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition or not. After that, like the price-fixing cartels, if the competition authority found the agreement had the objective to prevent, restrict or distort competition, it would not need to examine the anti-competitive effects. In the second step, the Commission analyses and evaluates

whether or not the agreement has the pro-competitive benefits to improve the production or distribution of goods or to promote technical or economic progress or any benefits to consumers.

3rd Question: Did the threshold of market share of 30 percent in the relevant market work effectively to detect the price-fixing cartels since the enactment of the Vietnam Competition Law on December 3, 2004?

The threshold of market share of 30 percent in the relevant market seems to be an easy method for the VCA to examine the effects of price-fixing cartels. However, the dissertation has proved that the threshold approach applied by the VCA is insufficient and ineffective in controlling monopolies and eliminating anti-competitive conducts. This is because many price-fixing cartels are legitimate if their combined market shares are just below 30 percent regardless of anti-competitive effects they might be causing, such as creating a hindrance to new entrants and causing negative effects to consumers.

In addition, the market share approach also heavily relies on the product definition and the total share market calculation. The current status of the VCA is that it is not an independent competition authority, and lacks a sufficient database to define the relevant market and product definition. These facts make it difficult for the VCA to effectively identify the market share. The case of *Tan Hiep Phat Company v. Vietnam Brewery Company* showed that the VCA couldn't punish the anti-competitive conduct of Vietnam Brewery Company because the VCA defined the beverage product market without draught beer and identified the geographical market as the entire nation. As a result, the foreign beer company's market share was calculated as being below 30 percent.

In terms of cartel enforcement, the fact is that the VCA's investigation of eight cases of anti-competitive conducts during the period of 12 years enforcement is very few and not impressive. The study reviewed and found that the first case of price-fixing cartels in 2008 was easily detected because members of the Vietnam Insurance Association made a public announcement about its decision to increase the car insurance premium. Later, the Vietnam Insurance Association explained that they were not aware of the illegality of their price raising action. Thus, the VCA should proactively advocate anti-cartel legislation to enhance the

enterprises' perception and awareness about the competition law. In addition, the lack of a leniency program leaves the VCA without a tool to effectively combat the cartels.

II. How Can Vietnam Effectively and Efficiently Detect the Cartels?

4th Question: Is Vietnam ready to accept a Leniency Program? And how can the program work effectively and efficiently in Vietnam?

The research found that there were three main reasons why the VCA did not introduce a leniency program since its enactment of competition law in 2004, despite many jurisdictions successfully applying as a tool for detecting more cartel activities: Firstly, the competition law was very new to Vietnamese enterprises and the priority of the VCA was to advocate the law and regulations on competition. Secondly, at the time of enacting the competition law, the administrative fines of 5 percent for price-fixing cartels did not deter enterprises from becoming involved in anti-competitive conduct. Additionally, the fines framework of a 'maximum of up to 5 percent of turnover' was too vague. The fine could consequently be interpreted as a negligible sum such as 0.001 percent. As a result, the VCA faced significant challenges in setting the discretionary amount for each case. Thirdly, cartel agreements were not subject to criminal punishment at that time, as a disincentive that would have forced cartel members to consider carefully the benefits and costs of cartel formation. Therefore, based on this background, it is clear that Vietnam was not ready to implement a leniency program when the VCL entered into force in 2005.

To date, Vietnam has been implementing the competition law for approximately 12 years. The capacity of the enforcing authority has been strengthened over this time. The VCA staff had undergone many training programs and capacity building projects supported by other competition jurisdictions such as Japan, Switzerland and the EU. VCA staffs have also had opportunities to share experiences with competition experts in forum of the OECD and the International Competition Network. In addition, the VCA staffs have also gained experience in dealing with many cartel cases and anti-competitive conduct over the past 12 years. Furthermore, in practice, the perception of cartels by Vietnamese enterprises has been enhanced considerably. The sanctions against anti-competitive conduct are now stricter, following the July 21, 2014, Decree No.71/2014/ND-CP to increase the administrative fines of cartels from 5 per cent to 10 per cent of

the turnover of previous financial year. Significantly, a criminal sanction against cartels has recently been introduced. Thus, if there were no leniency program, it would be extremely tough for the VCA to discover the complicatedly illegal cartels that cause harms to consumers and other enterprises' interests. Consequently, the anti-cartel enforcement should be one of the priorities of the VCA. To detect and combat cartels effectively and efficiently, Vietnamese competition enforcement should introduce a leniency program that is transparent and easy for the enterprises to access.

III. Why is there a Gap between the Regulation and Practice on the Concept of Cartels under the Vietnam Competition Law?

The dissertation discovered that there is a conceptual gap between the regulation and the practice of cartels, which is a unique point of Vietnam. Although the perception of the enterprises and the public about cartels has been enhanced after 12 years of competition law enforcement, the current regulations on the definition of cartels (Article 3(3) and Article 8 of the competition law) are not sufficient and comprehensive enough to detect the cartels.

This dissertation explored why Vietnamese lawmakers agreed to such a concept of cartels, and identified two main reasons. The first reason is that when Vietnam adopted the competition law in December 2004, it already had sufficient conditions to accept a competition rule and realized the benefits of the competition law. The first of these conditions was the significant economic growth rate that Vietnam had achieved since implementing *Doi moi* in 1986. The second condition was that the concept of a socialist-oriented market economy of the Communist Party of Vietnam has been quickly developed and applied it into the Vietnamese market conditions with a multi-forms economy, which has resulted in fierce competition among the economic forms. The third condition was that while there were some anti-competitive acts happening in the market, it was considered as essential in protecting the legitimate rights of enterprises and to ensure a fair business environment. The fourth condition was the strong support from received from the political systems to enact the competition regime. The fifth and final condition was that Vietnam was requested by WTO accession negotiation member states to enact the competition rules to control the monopoly and to eliminate the anti-competitive acts to create a level playing field for enterprises. As a result, the study found that while Vietnam (as a condition

to become a WTO member) and Japan (to dissolve cartels) were under the external pressure to enact the competition law, the EU has enacted its competition regime, as it is needed for the European economic integration to protect the common market.

The second reason why Vietnamese lawmakers agreed to such a concept of cartels is that while Japan and the EU follow a conduct and effect-based approach, Vietnam is applying the traditional form-based approach. With such an approach, the current concept of cartels is defined by listing eight types of cartel agreements together with a general indication of cartel harms, namely, 'reduce, distort or hinder competition in the market'. Since the perception of cartels was not understood sufficiently at the time of enacting the competition law, the definition of cartels doesn't include the basis feature of cartels that is mutual coordination. In addition, the dissertation also found that the definition of cartels under the EU Competition Law interprets both horizontal and vertical pricing agreements as set out in Article 101. Although the EU Competition Law does not provide clear-cut definitions of agreements and concerted practices, based on case law, the notion of 'agreement' has been interpreted in a broad sense and requires two essential elements: (i) the existence of a concurrence of will between at least two parties; and (ii) the implicit or explicit manifestation of such concurrence.[629]

Similarly, the Japan Anti-Monopoly Act also defined clearly the horizontal pricing agreements as unreasonable restraint of trade set out in Article 2(6) and the vertical pricing agreements as unfair trade practices set out in Article 2(9)(iv). However, unlike the JFTC and the European Commission, the VCA is silent about whether the cartel agreements cover a tacit agreement or not. As a result, the current cartels definition might miss the detection of cartels if their conduct is not listed.

IV. Suggestions for Improvement

While the Vietnamese legislators are discussing how best to amend the competition law after 12 years of enforcement, this dissertation suggests that the VCA should take into consideration the following recommendations based on the findings from a comparative analysis with the Japan Anti-Monopoly Act and the EU Competition Law.

[629] Case T-41/96, Bayer AG v Commission, [2000] ECR II-3383, para. 173.

Firstly, the definition of cartels should be comprehensive enough to cover all kinds of cartel. Accordingly, it should include three main features of cartels. First, the enterprises have an agreement or collusion. And the formality of that agreement that could be an explicit or a tacit agreement or collusion is also an infringement of cartel regulation. Second, that agreement is made by direct competitors mutually or in concert with other enterprises. The internal agreements between parent and subsidiary companies are not subject to the cartel agreements. Third, the objective of that mutual agreement is to restrict or to distort or to prevent competition in the market. In addition, the negative impacts on public interests should be also taken into consideration as one of the anti-competitive effects. As a civil law country like Vietnam without case law practice, a separate provision about the horizontal and vertical agreements could help the Vietnamese enterprises better understand and strictly enforce it.

Secondly, the VCA should apply the per se illegal rule with price-fixing cartels. It is important to reiterate that the per se illegal principle is not new to the VCA. The fact is that the VCA is already applying the per se illegal rule with three types of anti-competitive agreements: agreements to prevent or restrain new entrants from entering the market, agreements to exclude rivals from the market and bid-riggings. The nature and harms of bid-rigging are the same as the price-fixing cartels. Concurrently, the vertical pricing agreements that are classified as abuse of dominant position in the market set out in Article 13(2) are prohibited. Moreover, other jurisdictions also classify the price-fixing cartels and bid-rigging as hardcore cartels together with cartels to restrict output and market allocation because of their nature and harms. Furthermore, the cartel perception of the public has been enhanced and it is now commonly considered as a crime in Vietnam. The 2015 Criminal Code has introduced criminal sanctions of up to two years in prison.

Thirdly, in terms of other types of cartels, the Vietnamese lawmakers should consider to apply the effect-based approach to examine the harms and effects of cartels instead of relying on the threshold of market share only. Currently, more than 96 per cent of the total number of Vietnamese enterprise comprises small and medium enterprises, accounting for a small portion of market share in each business field. Significantly, the market characteristics are a mixture of monopoly and oligopoly. In an oligopolistic market, enterprises are interdependent and easier to

form a cartel that can be formed by an explicit or implicit agreement. Japan and the EU have utilized the approach of conduct and effects analysis as a useful tool to examine the anti-competitive effects, especially in an oligopolistic market. Therefore, the application of an effect-based approach by examining the harms of 'substantial restriction competition' could help the enforcement authority eliminate the anti-competitive harms of tacit agreements. Furthermore, the approach could help the VCA analyze cases in a more comprehensive way that does not only focus on the current competition restriction but also the potential restriction and market entry conditions for other possible market players. Although the suggested approach could create more burdens for the VCA to prove the harms of cartels, the practice is that the working capacity of the VCA has been improved. Moreover, if the organization of the VCA and VCC were restructured in the direction of a more independent organization, the newly suggested approach would be more practical.

Fourthly, anti-cartel enforcement should be one of the priorities of the VCA. To detect and combat cartels effectively and efficiently, Vietnamese competition enforcement should introduce a leniency program in a transparent way that is easy for the enterprises to apply for. This is because Vietnam has already applied stricter fines and criminal sanctions against cartels. Furthermore, the harmful perception of cartels has been enhanced as a result of 12 years of enforcement.

On top of the above-mentioned suggestions, the Vietnamese lawmakers should adopt a comprehensive competition policy, which promotes economic efficiency. Although Vietnam carried out the economic reforms more than 30 years ago and is now embarking on a socialist-oriented market economy, some economic sectors like railways, electricity and telecommunications are still monopolized by the SOEs, which are not operating effectively. In order to mobilize and allocate the economic and productive efficiency, there is a need to encourage competition among economic sectors by creating equal business opportunities for all enterprises. Furthermore, together with the development of the fourth industrial revolution (which is defined by the World Economic Forum as a combined power and technology of physical, digital and biological fields), greater competition could make the enterprises invest more into innovating new technology and solutions beneficial for the consumers.

Therefore, this dissertation's findings and suggestions lead to a number of benefits. They help the Vietnamese legislators have a better understanding about the nature and harms of price-fixing cartels. In addition, they also provide useful inputs to Vietnamese lawmakers when they discuss about the amendment of the current competition rules, especially the comparative study with the JFTC and the European Commission practices dealing with cartels. Furthermore, they contribute to the effective anti-cartel enforcement of the VCA.

As part of this dissertation, future research topics and limitations of this study need to be considered. Due to the harmful effects of horizontal price-fixing cartels and the need to explore a deep analysis about this type of cartel agreement, the dissertation could not cover the analysis of vertical pricing agreements. In addition, the cartel settlement procedure, which the EU is currently applying, is a very effective and efficient mechanism. Thus, future research should concentrate on these issues. Moreover, a deep analysis and a comparative study about how to examine the cartels in oligopolistic market should be a very interesting subject for further study. Additionally, during the process of writing this dissertation, while there are many English documents and databases about the EU Competition Law, English language documents about how the Japanese cases are very limited and ideally should be made available, as they would provide valuable lessons for countries like Vietnam to learn from.

Appendix: Some Significant Articles about Cartels under Vietnam Competition Law

Vietnam Competition Law no. 27/2004/QH11, enacted on December 03, 2004 pursuant to the 1992 Constitution of the Socialist Republic of Vietnam as amended and added to by Resolution 51-2001-QH10 passed by Legislature X of the National Assembly at its 10th Session on 25 December 2001;

Chapter I

GENERAL PROVISIONS

Article 1. Scope of governance

This Law governs practices in restraint of competition, unfair competitive practices, the order and procedures for resolution of competition cases, and measures for dealing with breaches of the laws on competition.

Article 3. Interpretation of terms

In this Law, the following terms shall be construed as follows:

1. Relevant market consists of relevant product market and relevant geographical market.

Relevant product market means a market comprising goods or services which may be substituted for each other in terms of characteristics, use, purpose, and price.

Relevant geographical market means a specific geographical area in which goods or services may be substituted for each other with similar competitive conditions and which area is significantly different from neighboring areas.

3. Practices in restraint of competition means practices of enterprises which reduce, distort, or hinder competition in the market, including practices that amount to agreements in restraint of competition, abuse of dominant market position, abuse of monopoly position, and economic concentration.

5. Market share of an enterprise with respect to a certain type of goods or services means the percentage of turnover from sales of such enterprise over the total turnover of all enterprises conducting business involving such type of goods or services in the relevant market or the percentage of turnover of inward purchases of such enterprise over the total turnover of inward purchases of all enterprises conducting business involving such type of goods or services in the relevant market for a month, quarter, or year.

6. Combined market share means the total market share in the relevant market of the enterprises participating in an agreement in restraint of competition or in an economic concentration.

Chapter II

CONTROL OF PRACTICES IN RESTRAINT OF COMPETITION

Section 1. AGREEMENTS IN RESTRAINT OF COMPETITION ARTICLE 8 AGREEMENTS IN RESTRAINT OF COMPETITION AGREEMENTS IN RESTRAINT OF COMPETITION SHALL COMPRISE:

1. Agreements either directly or indirectly fixing the price of goods and services;

2. Agreements to share consumer markets or sources of supply of goods and services;

3. Agreements to restrain or control the quantity or volume of goods and services produced, purchased, or sold;

4. Agreements to restrain technical or technological developments or to restrain investment;

5. Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract;

6. Agreements which prevent, impede, or do not allow other enterprises to participate in the market or to develop business;

7. Agreements which exclude from the market other enterprises which are not parties to the agreement;

8. Collusion in order for one or more parties to win a tender for supply of goods and services.

Article 9. Prohibited agreements in restraint of competition

1. The agreements stipulated in clauses 6, 7, and 8 of article 8 of this Law shall be prohibited.

2. The agreements in restraint of competition stipulated in clauses 1, 2, 3, 4 and 5 of article 8 of this Law shall be prohibited when the parties to the agreement have a combined market share of thirty (30) per cent or more of the relevant market.

Article 10. Exemptions for prohibited agreements in restraint of competition

1. An agreement in restraint of competition stipulated in clause 2 of article 9 of this Law shall be entitled to exemption for a definite period if it satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers:

(a) It rationalizes an organizational structure or a business scale or increases business efficiency;

(b) It promotes technical or technological progress or improves the quality of goods and services;

(c) It promotes uniform applicability of quality standards and technical ratings of product types;

(d) It unifies conditions on trading, delivery of goods, and payment, but does not relate to price or any pricing factors;

(e) It increases the competitiveness of medium and small sized enterprises;

(f) It increases the competitiveness of Vietnamese enterprises in the international market.

2. The order, procedures, and duration of exemptions shall be implemented in accordance with the provisions in Section 4 of this Chapter.

Section 2. ABUSE OF DOMINANT MARKET POSITION AND MONOPOLY POSITION

Article 11. Enterprises and groups of enterprises in dominant market position

1. An enterprise shall be deemed to be in a dominant market position if such enterprise has a market share of thirty (30) per cent or more in the relevant market or is capable of substantially restraining competition.

2. A group of enterprises shall be deemed to be in a dominant market position if they act together in order to restrain competition and fall into one of the following categories:

(a) Two enterprises have a market share of fifty (50) per cent or more in the relevant market;

(b) Three enterprises have a market share of sixty five (65) per cent or more in the relevant market;

(c) Four enterprises have a market share of seventy five (75) per cent or more in the relevant market.

Article 12. Enterprises in monopoly position

An enterprise shall be deemed to be in a monopoly position if there are no enterprises competing in the goods and services in which such enterprise conducts business in the relevant market.

Article 13. Practices constituting abuse of dominant market position which are prohibited

Any enterprise or group of enterprises in a dominant market position shall be prohibited from carrying out the following practices:

1. Selling goods or providing services below total prime cost of the goods aimed at excluding competitors;

2. Fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price goods or services, thereby causing loss to customers;

3. Restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development, thereby causing loss to customers;

4. Applying different commercial conditions to the same transactions aimed at creating inequality in competition;

5. Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services or forcing other enterprises to agree to obligations which are not related in a direct way to the subject matter of the contract;

6. Preventing market participation by new competitors.

Article 14. Practices constituting abuse of monopoly position which are prohibited

Any enterprise in a monopoly position shall be prohibited from carrying out the following practices:

1. Practices stipulated in article 13 of this Law;

2. Imposing disadvantageous conditions on customers;

3. Abuse of monopoly position in order to change or cancel unilaterally a signed contract without legitimate reason.

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