PROMOTING ECONOMIC DEVELOPMENT THROUGH SOUND COMPETITION POLICY

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Introduction

I would like to thank Chairman Hwang and the Taiwan Fair Trade Commission for inviting me to participate in this conference on the role of competition policy in social and economic development.

The goal of competition policy should be to protect competition – not competitors. Adam Smith observed more than two centuries ago in the *Wealth of Nations* that when individuals or companies are forced to compete, they will, in pursuit of their own self-interest, work harder. Through this process, weak competitors are eliminated, and the remaining firms produce better products at lower prices.

Protecting competition, and thereby promoting consumer welfare, helps to further economic growth. Thirty years ago, Robert Bork, one of the pre-eminent antitrust scholars in the United States, observed that: "Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation. Antitrust thus has a built-in preference for material prosperity. . . ."[1]

Today, there is increasing evidence of the connection between sound antitrust enforcement and economic growth. As one example, in the 2003-04

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[1]Robert H. Bork, *The Antitrust Paradox* 90 (1978).

Global Competitiveness Report published by the World Economic Forum, a professor at Harvard University in the United States, Michael Porter, reported on an analysis of micro- and macro-economic factors that contribute to a vibrant economy.[2] Porter's econometric analysis, perhaps unsurprisingly, led him to conclude that "the incentives and rules governing local competition show a strong relationship to national productivity," and that the "effectiveness of antitrust policy" is a "particularly potent" factor.[3]

Porter does not go into detail about the specific characteristics of antitrust policy in the countries he studied, but today I will highlight three particular principles that I believe are critical for promoting economic growth. ***First***, antitrust policy-makers should make it their top priority to investigate and put a stop to hard-core cartel activity such as price-fixing and market allocation. ***Second***, antitrust enforcers should be careful not to use competition laws to undermine intellectual property rights. Innovation drives economic growth, and competition laws that respect and protect intellectual property rights promote innovation. ***Third,*** enforcers should refrain from using their antitrust enforcement powers to serve non-antitrust goals.

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[2]Michael E. Porter, "Building the Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index," in World Economic Forum, *The Global Competitiveness Report 2003-04* (2003).

[3] *Id.* at 40.

Cartel Enforcement

Our Supreme Court has observed that cartels are the "supreme evil of antitrust."[4] Agreements among competitors to fix prices or allocate markets have no pro-competitive justification and are always harmful to consumers. Perhaps for this reason, Robert Bork has written that "price-fixing cases deliver more consumer welfare for the enforcement dollar than any other kind of prosecution."[5]

Accordingly, the Antitrust Division of the U.S. Department of Justice has declared cartel enforcement to be its highest enforcement priority.[6] Of course, we vigorously protect competition in the areas of mergers and other non-cartel conduct, but we give special emphasis to cartel enforcement. When it comes to non-cartel conduct, antitrust enforcers need to consider the possibility of falsely condemning conduct either that does not have any anticompetitive effect, or the potential anticompetitive effects of which are outweighed by efficiencies and benefits to consumers. A sound enforcement hierarchy helps to avoid deterring businesses from competing vigorously.

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[4] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

[5] Bork, *supra* note 1, at 406 (1978).

[6] *E.g.*, R. Hewitt Pate, Ass't Att'y Gen., U.S. Dep't of Justice, "Securing the Benefits of Global Competition," address before the Tokyo America Center 4-6 (September 10, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205389.pdf; Thomas O. Barnett, Ass't Att'y Gen., U.S. Dep't of Justice, "Message from the AAG," in *Antitrust Division Update* (Spring 2006), *available at* http://www.usdoj.gov/atr/public/216254.htm.

The Antitrust Division has had record success in cartel enforcement in recent years – both in terms of fines and prison sentences. And there is evidence that some cartels affirmatively exclude the United States market from their cartel agreements for fear of criminal prosecution in the United States. Our cartel enforcement is successfully deterring companies from joining cartels that would prey on U.S. consumers, thus ensuring that our consumers benefit from continued competition.

Intellectual Property

And now to intellectual property. In order to promote economic growth antitrust enforcers should be careful not to use competition laws to stifle innovation. Innovation drives economic growth, and to promote innovation competition laws should respect intellectual property rights.

Strong, predictable and enforceable intellectual property rights are critical for economic growth. Businesses cannot make efficient decisions about investing in research and development when their rights to what they develop are uncertain. And, if intellectual property protection is weak, firms will invest less in intellectual property in the first place.

How can competition policy help achieve the ultimate goal of predictable, enforceable IP rights? ***First***, a pro-growth competition law regime should respect

licensing freedom. Once a firm obtains intellectual property and establishes the right to enforce it, the firm can proceed to commercialize its invention. The firm may use the IP itself, it may license it to others, or it may even choose not to license or use the IP at all. A license can promote efficiency by permitting the IP owner to join forces with others to combine the IP owner's skill (invention) with the skills of others (for example, marketing, manufacturing and retailing). Recognizing this, the competition authorities of the world's three largest and most innovative economies all have concluded that licensing should be presumed to be procompetitive.[7]

More recently, we now understand that firms should generally be free to set royalties at whatever rate they choose, or unilaterally and unconditionally to refuse to license altogether, without fear of antitrust challenge. In fact, if a monopoly is lawfully obtained, whether derived from IP rights or otherwise, we do not object even to setting a monopoly price. High profit is the reward that encourages firms

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[7] *See* U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (Apr. 6, 1995) ("*IP Licensing Guidelines*"), *available at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm; Commission Regulation (EC) No. 772/2004, *On the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements* (Apr. 27, 2004) (*"Technology Transfer Block Exemption"*), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_123/l_12320040427en00110017.pdf; Japanese Fair Trade Commission, *Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act* (July 30, 1999), *available at* http://www.jftc.go.jp/e-page/legislation/ama/patentandknow-how.pdf.

to invest and innovate. In the words of an eminent American jurist, Learned Hand, "The successful competitor, having been urged to compete, must not be turned upon when he wins."[8] A similar economic logic supports the freedom of intellectual property owners to license at high royalty rates.

Second, antitrust enforcement in the IP arena should focus not on form, but rather on economic effect. In the past, rigid rules were adopted as shortcuts for analyzing whether a particular intellectual property licensing practice was an antitrust violation. Such rules were embodied in the United States in what was known as the "Nine No-No's," and in the EU in the original *Technology Transfer Block Exemption*. But both agencies came to find that their rules were too blunt to be used as effective tools in the fast-developing technology area, and more generally that they risked too many "false positives" – condemning behavior that in a significant number of cases is procompetitive and efficiency enhancing.

The U.S. agencies abandoned the "No-No's" approach and later replaced it with the1995 *IP Licensing Guidelines*, which focus on the competitive effects of licensing practices. Licensing restraints in the U.S. are to be evaluated by looking not simply at the form of a restraint but also at its effect in the marketplace, which requires consideration of factors such as the horizontal or vertical relationship of

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[8] *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

the parties, the concentration of the market, the responsiveness of the market to supply and demand changes, and the ease of entry by rivals. The EU made a similar major leap forward when its 2004 revised *Technology Transfer Block Exemption* dropped most of its rigid tests in favor of an effects-based approach. The antitrust agencies in Canada and Japan have also embraced an effects-based approach because there is consensus that the false positives of form-based systems can frustrate business, impede the economy, and waste scarce competition enforcement resources.

Keeping Antitrust Focused on Antitrust

My final point is that, in order to get the greatest benefit from an antitrust policy focused on consumer welfare, antitrust policy should not seek to foster other public policy goals, however laudable they may be. For example, when Robert Bork was writing thirty years ago, he observed that antitrust law in the United States erred by introducing non-antitrust goals such as "the survival or comfort of small business."[9] One example of this tendency was a case in which a merger of grocery store chains was held by the Supreme Court to be an antitrust violation even though the merged firm represented just 1.4% of the grocery stores and 7.5%

[9]Bork, *supra* note 1, at 7.

of grocery sales in the relevant market in Los Angeles.[10] The Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines – which were first prepared in part as a response to that grocery store decision – have turned away from using merger review to serve policy goals other than antitrust.

Our Supreme Court has also firmly held that antitrust law does not concern itself with non-competition objectives. For example, when the United States government challenged an engineering society's rule preventing its members from engaging in competitive bidding, the Court rejected as an antitrust defense the claim that the ban furthered a public interest in having safe bridges and buildings. The Court held that antitrust analysis "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[11] It noted that competition is "the best method for allocating resources in a free market," and that "all elements of a bargain," including "quality, service, safety and durability," will be improved through competition.[12] Legitimate policy concerns, such as safety standards, poverty reduction, or reducing pollution, are better and more efficiently dealt with outside the realm of antitrust law.

This view that the only goal of competition policy should be to protect

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[10] *United States v. Von's Grocery Co.*, 384 U.S. 270, 301-02 (1966).
[11] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).
[12] *Id.* at 695.

competition is spreading. The Organization for Economic Cooperation and Development has noted that "[a]mong OECD countries, there appears to be a shift away from use of competition laws to promote" non-antitrust objectives.[13] Instead, member countries are adopting a tighter focus on the "generally accepted 'core' competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency. . . ."[14]

Conclusion

I started with a simple point – that the purpose of competition policy should be to protect competition. Though this principle is abstract, the concrete principles I have articulated here, if applied properly, can be richly rewarding for consumers and society. Antitrust enforcement policies that focus on stopping cartels, promoting innovation with sound intellectual property policies, and avoiding non-competition-related goals will help foster innovation and otherwise enhance economic growth.

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[13]OECD Secretariat Note, *The Objectives of Competition Law and Policy* 3 (Jan. 29, 2003), *available at* http://www.oecd.org/dataoecd/57/39/2486329.pdf.

[14]*Id.*