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Chapter 3 - Focus

Cooperative Law Enforcement Responses and Drawbacks

: Embracing the Behemoth

Shuto Naritomi*

An important trend to consider when analyzing the battle between Leviathan and Behemoth in the competitive space is the use of "cooperative law enforcement". The definition of cooperative law enforcement can vary based on context and scope. For the time being, we will define it as the handling of suspected violations of law based on consultation and agreement between the authorities and the parties concerned and cooperation between the parties.

Cooperative law enforcement is a method that has traditionally been used in the United States in environmental policy and other areas [see Toshifumi Sowa, "Legal Theory of Administrative Law Enforcement Systems" (Yuhikaku Publishing, 2017), Part 3 et seq.]. This approach forces a review of the relationship between regulators and regulated companies based on a results-oriented approach that emphasizes the actual achievement of legal objectives rather than procedure such as formal legal standards and compliance in terms of administrative operations. For example, taking environmental policy, the following changes occur.

In the conventional enforcement system where companies are presented with standards to be complied with for environmental protection and corrective orders or monetary sanctions are imposed for non-compliance, regulated companies try to conceal their non-compliance, and regulatory authorities find it impossible to crack down on all violations due to budget and manpower. By positioning regulated companies not merely as subjects of regulation, but also as collaborative parties, the authorities can exercise more discretion and companies can take more initiative in solving problems, since the goal of environmental protection is essentially something to be achieved by society.

Such trends can also be observed in competition law. Both U.S. antitrust law and EU competition law, which are seen as leading the international competition law trends, have histories of employing cooperative law enforcement.

In the context of U.S. antitrust law, unique case handling methods include consent decrees or consent orders. Although there are differences in whether these procedures are judicial or administrative, they are

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both designed to handle cases in which the competition authority and the business agree on certain measures to eliminate the alleged violations and the resulting anticompetitive situation. In both cases, ① there is no official finding of a violation, nor is there an admission of a violation by the operator, and ② a certain amount of sanctions are provided in the event that the agreed-upon measures are not implemented.

For U.S. antitrust law, particularly in cartel cases, there is the possibility of criminal prosecution. In such situations, as you know, the case traditionally might be handled through Plea-Bargaining. In this situation, the defendant is required cooperation with law enforcement, including guilty pleas and compliance with law enforcement, based on contract with DOJ. In cases where corporate punishment is on the table, a system that allows for a Deferred Prosecution Agreement (DPA) in exchange for compliance with certain conditions, such as the establishment and implementation of a compliance program, may also be utilized.

On the other hand, a unique method of handling cases in relation to EU competition law is the commitment decision. A commitment decision legally obligates an undertaking to take measures to resolve competition concerns identified by the European Commission, if the Commission agrees to the contents of the application. In a case resolved through a commitment decision, the European Commission will conclude its review without making a decision on the existence or non-existence of a violation. If the undertaking fails to implement the agreed-upon measures, the Commission may impose fines or periodic penalty payment. Both U.S. antitrust law and EU competition law employ the system of cooperative law enforcement supplement or even surpass ordinary procedure, and in terms of the number of cases handled, cooperative law enforcement is used to the extent that it is positioned as the de facto standard case resolution method.

Additionally, in Australia, the Competition and Consumer Act 2010 has institutionalized court-enforceable undertakings, which are being used to a certain extent [see Kazuhiro Tsuchida, “Renaissance of Economic Law” (Nihon Hyoron sha, 2022), Chapter 13 et seq. for an introduction to this system and a discussion on cooperative law enforcement in competition law].

These systems generally are beneficial to both the authorities and businesses. From the perspective of the authorities, this means ① prompt correction of suspected violations, ② the ability to allocate limited resources to other cases, enhancing overall efficiency and deterrence in competition law enforcement, and ③ help to avoid litigation, such as requests for revocation of administrative penalties. From the business side, it also leads to ① no violation being found, ② resources for response being saved through expedited procedures, and ③ the risk of private lawsuits from third parties being reduced. These measures are sometimes applied in relation to digital platforms (hereinafter “DPF”) operators. For example, in the 2013 Apple E-Books case, a commitment decision was issued to refund money due to concerns about the abuse of a dominant market position as exploitative abuse in relation to the unreasonably high price of the product [E-Books (Case AT. 39847) Commission Decision C (2013) 4750 [2013] OJ C 378/25].

The above trends have also influenced the Antimonopoly Act of Japan. The 2016 amendment to the Antimonopoly Act introduced a commitment procedure (Article 48(2) et seq.) modeled after EU competition law, whereas the 2019 amendment to the Antimonopoly Act introduced a reduction system for cooperation in investigation (Article 7(5)) in addition to a surcharge leniency system. Under the surcharge leniency system, undertakings involved in bid rigging, price cartels, and other unreasonable restraint of trade (latter part of

Article 3, and sixth paragraph of Article 2 of the Antimonopoly Act) are reduced or exempted from surcharge payment if they report the facts and submit materials related to the violation alone without colluding with other businesses. Under the previous leniency system, the percentage of reduction or exemption was determined based solely on the order in which applications were submitted to the JFTC by business operators. As a result, there was little incentive for businesses to cooperate with the JFTC in a sufficient manner after filing an application.

However, with the introduction of the investigation cooperation deduction system, the degree of substantial cooperation with investigations is now considered when reducing the surcharge, thereby increasing the incentive for businesses to cooperate. Cases violating the Antimonopoly Act where unfair restriction of trade is subject to penalties (Article 89, etc. of the Antimonopoly Act), may be dealt with through criminal proceedings. But even such cases can now be handled under the consultation and agreement system (Article 350(2) et seq. of the Code of Criminal Procedure). Thus, in antitrust enforcement, cooperative law enforcement is being prepared and utilized, aligning with global trends.

In discussing the above recent trends in competition law enforcement, it is important to consider how to regulate anticompetitive behavior by the DPFs. For now, we would like to consider the issue of affirmative agreements in the context of DPF anticompetitive behavior, which, given the characteristics of the market, such as the rapid pace of technological development, requires a more rapid response than anticompetitive behavior in traditional business domains. In this sense, it may be more useful to handle the case through the commitment procedure than through ordinary procedures.

However, there are some concerns. One is the effectiveness of the commitments. Although the commitment procedure is characterized by cooperation and voluntary measures to be developed and implemented by the businesses concerned, it may be relatively less enforceable than ordinary violation decisions. For example, in the 2013 Microsoft case, despite Microsoft's commitment to provide a screen for users to choose their browser as a remedy for bundling concerns, the commitment was not fulfilled, and a fine was imposed [Microsoft (Tying) (Case AT. 39530) Commission Decision C (2013) 1210 [2013] OJ 2013/C 120/06].

This problem of relatively low enforceability may be even more acute in the Antimonopoly Act of Japan, because the Act does not provide for measures to ensure the fulfillment of commitments, such as the surcharge payment and periodic penalty payment like those under EU competition law. Furthermore, if the approved commitment plan is not implemented, the JFTC may rescind the approval (Article 48(5) of the Antimonopoly Act) and the case returned to the ordinary examination procedure (Article 48(4) and (8) of the Antimonopoly Act).

Another concern is the lack of precedent. As mentioned above, when a case is handled through the commitment procedure, the authorities merely state that there is a competitive concern, and no proof or finding of a violation is established. This creates a problem of unclear interpretative standards regarding the reasons for potential anti-competitive effects. This problem is more pronounced in the case of DPF violations. In other words, we know that new challenges may arise when considering whether a DPF activity has an anticompetitive effect. Therefore, in order to theoretically develop the application of competition law, it will be necessary to set certain limits on the handling of cases under the commitment system.

There may be problems in the relationship with third parties who are considered victims of anticompetitive conduct. In order for victims to recover their own damages, they usually file civil lawsuits for injunction or damages against acts in violation of the competition law, separate from the case resolution by the competition authorities. Under the Antimonopoly Act of Japan, the hurdle of proof for victims to prove their case is low because, after the Japan Fair Trade Commission (JFTC) implements a cease-and-desist order, the undertaking is liable for damages without negligence on the assumption that the JFTC has found a violation (Article 25(1) of the Antimonopoly Act). However, when a case is handled under the commitment system, there is no finding of a violation, which may result in a relatively higher hurdle of proof in a civil lawsuit by a third party. This issue requires further examination as to whether it can be justified as a way to provide relief to victims under the Antimonopoly Act [to learn more, see Shingo Seryo, "On the Commitment System and the Private Action/Damages System: An Introduction to EU Law" in Professor Takaji Kanai's 70th Birthday Celebration Essay Collection, "Issues and Theories of Contemporary Economic Law" (Koubundou, 2022), p. 515.].

Ensuring transparency and fairness in the process is also crucial. Under EU competition law, a market test must be conducted after the submission of a commitment proposal by the undertaking. This mandatory procedure facilitates the European Commission to check whether the content of the commitment is appropriate and proportionate to resolve competition concerns. However, under the Antimonopoly Act of Japan, there is no such mandatory public consultation process. This makes it difficult, compared to EU competition law, to reflect the opinions of third parties, including those involved in the case, and it may be questionable whether the process is sufficiently transparent and fair.

As discussed in this book (see Chapter 3, Part II), the search is on for a direction to discipline anticompetitive behavior by DPFs through preemptive "ex ante regulation" or public-private co-regulation, via the enactment of the Digital Markets Act and the Digital Services Act as global movement, as well as the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA) and other new legislation in Japan. However, as mentioned previously, the trend in competition law enforcement in general is already in the direction of enforcing the law with cooperation from business operators. In this sense, the competition law response to DPFs may be institutionally oriented toward what is referred to in this book as a "cooperative model".

Indeed, it is certainly important to handle cases efficiently and effectively with limited resources, and relying on the use of conventional enforcement in all cases involving alleged violations of competition law may not be conducive to achieving the objectives of the law. In addition, in areas such as digital markets, where traditional case processing is time-consuming and on the other hand the speed of evolution of related technologies is fast, case processing through coordinated law enforcement may work more effectively.

However, achieving efficiency in case handling through cooperative law enforcement still presents theoretical challenges. These challenges are deeply connected—sometimes even conflicting—with fundamental principles that modern states emphasize, such as "due process" and "the rule of law".

When we think about the battle of the Leviathan and Behemoth, we may also need to reexamine the relationship of regulations with the procedural legal principles that must be upheld, in addition to considering their practical effectiveness and efficiency.