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Implementing Competition Law in Asia: Using European and U.S. Experience

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I have had the great pleasure of participating with Prof. *Ulrich Immenga* at numerous conferences on competition law and its development. I have always benefitted enormously from his erudition and insights at such conferences, and his presence has always made them not only more valuable, but more enjoyable. I decided, therefore, to include in this *Festschrift* in his honor an article that is based on remarks made at a conference in which we both participated.[1]

Competition law experience in much of the world is marked by the relative ineffectiveness of competition laws. Competition law statutes proclaim norms of economic conduct, but often these norms have little, if any, effect on the conduct to which they are aimed. They do little to develop competitive markets. In the context of globalization, this issue is becoming increasingly important for countries in many parts of the world.

In two areas of the world, however, competition law has become an important factor in legal, social and economic development. I refer, of course, to the United States and Europe. In this brief essay, I look at the competition law enforcement tools and strategies used in these two areas and at the factors that have contributed to their effective use. My specific objective is to relate that experience to the issue of competition law enforcement in Asia.

I do not here suggest to Asian decision-makers that I know what they should do. The role I envision is much more modest. It is to comment on experience with the implementation of competition law in Europe and the US and to suggest ways in which information about that experience may be useful in the context of Asian competition law systems.

Asian states will develop their own competition law systems on their own terms and on the basis of their own institutions, traditions and goals. In making choices about the structure and operations of their competition law systems, however, they are likely to look to US and European concepts and institutions. There may be value, therefore, in looking at how such concepts and institutions have there been used in implementing competition law and assessing how Asian governments, competition law officials and attorneys can evaluate and utilize this experience.

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[1] This paper is adapted from remarks prepared for presentation at a conference on the development of competition law and policy in Asia held in Bonn, Germany, on May 17, 2003 and sponsored by the Friedrich Naumann Foundation.

The central theme of the analysis is that competition law principles have been implemented effectively in both the US and Europe, but that the respective paths to competition law effectiveness have been very different. The most prominent difference has been the central role that private enforcement has played in the operation of antitrust law in the US, whereas in the competition law systems of Europe, it has been either non-existent or of secondary importance. This contrast is fundamental to understanding differences between the European and US systems and their respective paths to competition law effectiveness.

This Article will first identify some of the basic issues relating to the implementation of competition law. It then looks at experience with implementing competition law in the US and in Europe. Thereafter I analyze the differences in those two arenas of experience and make some suggestions as to how that experience might be useful to decisionmakers in Asia.

I. Implementing Competition Law: Problems and Issues

What then are some of the key issues in implementing competition law? Note that I use the term „implement". My concern here is with the mechanisms used to encourage conduct consistent with competition law norms. The issue is usually framed in English as „enforcement," as in „How is competition law enforced?" For my purposes, however, that is too narrow. It may be a reasonably accurate way of looking at US experience, but it misses much in European and Asian experience. I use, therefore, the broader term „implement," which includes all means used to improve compliance with competition laws.

Two basic types of tools are used to implement competition law. One is administrative action; the other is enforcement through privately-initiated legal actions.

A. Administrative Mechanisms

Administrative mechanisms rely on the decisions of public officials to increase compliance with competition laws. The initiative of government officials is the central factor in their operation.

Administrative authorities have basically four means of achieving competition law compliance. One is direct action by the authority itself. Some administrative offices have the legal authority to penalize private conduct without the involvement of courts. Such administrative actions are usually subject to some form of review, and here the issue is the nature of the reviewing body. In some systems, reviewing authorities are administrative tribunals. In others, they may be specialized tribunals or regular courts.

A second mechanism requires that administrative officials operate through some form of court or similar tribunal. Here the administrative office is not entitled to impose sanctions itself, but must seek approval and/or implementa-

tion of its orders by a court. Only if it can convince the court to take action, can it directly influence private conduct. This again raises the question of what kind of tribunal makes such decisions. Administrative courts, specialized courts, and regular courts are all used.

A third implementation mechanism is administrative pressure. Here the officials seek to convince business decision makers to act in conformity with the law. The effectiveness of this pressure mechanism depends on a variety of factors such as the authority of the administrative authority to compel conduct, its resources, the likelihood that it will be successful, the status of the administrators and so on.

Finally, administrative officials can „educate" business leaders. In much of the world, there is little awareness of competition law norms, procedures and sanctions. Administrative officials can increased compliance by informing business decision makers of existing rules and their interpretation as well as by making them aware of the interpretations, plans and compliance tools of the authority.

The characteristics of administrative institutions are an important factor in the implementation of competition law. Here five questions are particularly prominent: Who are the officials – i.e., what is their status – political, intellectual and even social? To what extent are they specialized on competition matters? What penalties can be imposed? What are their incentives to act vigorously and impartially? And how independent are they of political influence?

B. Private Law Suits

Another mechanism for implementing competition law is private legal action. Here private rather than government initiative triggers legal consequences. As we shall see, this type of enforcement is most importantly found in the U.S. antitrust system. This presents issues similar to those just mentioned. The effectiveness of this mechanism will depend on factors such as which courts or tribunals are open for the prosecution of such suits, how independent the courts are of political pressure, what the obstacles are to such private suits, what types of procedures are used, and what remedies are available for enforcement.

We can now look at how some of these tools are used in the competition law systems of the U.S. and Europe.

II. Implementing United States antitrust law

A. Basic Mechanisms of Implementation

In viewing the competition law implementation mechanisms in the US, it is important to recognize that they are almost exclusively enforcement mechanisms in the narrow sense. Education has played a very limited role, and administrative pressure generally plays more secondary roles than it has played in many European competition laws.

The system includes both public and private mechanisms. Two agencies of the Federal government are authorized to enforce the competition laws. One is the United States Justice Department, which is part of the executive branch of government and subject, therefore, to political controls. The Justice Department must operate through the courts – i.e., it must bring an action in the regular courts for enforcement. Moreover, when it brings an action in court, it is basically subject to the general procedures of the courts. It may bring both civil and criminal actions, depending on the gravity of the conduct and other factors such as intent. The other enforcement agency is the Federal Trade Commission, which operates as an independent agency. It may issue orders directly to private decision makers, but its orders are reviewable by the regular courts.

The most distinctive feature of the US system is the prominence of private enforcement. In general, a business firm that has been harmed by anticompetitive conduct may bring a civil action in the regular courts, seeking either to restrain conduct or to be compensated for harm caused. Private enforcement in US antitrust law has several features that are important for assessing its operation. I here mention only one.

This is the concept of a private attorney general. The idea is that private suits should be encouraged as a means of making antitrust law enforcement more effective. It has long been a tenet of US antitrust law that public enforcement is not enough. The law provides incentives, therefore, for private actions. The most important of these is the provision of triple damages for violations of the antitrust laws. Where a plaintiff is successful in a law suit for compensation, the compensation awarded is trebled. This acts as a powerful encouragement for private litigation.

B. Creating the Antitrust Law System

Institutions and practices for implementing U.S. antitrust law have evolved over more than a century, but, remarkably, the basic institutional structure has changed little since the early part of the twentieth century. Similarly noteworthy is the lack of serious debate about many of those features. The fundamental enforcement features have often become part of the system with little discussion.

The first U.S. antitrust statute was enacted in 1890 in response to populist political pressure. Several large „trusts" (i.e., integrated groups of companies) were perceived to be using their economic power to force their competitors out of business, gain unfair terms from their suppliers, and raise prices to consumers. This led to widespread popular resentment in some parts of the country and demands for constraints on the anticompetitive activities of big business.[2]

[2] For leading discussions of the development of US antitrust laws, see *Hovenkamp & Hosking*, Enterprise and American Law, 1836–1937 (1991); *Kovacic & Shapiro*, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. Econ. Perspectives 43

In response to these demands, Congress enacted a simple statute („the Sherman Act") that made „restraints of trade" and „monopolization" violations of Federal law.[3] Both concepts were already part of the Common Law tradition of case law that had originated in England and that was also the basis of the US legal system.[4] They had been seldom applied in the nineteenth century, however, either in the US or in England. The Sherman Act merely incorporated those concepts into Federal law and attached penalties for their violation. It thus „codified" existing case law and gave the federal government and the federal courts authority to use existing substantive principles. It did not create new institutions, procedures or methods to apply the law. The result is that the operation of the antitrust system depends on general institutions and procedures of the legal system.

C. Enforcement and the Evolution of the US Antitrust System

The basic structure of the US enforcement system has changed little. The same vaguely-worded statute (the Sherman Act) is still the system's main text, and the mixture of private and public enforcement remains. What has changed has been the mix of public and private enforcement and the context in which those mechanisms have operated.

We can identify three phases in the development of the US antitrust law system that are important for analyzing US experience with implementation. During the first phase, which lasted until the Second World War, the role of antitrust law was often uncertain. In the early years, the Federal government was still relatively small, and the administrative tradition was weak. The FTC was created in 1914 to strengthen enforcement, but its impact was limited. At the end of the 1930s there were efforts to breath fresh life into the system, but it was not until after the Second World War that the role and significance of the antitrust system expanded rapidly.

The second period, which lasted for some three decades after the close of the Second World War, saw antitrust achieve exceptional levels of influence and importance. During this period, there was some new auxiliary legislation, but the primary factors in the expanded role of antitrust were the willingness of courts to expand interpretations of existing statutes and the willingness of law enforcement personnel to pursue such developments. These developments reflected shifting social and political values as well as an international situation which deterred investment in the US market. With the domestic market largely protected from foreign economic pressures and international competition, anti-

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(2000); *Letwin*, Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act (1981) and *Peritz*, Competition Policy in America, 1888–1992 (1996). See also *Fox & Sullivan*, Antitrust – Retrospective and Prospective: Where are we coming from? Where are we going? 62 N. Y. U. L. Rev. 936 (1987).

[3] 15 U. S. C. § 1 (2001).

[4] See *Letwin*, supra note 2, at 18–52.

trust laws were used to bridle the growing size and power of US domestic corporations.

During this period, antitrust enforcement, both public and private, became very active.[5] Government offices brought large numbers of important cases and pushed the courts to expand their interpretations of antitrust prohibitions. As they did, private actions also increased. The courts were generally receptive to more aggressive enforcement and tended to facilitate access to the courts. As a result of these changes, antitrust law became a major factor in much business decisionmaking.

The third stage, which began in the late 1970s and continues today, represents a significant change of direction.[6] In the 1970s, the economic and political conditions in the US and in the world were changing. As the US economy was exposed to increased international competition, judges and enforcement officials became more willing to assume that the competitive forces of the market would deter anticompetitive conduct. Moreover, a change in the political climate beginning with the election of Ronald Reagan in 1980 discouraged government intervention in the economy.

These changes in perspective encouraged the law and economics „revolution" in antitrust law.[7] This refers to the reorientation of antitrust thought generated by a group of legal academics who began to reshape the meaning of the antitrust laws, replacing the prevailing mixture of case law analysis and social and political values with analytical tools based on economic models. The central effect of this change was to reduce public enforcement of the antitrust laws and to reduce the scope of antitrust prohibitions, thereby discouraging private enforcement. Law and economics approaches to antitrust gained widespread academic and judicial acceptance in a relatively short period of time (about a decade).

D. Themes in Implementing US competition law

Several themes relating to enforcement emerge from this development. First, implementing the antitrust laws has been understood in the US as a matter of „enforcement." The educational and constructive functions of competition law have played marginal roles at best. Second, private and public enforcement mechanisms have conditioned each other's operations. For example, the existence and importance of private enforcement have meant that administrators have limited control over the development and application of the law. Third, the

[5] For classic discussions of these issues, see *Fox*, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140 (1991) and *Pitofsky*, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979).

[6] For discussion, see *Gerber*, Competition, in Oxford Handbook of Legal Studies (2003).

[7] See, e.g., *Bork*, The Antitrust Paradox (1978) and *Posner*, Antitrust Law: An Economic Perspective (6th ed., 2000).

fact that both public and private enforcement rely to a substantial extent on litigation in the regular courts means that they are dependent on the procedural rules of those courts and on the attitudes and perspectives of the judges on them. And fourth, US enforcement experience has changed, often abruptly, as a result of political and other factors, and this has engendered a degree of skepticism about the neutrality and predictability of the antitrust laws.

III. Implementing Competition Law in Europe

European experience in implementing competition law presents a very different picture.[8] In it, the goals and methods of competition law have evolved gradually over a century as national and then regional (i.e., European Union-EU) decision makers have sought to construct and protect market economies and develop and protect democratic political systems. Enforcement has been almost exclusively based on administrative conduct, with private enforcement playing a very limited role. The features of this model have evolved slowly, focusing at different times on different elements and forms of administrative activity.

A. Evolution of the European Competition Law Model

The evolution of competition law is a story that is less well-known than the US story and more complex. We need, therefore, to look at it in somewhat more detail.[9] The idea of using law to protect the competitive process was developed and almost enacted in Austria in the 1890s.[10] The key actors were a bureaucratic elite that sought to encourage economic growth and competitiveness, reduce antagonisms between workers and owners and among regional ethnic groups, and give itself a voice in economic developments. The system was conceived as administrative law. The basic idea was „we can give this assignment to a group of talented and enlightened administrators, who will interpret the provisions and develop an administrative practice to implement them". This also had the advantage of being relatively easy to do. These ideas were picked up and widely promoted by politicians in Germany before the First

[8] I will here refer to Europe as one system and to European experience as one experience. In a technical sense, this has not been true until very recently, but, as I have shown elsewhere, European competition experiences have been interrelated and interwoven throughout the development of each individual system. *Gerber*, Law and Competition in Twentieth Century Europe: Protecting Prometheus (1998; pbk, 2001).

[9] I recount this story in detail in *Gerber*, Law and Competition, Id. A summary is contained in *Gerber*, Europe and the Globalization of Antitrust Law, 14 Conn. J. Int'l Law 15 (1999) from which I have borrowed in preparing this article.

[10] I recount this development in detail in *Gerber*, The Origins of the European Competition Law Tradition in Fin-de-Siecle Austria, 36 Am. J. Leg. Hist. 405 (1992) and *Gerber*, Law and Competition, supra note 8, at 43–68.

World War, particularly by those representing smaller businesses. The German Kaiser was not willing, however, to allow interference with his plans for industrial and military development. After that war and the creation of a German republic, supporters of the idea succeeded in enacting an early form of competition law in the so-called *Kartellverordnung* (1923), which became a significant part of German economic and legal life during the Weimar period. The reasons for the interest in competition law were similar to those mentioned above for Austria, and it again relied on administrative decisionmaking.[11]

The issue of competition law was widely discussed in Europe, and by late in the decade there was widespread agreement about the need for competition law and about what its basic features should be. The basic model was that neutral and expert bureaucrats would develop and enforce general principles designed to prevent economic actors with significant economic power from using that power to harm the economic process.[12] After the end of the Second World War many European governments turned to competition law as a means of encouraging economic revival, reducing class antagonisms, undergirding recently rewon and still fragile freedoms, and achieving political acceptance of postwar hardships.[13] Virtually all of these competition law systems were based on the thought and experience of the interwar period. In most of them, however, competition law was imbedded in economic regulatory frameworks that impeded its effectiveness, and it was seldom supported by significant economic, political or intellectual resources. As a result, these systems remained a rather marginal component of general economic policy, and some have only gradually developed beyond that point.

In postwar Germany, competition law took a different and important turn. This change of direction was prepared during the nazi period by a group of lawyers and economists who secretly and often at great personal risk developed ideas of how Germany should be reconstituted after the war.[14] In their „ordoliberal" vision of society, economic freedom and competition were the sources not only of prosperity but also of political freedom, and thus law had to protect the competitive process. Moreover, in this view, competition law could accomplish that goal only if it operated primarily according to juridical principles and procedures rather than on the basis of administrative discretion.

This group of ordoliberals (often called the „Freiburg school" of law and economics) and economists explored carefully the possibility of using law to protect the process of competition and thus prevent both the debacle of the Weimar period – too little control of economic power – and the calamity of nazism – too much control of social life by the state. They sought a means of protecting economic liberty and competition from both the state and private accumulations of power.

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[11] For discussion, see *Gerber*, Law and Competition, supra note 8, at 69–114.

[12] For discussion, see Id. at 153–162.

[13] For discussion, see Id. at 165–231.

[14] For discussion, see *Gerber*, „Constitutionalizing the Economy: German Neoliberalism, Competition Law and the ‚New Europe,'" 41 Am. J. Comp. L. 25 (1994).

The central idea was that a polity should choose an economic order based on competition and economic freedom. This choice should be seen as the adoption of an „economic constitution", and legal processes should be used to protect this constitution in essentially the same ways that it is used to protect the political constitution. Competition law was seen as the central tool for protecting this economic constitution. These ideas had great influence on the development of the German Law against Restraints of Competition (GWB), which was enacted in 1957 as the first „modern" competition law in Europe. Although modified several times since then, its basic principles remain in effect.[15] Competition law in Germany is conceived as an essentially „juridical" system. Decisions are generally to be made according to well-developed judicial methods and procedures. It contains procedures to assure that the administrators of the Federal Cartel Office (FCO) conceive their task as primarily one of applying a statute according to juridical principles rather than pursuing short-term policy objectives. It provides for review by the regular courts of FCO decisions, and it even allows private suits in certain kinds of cases.

Competition law acquired great importance in Germany because it was associated with the establishment of an effective and socially responsible market economy. It was a key feature of the „social market economy", and as such it played a key role in some of postwar Europe's most impressive economic and political successes.[16]

But what about the rest of Europe? During the first four decades after the end of the Second World War, most European countries enacted competition statutes of the „administrative control" type. Most of them initially gave power to administrators to enforce relatively vague statutes. The decisions of these administrators were typically subject to legal control only for violation of administrative law principles. These systems have gradually grown in importance, as administrators slowly gained support for the idea of using law to protect the process of competition.

As these systems have developed in importance, however, they have also changed some of their basic operating principles. I call the process „juridification", and I use it to refer to the development of increasingly juridical modes of operation. European national competition law systems increasingly have restructured competition law decisionmaking from one based primarily on administrative discretion and policy judgment to one that is today far more based on the methodologically grounded application of legal principles. Accordingly, for example, administrative decisionmaking has been subjected to review by courts to an ever increasing extent. At the same time, administrators have been given increasingly powerful tools for combating competitive restraints.

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[15] Gesetz gegen Wettbewerbsbeschraenkungen, 1957 Bundesgesetzblatt [BGBl]I 1081 (July 27, 1957).

[16] For an overview of this development, see *Giersch* et al., The Fading Miracle: Four Decades of Market Economy in Germany (1992).

B. The European Union: Integration and Public Enforcement

The establishment of the European Economic Community in 1957 created additional roles for competition law and placed it at the center of postwar European history.[17] Competition law was charged with the task of eliminating obstacles to trade across national borders and creating the conditions for a successful and attractive „European" market. The European Commission and the European courts have fashioned a Community competition law that is generally seen to have been effective in accomplishing those goals. This duality of goals has been a central element in the evolution of competition law in the EU.

Competition law has been a central component of the legal system of the EU since its early years. It has been used to break down barriers to trade and establish the conditions for positive economic development. It has also been used by the European Commission and the European Court of Justice to move the process of intégration forward, especially during periods when the political impetus has weakened. Although the Community competition law system contains strong administrative elements, it is also imbedded in a juridical framework in which the two European Community courts play a central role.

The institutions of the European Union have relied on several implementation strategies to achieve these competition law goals. In the early years, and then again with each expansion of membership, education has been a central tool. Officials have understood their role to include extensive efforts to explain the content and theory of the substantive rules as well as the procedural avenues for bringing matters to the attention of the Commission and making complaints effective. This has been part of a broader conception of using competition law to construct and develop market economies in Europe and a common market for Europe.

If we look at enforcement issues specifically, EU competition law has been enforced almost exclusively by the European Commission. The Commission can order the imposition of fines and prohibit actions such as mergers. The two European courts can review Commission actions to determine whether they are in conformity with the treaty and whether proper procedures have been followed.

Private enforcement action has remained little developed in EU competition law. Originally, it was not even available, but it was made a possibility in the 1970s. In the 1970s legal barriers to private actions within European community law were removed, but such actions have remained rare. Those who consider themselves harmed by anticompetitive conduct continue to prefer to appeal to public enforcement authorities and to avoid filing private actions.

The so-called „modernization" of EU competition law will change this situation in fundamental ways. According to plans adopted in December, 2002, and scheduled to become effective on May 1, 2004, national competition authorities and national courts will become the primary mechanisms for enforcing EU

[17] See *Gerber*, Law and Competition, supra note 8, at 334–91.

competition law. These reforms were designed to deal with the enlargement of the EU from 15 to 25 members by reducing reliance on the Commission and increasing the role of private enforcement actions in local courts.

C. Themes in European Competition Law Implementation

European experience with competition law has thus featured a variety of implementation strategies, including education, administrative pressure, and increasingly strict enforcement. It has relied to a very large extent on public implementation mechanisms, with private enforcement remaining of marginal experience. Its successes have often been associated with growing attention to the effectiveness and predictability of legal process and confidence in the fairness and neutrality of administrators and courts.

IV. US and EU Experience in Implementing Competition Law: Value for Asia

This brief review of the development of implementation of competition law in the US and EU competition law highlights the choices for decision makers and suggests the likely relevance of particular implementation strategies. It provides a means of placing concepts and institutions in the context of their use so that they can be more effectively evaluated and related to the needs of Asian societies. It suggests that Asian decision makers can expect value from analyzing both EU and US competition law experience. In particular, however, it reveals the extent to which European experience with competition law may be particularly likely to have significant value for constructing and operating competition law in Asia.

Neither experience should be understood as a model to be adopted by Asia decision makers in its entirety. The circumstances and traditions of Asian countries differ too greatly from their analogues in the US and Europe to expect „copying" of an entire system to be useful. Value is likely to come only from careful analysis of specific aspects of that experience and adaptation to Asian circumstances.

A. Predicting System Effectiveness

It is also important to recognize that the effectiveness of implementation measures depends on many factors that constitute the context within those measures are taken. Some contexts are external to the legal system. These include, for example, the characteristics of the economy and its relationship to the global economy, the characteristics and policies of the state, and the cultural traditions and practices of the society in which enforcement is to be sought. Others are internal to the legal system and relate to factors such as the role of judges and the methods of legal interpretation.

In general, and all other factors remaining the same, the greater the similarities between the experiences and systems being compared, the greater is the potential value of the comparison. From that perspective, the experience of competition law in the US is noticeably more distant from that of Asian countries than is that of Europe. Several examples indicate the forms of difference. First, the US market is both larger and more open than are Asian markets, increasing the level of competition on most US markets. Second, US political experience differs dramatically from Asian analogues. The long history of relatively open democratic processes and the general lack of a controlling political elite are prominent factors here. Third, competition has very high status as a value in American culture, thus providing much support for the general goals of competition law. Finally, the legal system gives judges a higher status and a more independent role in interpreting and applying legal principles than judges typically enjoy in Asia.

European experience, in contrast, has some relatively close parallels in relevant areas. The economies of European countries have typically been small, the power of central bureaucracies has often been much closer to Asian experience than to US experience, and the methods of European legal systems share much in common with their counterparts in Asia, who frequently looked to European systems in fashioning their systems. The development of competition law in Europe has often centered on the dual goals of controlling powerful business entities and breaking down barriers to the development of competitive processes, and in this its goals share much with objectives often associated with competition law in Asia.

The broader issues of system conformity also make European experience relevant to Asia's situation. Asia's legal culture is based largely on the interpretation of statutory texts. These texts together with administrative, political and judicial interpretations structure and frame the operation of the legal system. The same is generally true in the legal systems of the European continent. While judicial and/or scholarly interpretations play far greater roles in some countries than they may in Asia, this text orientation and all the educational, cognitive and institutional practices that it brings with it represent the basic operational mechanism of law. Thus the materials that Europeans have had available in constructing their competition law systems are similar to those available today to Asia's decision makers.

B. Assessing Implementation Tools

We can now analyze the competition law experience of the US and European countries in relation to some of the specific factors that influence the effectiveness of implementation strategies. It is important to remember that interactions among individual factors – particularly, mutual support – often play important roles in the effectiveness of individual tools.

1. Education

Educating business decision makers about competition law principles is a prerequisite to effective implementation. Only where they know what the rules are can such decision makers conform economic conduct to those rules. In Europe, this implementation tool has played central roles, and, in the context of EU expansion, it remains a primary implementation focus of the European Commission. Administrators have been given the responsibility of carrying out this educational function, and they often have been given significant resources with which to carry it out.

In the US, the direct educational function has seldom, if ever, played a leading role in competition law experience. Some argue that the threat of possible legal action is an effective educational tool. The greater the risks of such legal action and the higher the probable penalties for violation, the greater are the incentives for business decision makers to inform themselves of competition law norms. This is a very different strategy than the administrative educational role, and it shifts the costs from the government to the firms, which must pay for the legal information and advice.

2. Enforcement Mechanisms

Enforcement tools are central to effective implementation. Not only must businesses know what the rules of a market economy are, but they also must have incentives to conform their conduct to them. Anticompetitive practices can be profitable, and thus there must be deterrents to engaging in them. We need here to distinguish between two factors in enforcing competition law. The first is obvious – legal authority to take actions such as fines against those who violate competition laws. At least as important, however, is the capacity to acquire information regarding violations. Here, again, European and US experience represent different approaches to the task.

US antitrust law relies heavily on private incentives and extensive procedural rights to compel the production of information (so-called „discovery rights"). Private litigation as a means of enforcement depends on the willingness of those who consider themselves harmed by anticompetitive conduct to institute and pursue litigation. Moreover, such litigation requires that they voluntarily provide extensive information to the courts, and procedural rules then provide extensive rights to the parties to demand information from each other. Administrative authorities have access to the same types of extensive tools to compel the production of information. Where the government uses criminal sanctions, its capacity to enforce the production of information is increased in some ways, but limited in others.

In Europe, in contrast, the strategy for getting information related to anticompetitive conduct has been primarily administrative. There are variations in the precise configuration of administrative remedies, but they typically involve administrative penalties for failure to produce required information. Experience

using this strategy has shown that its effectiveness often depends on the resources and status of the administrators seeking the information and on cultural acceptance of the propriety of volunteering economic information to state authorities.

Both strategies have proven effective, with US discovery rights producing particularly large amounts of information. The costs of this information are often, however, very significant, and they are distributed differently. In the US model, they are borne primarily by the litigants themselves, whereas in the administrative model, they are borne primarily by the enforcement authorities.

When we turn to the remedies that are available for use in deterring anticompetitive conduct, there are few differences in what is available between the US and Europe. Enforcement measures typically include fines and orders to discontinue violative conduct. In the US, criminal sanctions, including jail terms, are available, but they are used only in the most egregious cases.

The differences are located primarily in the ways in which the tools are employed. In the US, the regular courts are at the center of the picture. They are the final arbiters of both private and public enforcement measures. As a result, their procedures control the deployment of most enforcement tools, and the principles applied there must be applied on a generalizable and abstract basis. In Europe, administrative decision making is the centerpiece of the enforcement system, and this allows competition law enforcement to be influenced by other administrative goals.

3. Implementation Support

The availability of information and enforcement measures is of little value if they are not used to deter violations. Their use and deterrent effect depend, however, on various kinds of support for competition law principles and procedures. Private and public implementation measures call for different kinds of support.

Support for private enforcement mechanisms revolves around the role and status of courts and perceptions of how they operate. Where the courts are perceived as independent of political and other forms of influence (such as corruption), the willingness of firms to commence litigation tends to increase. In the US, confidence in the independence of courts has been a major factor in the relatively frequent use of private litigation. Cultural acceptance of the value of both competition and litigation have increased this usage rate.

European experience has shown, however, that independent courts and highly respected courts are often not enough to induce the use of private litigation to enforce competition law. Europeans have been resistant to the idea of engaging in private antitrust litigation.

Public implementation may also depend on support from the courts, but other factors also play important roles. One is the relationship of competition law to other goals and policies. Where competition law is supported by other policies, public enforcement tends to be effective. In Europe, for example, competition law has often been used to facilitate the reduction of government

controls by combatting market distortion by single firms or groups of firms that have recently enjoyed government support and/or protection. Similarly, competition law has often been seen as a way of spurring economic growth and reducing inflation, and this has generated support for competition law enforcement. On the other hand, where economic developmentalism and industrial policy are priorities, competition law often is not effective.

Political support is often critical. In the US, public enforcement was dramatically reduced in the 1980s by the Reagan administration, but at other times in US history, public support has strongly encouraged competition law enforcement. In Europe, public enforcement of competition law has been given major impetus by public support based on perceptions not only of its economic benefits, but also of its capacity to increase economic justice and distributive fairness. Competition law has often been used to assure the public that large corporations would not „abuse" their economic power by exploiting consumers or by unfairly impeding the competitive opportunities of rivals and potential rivals.

Finally, the support of administrative elites can be critical. Where administrators form such elites, they are often highly influential. Where they perceive competition law as a threat to their prerogatives, they tend not to enforce it vigorously. This has happened in some cases in Europe, and in such cases the administrative model of competition law has been valuable. It provides a means of overcoming resistance from such elites. In addition, it allows a higher degree of flexibility in adjusting to changing circumstances and policy requirements, and it allows for gradual development of expertise and confidence in the competition-protection project.

V. Concluding Comments

Lawyers, judges, administrators and business leaders in Asia can gain much by analyzing both US and European experience in implementing competition law. Those experiences have differed in many ways, but both have worked. Both have become influential factors in shaping business conduct. It would be a mistake to think that there is a „right way."

It is fair to conclude, however, that European experience in this area generally has closer parallels with the current situation of Asian countries than does US experience. At many points, Europeans have faced similar problems, and they have often had similar legal materials from which to fashion responses to them. Thus it may be particularly instructive for Asian decision makers as they consider the construction and development of competition law.

Decision makers in Asia will decide whether and how to use materials from foreign sources. They will form the goals, concepts, and institutions of their own systems by reference not only to their own perceived needs, but also by reference to foreign materials. This brief review suggests that careful analysis of European and US experience may be of significant value in that effort.