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Working Paper Series

Working Paper Number 09

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Competition Law and Public Policy Justification: the EU and Japan compared

Public policy justification is one of the main points which reveal a country's features regarding competition law. In an era of worldwide competition law enforcement, the need for converged thinking on basic elements of competition law is intensified. This article outlines key aspects of an EU/Japan comparative study on public policy justification and contributes to seeking for clues to enable mutual understanding.

Introduction

Competition laws have similar provisions across the world, but each country attributes different meanings to these laws. For instance, China has recently enacted their competition law and the provisions are similar to those of EU competition law or the Antimonopoly Act in Japan.[1] However, the laws in China are based on the socialist market economy thus inevitably contain different meanings from the equivalent laws in other countries.[2]

Public policy justification is one of the main points which reveal a country's features regarding competition law. In the first annual ICN (International Competition Network) conference, the concept of "public interest"[3] was discussed as a standard for evaluating non-competition concerns in merger regulation. As the former Competition Commissioner Mario Monti says,[4] "It is difficult to generalise about what kinds of public policy objectives should be considered legitimate or appropriate to a particular jurisdiction" and "it is also important for us to recognise that not all economies are at the same stage of development, and that not all countries are characterised by the same social challenges".

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1 Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (1947, revised 2005; "Antimonopoly Act").

2 For general information, see articles in "Symposium: The Anti-Monopoly Law of the People's Republic of China" (2008) 75(1) *Antitrust Law Journal*.

3 In general, "public interest" is interchangeable for "public policy" and "non-competition concerns". However, like the Antimonopoly Act in Japan, the phrase itself is often selected as the legal term in the laws and the margin of interpretation depends on that country, so this article chooses the word "public policy" or "non-competition concerns" alternatively.

4 Monti, Mario, *Analytical Framework of Merger Review Introductory Remarks*, ICN Inaugural Conference, Naples, September 28-29, 2002.

Therefore, to consider public policy justification sheds light, from the opposite angle, on two fundamental questions: "What is the concept of competition?" and "To what extent and in what circumstances does competition law apply?" in a particular jurisdiction.

This article outlines key aspects of an EU/Japan comparative study on public policy justification and contributes to seeking for clues to enable mutual understanding.

Although Elhauge and Geradin[5] allocate one section "Are Social Welfare Justifications Admissible?" in their work and make the EU/US comparative study by picking up several leading cases, there are few studies focusing on comparative analysis on public policy justification.[6]

In an era of worldwide competition law enforcement, the need for converged thinking on basic elements of competition law such as exclusionary abuses is intensified.[7] This study will parallel with this kind of contribution.

In addition, as Robertson points out, "There seems to be remarkably little literature on the precise meaning of 'restriction of competition' under Art 81(1)".[8] This issue is the other side of the coin of justification and to sophisticate the study on justification will also be meaningful for approaching this core concept of competition law.

The discussion will proceed as follows:

First, the need for sophisticated consideration on public policy justification will be observed.

Second, legal developments in the EU/Japan on the basic provisions and landmark cases on public policy justification will be reviewed.

Third, a comparative analysis will be made in terms of constitutional requests and enforcement.

Finally, this article will conclude with an outline of some implications for the future.

Need for Sophisticated Consideration on Public Policy Justification

In the EU, along with the development of EU law as a whole, the notion of "European Social Model" has been penetrated.[9] This reflects "constitutionalisation" of the EC Treaty, which means it originated from the European *Economic* Treaty but has absorbed a lot of non-economic factors such as employment, culture, social cohesion and so forth in its history.

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[5] Elhauge, Einer and Geradin, Damien, *Global Competition Law and Economics*, Hart Publishing, 2007, p150.

[6] For latest example, Alese refers to public policy issues, but only allocates the final chapter. Alese, Femi, *Federal Antitrust and EC Competition Law Analysis*, Ashgate Publishing, 2008, Chapter 17 (Limitations and Conclusions).

[7] See, US Department of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act, 2008 (Chapter 10: An International Perspective).

[8] Robertson, Beverly, "What is a Restriction of Competition? The Implication of the CFI's Judgment in O2 Germany and the Rule of Reason" [2007] *ECLR* 252. He does not deal with justification directly. Whereas Article 81(1) uses the phrase "the prevention, restriction or distortion of competition", this article uses "restriction of competition" alternatively.

[9] Joerges, Christian and Rodl, Florian, "'Social Market Economy' as Europe's Social Model?", *EUI Working Paper LAW*, No.2004/8, European University Institute, p.19. Spidla, Vladimir, The European Social Model, at "European Social Model" Conference, European Parliament, Brussels, February 14, 2008.

The newly signed Lisbon Treaty is to amend the basic provisions on competition[10] and insert the phrase "social market economy"[11] and strengthen the description of the services of general economic interest.

Many authorities are inclined to disregard these amendments,[12] but these developments give rise to the discussion on the relation between competition law and public policy from various angles.[13]

In addition, "Modernisation"[14] in EU competition law has much influence on the debate on justification.

From the perspective of enforcement, de-centralisation of competition authority is introduced by the Regulation 1/2003,[15] which necessarily accompanies a fear of incoherent decisions and judgements in substantive analysis in different Member States because of each unique public policy justification. Therefore, as consistent interpretation is urgently requested, in reality, we need to confront this reconciliation.[16]

In Japan, one scholar mentioned about ten years ago: "Today, the time is ripe for discussing the social legitimacy and Antimonopoly Act directly."[17]

Japan's competition authority, the Japan Fair Trade Commission (hereinafter "JFTC") has concentrated power on the Antimonopoly Act and its enforcement has tended to use informal "Warnings" and "Cautions", which do not need sufficient evidence to prove a violation while there is little room for private litigation. This yields insufficient development of legal rules and the JFTC's decisions are criticised as being related to easy categories. The JFTC has not been forced to state adequate legal explanations for its actions and the time has yet to come when the true debate on public policy justification is pursued.[18]

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[10] The phrase "a system ensuring that competition in the internal market is not distorted" in Article 3(1)g EC is to be transferred to the protocol.

[11] Concerning the historical background of the concept "social market economy", see, Gerber, David J., *Law and Competition in the Twentieth Century Europe – Protecting Prometheus*, Oxford University Press, 1998.

[12] European Union Committee, House of Lords, *The Treaty of Lisbon: an impact assessment Volume I: Report*, 2008, section 9.18.; The Law Society, *A guide to the Treaty of Lisbon*, January 2008.

[13] Freeman, Peter, *Is competition everything?*, A lecture given by Competition Commission Chairman Peter Freeman at a meeting of the Law Society Europe Group, 2008; Baquero Cruz, Julio, *Between Competition and Free Movement - The Economic Constitutional Law of the European Community*, Hart Publishing, 2002, p 85.

[14] "Modernisation" has two forms (procedural or institutional and substantial) and both are intermingled. Gerber, David, "Two Forms of Modernisation in European Competition Law" (2008) (31) *Fordham International Law Journal* 1235.

[15] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[16] From the start, the system was designed to expel public policy consideration. *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* - Commission Programme No. 99/027, COM (99) 101 final.

[17] Uchida, Kosaku, "Antimonopoly Law and Business Activities: Justifiable for the Social and Public Purposes", *The Hikone Ronsou*, 1999-2003 (in *Japanese*).; In the article, he defines the "social legitimacy" very widely, which appears to be the same as "public policy".

[18] First, Harry and Shiraishi, Tadashi, "Concentrated Power: The Paradox of Antitrust in Japan", *Law in Japan: A Turning Point*, University of Washington Press 2007, p 521. They say the situation that the powerful centralised enforcement does not necessarily lead to legal developments as the "paradox of antitrust in Japan".

However, the JFTC has recently changed its stance and issued many guidelines under the pressure of the industries and de-regulation initiative by the government. Those guidelines are published in cooperation with the regulatory authorities like the MIC (Ministry of Internal Affairs and Communications), the METI (Ministry of Economy, Trade and Industry) and so forth in the field of telecommunications, electricity.[19] Those guidelines reflect the deeper insight and more detailed analysis in public policy justification compared to the past papers owing to the helps and the pressures by the Ministries.

Broadly speaking, how to reconcile competition law with public policy is a common important theme in both jurisdictions today. This also reflects the fundamental elements of each competition law and to observe the situation comparatively would provide a better understanding.

In what follows, background developments and landmark cases will be examined from the EU and Japan.

EU Competition Law

(i) Background Developments

In the past, the maintenance of "economic freedom" and the integration of the internal market were stressed as the only main objectives of EU competition law.[20] But recently, the Commission tends to focus on economic efficiency and consumer welfare as a substantive sphere of "Modernisation".[21]

In the course of that, there has been much debate on how we should interpret Article 81 EC. Some scholars are favouring for "US rule of reason" style interpretation of "restriction of competition" in Article 81(1) EC for introducing economic analysis and strictly limiting the scope of the Article 81(3) EC.[22]

But the Court of Justice stresses the bifurcated structure of Article 81 EC and it is observed that Article 81(3) EC rather than "restriction of competition" should be used for justification.[23]

When it comes to the justification in Article 81(3) EC, it has been interpreted narrowly[24] and the Commission published several guidelines which stipulate that non-economic issues are not dealt with in Article 81(3) EC.[25] According to this interpretation, for instance, as to environmental policy, the Commission widens the concept of economic efficiency and

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[19] Harry and Shiraishi propose more co-operations among government agencies, ibid.

[20] Jones, Alison and Sufrin, Brenda, *EC Competition Law (3rd ed.)*, Oxford University Press, 2007, p 44. The German Ordoliberals had influenced the origins of European competition law. See, Prosser, Tony, *The Limits of Competition law*, Oxford University Press, 2005, p 24.

[21] Weitbrecht, Andreas, "From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law" [2008] ECLR 81. Gerber [1998], [2008].

[22] Korah, Valentine, An Introductory Guide To EC Competition Law And Practice, Hart Publishing, 2004.

[23] Case T-112/99 *Metropole Television (M6) v Commission* [2001] ECR II-2459, para.76.

[24] Kjolvye, Lars, "The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81" [2004] ECLR 566.; Commission Notice, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.

[25] For example, see Commission Notice, Guidelines on the applicability of Article 81 to horizontal co-operation agreements, [2001] OJ C 3/2.

appears to consider only economic factors by reason that the environment has an economic value.[26]

These developments lead to coherent and consistent interpretation in terms of "consumer facet",[27] but it was not the end of the story. The *Wouters*[28] case emerged and that case changed the course of the law in this area.

(ii) Landmark Cases

Wouters is regarded as a landmark case.

This case concerns the decision by the Netherlands Bar Association prohibiting the full-partnership between a law firm and an accountant firm to prevent a conflict of interest.

The Court of Justice says:

> "…not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) [Article 81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. *More particularly, account must be taken of its objectives*, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (…). *It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.*"[29] (emphasis by the author)

This case appears to decide the reconciliation between the non-competition objectives and "restrict of competition".

As Monti says, "This case provides a method by which an anticompetitive practice may be tolerated if it provides a necessary means to support a legitimate national policy, which may apply in cases of culture, or other national policies."[30]

This judgment has generated substantial interest and several interpretations have been submitted.[31]

One of the two main theories comes from four freedoms' justification, "mandatory requirements". This has grown out of the case law such as *Cassis de Dijion,*[32] which justifies

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[26] Specific case is the Decision 2000/475/EC *CECED*. See, Monti, Giorgio, *EC Competition Law*, Cambridge University Press, 2007, p 91. Other views are also submitted. Vedder stresses the importance of Article 6 EC (cross-sectional clause for environmental protection). See, Vedder, Hans, *Competition Law and Environmental Protection In Europe: Towards Sustainability?*, Europa Law Publishing, 2003.

[27] Komninos, Assimakis, "Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC", The University of Oxford, Centre for Competition Law and Policy, Working Paper(L) 08/05, 2005, p 11.

[28] Case C-309/99 *Wouters* [2002] ECR I-1577.

[29] Case C-309/99 *Wouters*, para 97.

[30] Monti[2007], p 110.

[31] Ibid; Komninos [2005]. As to Article 82 EC, similar interpretation is submitted. See Rousseva, Ekaterina, "The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?" (2006) 2(2) *Competition Law Review* 40.

the legitimate national rules even if the free movement of goods, person, service and capital are infringed.

The other theory is from competition scholars and the concept of "ancillary restraints" is introduced. It admits the inevitable anti-competitive effects from the legitimate regulations, but tries to narrow the inclusion of the non-competition concerns.[33]

In addition, the notion of constitutional evaluation has recently been submitted.[34] Its scope is similar to "mandatory requirements" justification in practice, but stamps a different label on the justification. It adopts a broader perspective than that the sole objectives of competition law have. This appears to extend the scope from the only *economic* rules by reference to "constitution".

Recently another case was added in the same context.

Meca-Medina case deals with the anti-doping rules by the International Olympic Committee, which restrict competition but are justified by its legitimate reasons.

This case takes the stance like the *Wouters* and the Court of Justice judges that:

> "Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, *account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives* (Wouters and Others, paragraph 97) and are proportionate to them.
>
> As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport."[35]. (emphasis by the author)

These developments show that reconciliation between competition law and public policy by the method like "constitutional evaluation" is needed to react against various complicated cases even if Article 81(3) EC justification is interpreted vaguely.[36]

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[32] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649. For general information, see Barnard, Catherine, *The Substantive Law of the EU – The Four Freedoms* - (2nd ed.), Oxford University Press, 2007, p 115.

[33] Whish uses the phrase "regulatory ancillarity"; Whish, Richard, *Competition Law* (5th ed.), LexisNexis, 2003, p 120. Faull and Nikpay use the phrase "public interest ancillarity"; Faull and Nikpay [2007], p 237. On the other hand, they use the term "commercial ancillarity", which means franchise agreements etc.

[34] Komninos [2005].

[35] Case C-519/04 P *Meca-Medina* [2006] ECR I-6991; Szyszczak, Erika, "Competition and sport" (2007) (32) *ELRev* p 95.

[36] This article focuses on the discussion on Article 81 EC, but several cases concerned with state prerogatives has already emerged. See, Prosser [2005], p 127.

Antimonopoly Act in Japan

(i) Background Developments

The Antimonopoly Act defines its objective that:

> "The purpose of this Act is, … to promote fair and free competition, … and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers."[37]

Based on this premise, two basic provisions stipulate that: "No entrepreneur shall effect private monopolization or unreasonable restraint of trade"[38] and "No entrepreneur shall employ unfair trade practices."[39]

The core concept of the term "private monopolization" and "unreasonable restraint of trade" in Article 3 are defined as the same[40] and "*contrary to the public interest*, *a substantial restraint of competition* in any particular field of trade" (emphasis by the author) [41] is the key description.

Historically speaking, public policy justification has been dealt with in the interpretation of "public interest". "Public interest" has been considered to be directly connected to the notion of free competition and common brief is that "public interest" is to maintain the free competition order itself and broader justification cannot be admitted.[42]

However, interpreted literally, the objectives of the Antimonopoly Act consist of economic and non-economic elements.[43]

In addition, the definition of "unfair trade practices" in Article 19 lacks the phrase "public interest" contrary to that in Article 3. But part of Article 19 is considered to prohibit similar conducts like Article 3, and if it is applied inconsistently, the result depends on the provision selected.

Therefore, how to reconcile the ultimate objective of Antimonopoly Act and how to interpret "public interest" coherently have been highly controversial in academy in the past.[44]

In those circumstances, several landmark cases have changed the course of the law.

(ii) Landmark Cases

Osaka Bus Association case[45] is the turning point. This enables us to make coherent interpretation on public policy justification regardless of the existence of the phrase "public interest".[46]

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[37] Antimonopoly Act, Article 1.

[38] Antimonopoly Act , Article 3.

[39] Antimonopoly Act , Article 19.

[40] Antimonopoly Law, Article 2(5), 2(6).

[41] In the following, this article uses the phrase "restriction of competition" instead of "restraint of competition".

[42] Negishi, Akira and Funada, Masayuki, *Japanese Antitrust Law* (3rd ed.), Yuhikaku Publishing, 2006 (in *Japanese*).

[43] Hayashi, Shuya, "Merger Regulation in the Antimonopoly Law", *Housei Ronsyu*, No.224, 2008, p 509. The article deals with the core concepts of Antimonopoly Law as a whole.

[44] Hayashi, p.515.

[45] *Osaka Bus Association* Decision, JFTC, July 10, 1995.

[46] Shiraishi, Tadashi, *An Introduction to the Antitrust Law of Japan* (3rd ed.), Yuhikaku Publishing, 2005, p 58 (in Japanese).

This case concerns the cartel on the rental bus minimum prices regulated by the government. As the actual prices are below the official minimum rate, its voluntary agreements are trying to stop the offenders and to increase the actual price much more, but those prices themselves are set below the official price.

In the decision, the JFTC states that in light of the ultimate objectives of Antimonopoly Act, this conduct is justifiable because this does not apply to "restriction of competition", instead of making use of the existence of "public interest" for justification.

This case is evaluated as deciding on the reconciliation between the non-competition objectives and "restrict of competition".

Two more similar cases follow this.

One is the *Air soft gun* case.[47] This case is related to the safety standard for airguns and its bullets and this standard forces a member to refuse to deal with violators.

The Court judges that "there is room for justification when the purpose of the voluntary standard setting is legitimate in the context of competition policy and its contents and measures are reasonable for achieving the objectives."

Another *SCE* case tells more specifically that,

> "… exceptionally, it should be judged that there is no restriction of competition when the conduct in question is not regarded as having adverse effect on competition scheme in terms of its object or necessity or reasoning as a means for its achievement." [48]

Against this trend, the reigning theory advocates that, considering the necessity of reading certain social and public purposes into the Act, the concept of "unworthy of protection by competition law" should be introduced.

This thinking resembles "ancillary restraints" in the EU and accepts public policy justification to some extent but narrows its scope. However, it might indicate the uselessness of the phrase "public interest" in the Act and pave the way for new interpretation.

What is more, one of the leading scholars, Matsushita, proposes a wider interpretation on public interest as a method for reconciliation between competition law and public policy. He states that *'contrary to the public interest'* principally means the contradiction against free competition but, exceptionally, reconciliation between the socially legitimate values and the restriction of competition makes it possible to support a legitimate social policy to prevail.[49]

These cases and theories represent the new way for interpreting public policy justification.

Comparative Analysis

As we observe, both jurisdictions have developed the standard of evaluating "restriction of competition" and widened the scope of public policy justification.

Of course, there are a lot of inherent differences between the Treaty and the national act. But both intellectually and practically, this comparison fosters the new perspectives for understanding the competition law in the era of worldwide competition law enforcement.

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[47] Tokyo District Court Judgement, April 9, 1997.

[48] *Sony Computer Entertainment (SCE)* Decision, JFTC, August 1, 2001(This case concerns copyright and antimonopoly law through pricing of game console).

[49] Mitsuo, Matushita, *An Introduction to Japanese Economic Law* (3rd ed.), University of Tokyo Press, 2002, p 81 (in Japanese). He refers to the past Competition Act in UK, which uses the "public interest" standard.

(i) Constitutional Request?

In a mixed economy, it is essential for us to reconcile competition with other values. Both in the EU and Japan, constitutional requests have been increased because to strengthen the enforcement of competition law only does not accommodate the complicated facts happening in the area where competition and non-competition factors are intermingled.

In general, competition laws have general provisions and the case law and the theories are building up interpretations. Those tend to follow the simple and strong reasoning and do not want to widen the scope because it will bring about vague results. Interpreting the present provisions flexibly, but consistently and coherently, needs a subtle handling, but is urgently needed now.

In the UK, the Competition Appeal Tribunal (CAT) tackles the similar complicated case under the Chapter I (parallel with Article 81 EC) and admits a difficult standpoint sincerely among the divided judgements.[50] As a result, it places much emphasis on the later decided case *Wouters*, instead of other cases based on Article 81(3) justification.

In Japan, Shiraishi proposes to break the conventional framework "Antimonopoly Act versus other laws" and locate "competition policy law" over Antimonopoly Act and other laws to accommodate various values including competition.[51]

This contribution would provide valuable insights and frames for creating a new approach.

(ii) Enforcement

Throughout this discussion, we can also acknowledge the importance of procedural or institutional reform for public policy justification.

In the EU, collegiality of the Commission's decisions is being re-evaluated because it can help to make a decision while considering the whole policies collectively.[52] Additionally, in the Member States, for example, the Office of Fair Trading (OFT) in the UK tries to introduce state aid rules into its competition policy scheme for comprehensive enforcement.[53]

These movements make the competition authorities prepare for the widened scope of competition law.

In Japan, historically speaking, the JFTC was called as "a watch dog that does not bite".[54] But the JFTC has recently introduced a lot of guidelines in cooperation with several Ministries. This mirrors not only the need for consideration on public policy but also for strong enforcement on the ground.

To observe the enforcement side would also highlight the implication for the future.

Concluding Remarks

As the Competition Appeal Tribunal (CAT) in the UK says, "competition law is not an area of law in which there is much scope for absolute concepts or sharp edges."[55]

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[50] *Racecourse Association / British Horseracing Board v OFT* [2005] CAT 29, para 167.

[51] Shiraishi, Tadashi, "Competition Policy and Government", *Government and Corporation – Modern Law series 8*, Iwanami Publishing, 1997, p 71.

[52] Freeman [2008].

[53] Office of Fair Trading, *Public Subsidies*, OFT705, November, 2004.

[54] Shogo Itoda, the former Competition Commissioner, "Competition in Japan's Telecommunications Sector: Challenge for the Japan Fair Commission", October 11, 2001.

[55] *Racecourse Association / British Horseracing Board v OFT* [2005] CAT 29, para 167.

Justification is one of the areas where it is so vague that we cannot grasp the whole picture under the rapid changes of the economic situation. The purpose of this article is to help to sketch the present and the future framework.

Along with economics advances more sophisticated analysis will be needed in the field of competition law.

The recent economic emphasis is on non-welfaristic features including procedural fairness, rights and so forth insisted mainly by the leading economist Amartya Sen.[56] For example, as Suzumura describes[57], procedural fairness of regulation versus market competition might be important factor in considering public policy justification in terms of non-welfaristic effects on consequences.

The CAT's statement will hold on for a while or for the future.

[56] As a comprehensive discussion, see, Sen, Amartya Kumar, "Democracy as a Universal Value" (1999) 10(3) *Journal of Democracy*, p 3, and so forth.

[57] Suzumura, Kotaro, Advances in Public Economics: Utility, Choice and Welfare, Springer, 2005, p 1.