

Unilateral Conduct Working Group  
Panel on the Assessment of Dominance  
April 14, 2008

Opening remarks of Randolph Tritell

Good afternoon. Our panel will discuss and compare approaches to the definition of dominance or substantial market power. As you know, this is an area on which not all of us in the competition community agree as to the proper approach. As a result, our work this year was very challenging. But the working group was up to the task, and has agreed on a set of recommended practices on the assessment of dominance or substantial market power that we hope will be adopted at our session on Wednesday morning.

Fortunately, we had some guideposts. As many of you are aware, the working method for the ICN groups with which I have been involved is to be guided in our work by the culture of the country that will be hosting the next annual conference, as reflected in that country's proverbs. This year, we found a rich tradition of proverbs in Japan. In the course of my remarks will take the great liberty of trying to share some of those with you and, with the indulgence of our hosts, including my very bad attempt at speaking a little Japanese.

First, our group was immediately made wary of the dangers of even getting into this topic when we learned that

Yabu o tsutsuite hebi o dasu  
By poking a bamboo thicket, one drives out a snake

I thought if we worked hard we would be rewarded, but then was a bit concerned when I heard the proverb,

Hone ori-zon no kutabire moke  
Break your bones and earn only exhaustion

So we knew that we would have to take some risks if we were to make progress – as the proverbs teach,

Koketsu ni irazumba koji o ezu  
You cannot catch a tiger cub unless you enter the tiger's den

So we took heart and were able to muster our strength, counting on the proverb,

Un wa yusha o task  
Fate aids the courageous

Our path to consensus was not a smooth one, but whenever time we stumbled, we were able to pick ourselves up again, taking inspiration from the proverb

Nana-korobi ya-oki  
Fall down seven times, get up eight

I thought it would be to our advantage to have assembled an impressively large group of agencies and NGAs to work together, and that there would be mutual benefit in sharing experiences. After all,

I no naka no kawazu taikai o shirazu  
A frog in a well does not know the great sea

But, then again, we had to be mindful of the dangers, as the proverbs tell us

Sendo oku shite fune yama ni noboru  
Too many boatmen will bring a boat up the mountain

Fortunately, our group had some of the finest boatmen, and I would like to take a moment to especially thank my co-chairs, first Felix Engelsing and then Kai Hooghoff of the Bundeskartellamt, and also my team at the FTC: Liz Kraus, Dina Kallay, Alden Abbott, Anna Chehtova, and Jurgen Schindler, and also our colleagues from the Justice Department, Ed Hand, Anne Purcell White, Greg Werden, and Paul O'Brien.

One of the challenges arises from the differences in cultures, levels of development, and legal systems that have produced different approaches to the analysis. In the beginning, we saw the reflection of the proverb,

Ju-nin toiro  
Ten men, ten tastes

Based on each jurisdiction's experience, they designed their own systems, illustrating the proverb,

Kani wa kora ni nisete ana o hour  
Crabs dig holes according to the size of their shells

Our large group of NGAs played a very valuable role in our group, but we first had to overcome some natural suspicions. Some of the NGAs represent firms that may be dominant, and felt that enforcement officials will too easily target large entities, on the theory that

Deru kui wa utareru  
The protruding nail will be hammered

and they were concerned that agencies that had power over dominant entities would be unable to resist using it, citing the proverb

Inu mo arukeba bo-ni ataru  
A dog that walks around will find a stick

The agencies, for their part, know that this is a difficult area of law to apply, and enforcement is susceptible to errors, even by experts like us – after all, as the proverbs teach,

Saru mo ki kara ochiru  
Even monkeys fall from trees

With that backdrop, we have a group today that reflects the diversity of experience and views of the working group. We will proceed in an interactive question and answer format, focusing on three key topics. The first is the role of market share alone in determining whether a firm is dominant or has substantial market power. Next, we will look at the other factors that most agencies consider in analyzing dominance. Finally, we will examine the role of presumptions and safe harbors based on market share.

Some of our NGAs were particularly concerned about the issue of presumptions, particularly when having a certain market share shifts the burden of proof to the firm. They seemed to be concerned that once there was a presumption, it would be hard to overcome, citing to us the proverb

Te ga ireba ashi mo iru  
When the hand is put in, the foot follows

We assured them that the agencies would hear out their arguments, but what could we say when they came back to us with this proverb,

Naku ko to jito ni wa katenu  
It is impossible to win over a crying child or a government official

With that in mind, we have a world-class group of government officials, as well as one former official, now an NGA. I think many of our panelists are well known to you and their full biographies are available on the conference website, so I will just briefly introduce them:

- David Lewis is the Chairperson of the South African Competition Tribunal
- Philip Lowe is the Director of the Competition Directorate of the European Commission
- Andreas Mundt is the head of the General Policy Division of the German Bundeskartellamt
- Ali Nikpay is the Senior Director of the Advisory, Policy, and International section of the UK Office of Fair Trading

- Akinori Uesugi, who has had a distinguished career at the Japan Fair Trade Commission, joins us today in his capacity as Special Advisor to the JFTC

- Terry Calvani is a former Commissioner of the US Federal Trade Commission and the Irish Competition Authority, and is now with the Washington, DC, office of the Freshfields law firm

To facilitate our discussion we have prepared a hypothetical scenario, which you will see on a slide, that panelists may use to illustrate their approaches. Some may refer to it, and others may address the issues directly. In the breakout sessions, we will have a more detailed discussion of the issues, and there will be a handout with a more elaborate version of the hypothetical that presents additional issues.

For each of the three topics, I will ask two members of the panel to be lead responders. They will speak for 5 minutes each, after which we will have 10 minutes of reactions from other panelists and further discussion among the panel. As the topics are interrelated, the discussion will probably not fall neatly into categories, but we will try to focus on the specific points. No one will speak too much, because we have learned that

Kuchi wa wazawai no moto  
The mouth is a cause of calamity

Let's begin our panel with a question to Ali about the role of market shares. Ali, how important are market shares to determining whether a firm is dominant or has substantial market power. How did the working group handle the issue in the recommended practices? Feel free to refer to our hypothetical, where you can explain how Alpha's share would affect our analysis of whether it is dominant.

Now I would like to ask the same question to David Lewis and see how his perspective, based on the South African experience, or more generally based on the challenges of younger agencies, compares with Ali's.

So we have agreement, as reflected in the Recommended Practices, that market share is a starting point, but some differences about how significant that starting point should be. But we all agree that at some point in the analysis, agencies have to look at other factors.

What are those other factors, and how should an agency weigh them, both against market share and relative to each other in a particular case, such as our MHA hypothetical. How do the recommended practices deal with this? What else would you want to know? Let's lead off with Philip.

Uesugi-san, what other factors would you look to, and how would they factor into the analysis?

Let's turn to the subject of presumptions and safe harbors. Should agencies form presumptions of market power based on market shares alone? If so, what should be their

significance? Should an agency form a presumption of dominance based on Alpha's market share? On the other side of the coin, should market shares form the basis for a safe harbor?

Andreas, how did the working group deal with these issues, and how would you think about them at the Bundeskartellamt?

Let's now turn to Terry for a perspective from a practitioner on the subject of market-share based presumptions and safe harbors.

I hope we have lived up to our charge from the JFTC to hold a lively debate, and that everyone's perspective on these issues has been enriched, or at least their appetite whet. We will have more opportunity to discuss the issues in greater depth in our upcoming breakout sessions. But now, let me turn the floor over to the President of the Conseil de la Concurrence, the Competition Council of France, Bruno Lasserre, to preside over our next panel.