ICR Law Center abuse of superior bargaining position seminar panel questions

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Q – Would you compare the regulatory regime, especially ASBP, in Korea with your own and/or other jurisdictions' regulation?

Comment:

The United States has no law at the federal level regarding "unfair trade practices" generally. At the federal level, the closest may be the Lanham Trademark Act §43, 15 U.S.C. §1125, and the Federal Trade Commission Act §5, 15 U.S.C. §45. Neither covers unfair trade practices generally.

Lanham Act §43 essentially establishes a cause of action for anyone who suffers lost sales or damage to business reputation as a direct result of another's false or misleading statements. The most common type of such statements is false advertising. The U.S. Supreme Court has noted that the Lanham Act, including §43, protects against unfair competition, based upon the common law tort of unfair competition that was "concerned with injuries to business reputation and present and future sales".[1]

FTC Act §5 prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce. There has been much discussion over what §5 covers that is outside the Sherman and Clayton Acts.

The FTC's 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act[2] states that §5 covers acts "that contravene the spirit of the antitrust laws and those [acts] that, if allowed to mature or [be] complete[d], could violate the Sherman or Clayton Act". The FTC set forth 3 principles that it will follow in determining whether an act or practice is an unfair method of competition under §5 that may not be within the scope of the Sherman or Clayton Acts –

1 – the public policy underlying the antitrust laws, that of promoting consumer welfare;

2 – whether the conduct has caused or is likely to cause harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and

3 – the FTC is less likely to challenge conduct as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm from the act or practice.

As for the other prong of §5 of the FTC Act, the FTC may conclude that conduct are "unfair acts or practices" only if "the act or practice causes or is likely to cause substantial injury to consumers which is

[1] Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. ___ (2014). See, 15 U.S.C. §1127 ("The intent of this chapter is to…protect persons engaged in such commerce against unfair competition…").
[2] https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf

not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition".[3]

Therefore, at the federal level, there are no laws that are cover unfair trade practices generally.

With respect to abuse of superior bargaining position in particular, the U.S. has no law that addresses that concept generally. The Robinson-Patman Act, 15 U.S.C. §13, might be considered a type of abuse of comparative advantage position law, with the comparative advantage position causing concern that of the downstream player. The Robinson-Patman Act prohibits price discrimination among similarly situated customers that might injure competition, the discriminatory provision of or payment for services, and inducing or knowingly receiving discriminatory prices.

However, the U.S. is a federal system, and U.S. states may and do enact laws that overlap or fill in gaps in federal laws, and/or are inconsistent with federal laws. Many states have enacted laws that address unfair competition that are similar to §43 of the Lanham Act.[4] Many have also diverged from federal law in continuing to apply the per se rule to resale price maintenance.[5] Thirty-five states have enacted Illinois Brick repealer statutes,[6] to make it clear that those states' antitrust laws allow indirect purchasers to recover damages for overcharges resulting from antitrust violations, contrary to the rule under federal law established by the Supreme Court in Illinois Brick Co. v. Illinois[7]. Beyond those general laws, many states also have specific laws that reflect concerns with superior bargaining positions.

Many states have laws regarding automobile dealerships and franchise relationships that reflect concerns similar to those that drive comparative advantage position laws. Franchises and automobile dealerships may be the 2 most common areas of sectoral regulation by U.S. states protecting the distributor relative to the manufacturer. California's Franchise Investment Law[8] and Vehicle Code[9] may be good examples of the genre.

Similar to Taiwan's Guidelines on Franchisor Practices, the California Franchise Investment Law requires registration with the state franchise authority that includes detailed financial statements by franchisors who seek to appoint franchisees in California and sets forth detailed disclosures that the franchisor must provide to potential franchisees. The required disclosures include information regarding the franchisor, fees, clauses that are unenforceable under California law, franchise terms, renewal, termination, transfer, dispute resolution and earnings claims. The law sets forth fraudulent, prohibited and unfair practices. It also requires a minimum time for proposed franchisees to review any contracts. The

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[3] 15 U.S.C. §45(n).
[4] See, e.g., New York General Business Law §349 http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:
[5] See, e.g., Michael A. Lindsay, Overview of State RPM, the Antitrust Source, October 2014 http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf.
[6] See, e.g., ABA Section of Antitrust Law, Indirect Purchaser Litigation Handbook 2d Ed (ABA Publishing 2016).
[7] 431 U.S. 720 (1977).
[8] http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CORP&division=5.&title=4.&part=&chapter=&article=
[9] http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=VEH&division=2.&title=&part=&chapter=6.&article=

California Department of Business Oversight has published Guidelines for Franchise Registration,[10] which provides detailed guidance to franchisors regarding their disclosure and registration obligations.

The California Vehicle Code contains detailed requirements as to notices and disclosures that automobile manufacturers must give to their dealers, the process of terminating or not renewing a dealer, the conditions for any modification of dealership agreements, and the relocation or addition of dealerships in a geographic area. The Vehicle Code also places conditions on an automobile maker's ownership or operation of dealerships in competition with independent dealers. California's New Motor Vehicle Board has published an Informational Guide for Manufacturers and Distributors,[11] which explains the requirements of the Vehicle Code for automobile manufacturers and distributors.

Therefore, while there is no general law in the U.S. regarding abuse of superior bargaining position, the concern exists and is addressed in many states for specific industries in which there is a conclusion that a superior bargaining position is common.[12]

Q – What do you think should be the mission of the regulatory regime of "unfair trade practice", esp. ASBP?

Comment:

From the perspective of the U.S. experience over almost 130 years of antitrust law and economic development, which may or may not make sense in the context of different histories or economic development and current economic situation, it is unclear to me that it is sound policy or practical to address under the rubric of "unfair trade practice" conduct that is neither unfair competition as covered in the Lanham Act nor unfair methods of competition under the FTC Act as enforced by the FTC.

Moreover, as Prof. HOU Liyang pointed out, the concept of abuse of superior bargaining position may subsume abuse of dominance, rendering meaningless provisions regarding abuse of dominant market position. As Prof. Hou also pointed out, everyone has relational market power some time. Superior bargaining power is relative to each transaction, thus making the determination for a given enterprise different depending on the counterparty involved in the transaction. This factor makes legal obligations unclear.

Acts that merely constitute normal, aggressive business negotiation could be considered abuse of superior bargaining position. However, aggressive negotiation can stimulate robust competition, and should be encouraged, not penalized. In addition, the focus on comparative advantage, which is distinct from dominant market position and focuses on relative bargaining power rather than on market power, may interject enforcers into commercial negotiations, which government is poorly suited for, and into normal market operations, which may impede normal market functioning. This would ultimately be

[10] http://www.dbo.ca.gov/Licensees/franchise_investment_law/pdf/310111UFDD.pdf
[11] http://www.nmvb.ca.gov/publications/manuf_guide.pdf
[12] Prof. D. Daniel Sokol pointed out that there has been growing resistance in the U.S. to some of these laws, fostered particularly by technological developments. The rise of Internet retailing has generated significant resistance to laws that protect traditional retailers. The efforts of Tesla Motors, Inc. to sell its electric automobiles directly to consumers in states that prohibit such direct sales have been widely publicized. These developments also highlight some of the costs and tradeoffs inherent in such laws.

detrimental to consumers and to the economy, as such a prohibition would likely affect most directly the most efficient and competitive firms. We would be handicapping success.

The current consensus in the U.S. is that the purpose of competition law in general is to promote consumer welfare through the competitive process.[13] A buyer that is able to use its position to extract more favorable terms from suppliers may in turn pass on the resulting savings for the benefit of consumers. But a law that penalizes the unilateral actions of such a buyer, or other entities, that otherwise lacks market power can not only lead to inappropriate government intervention into routine business decisions and agreements, but also increase the risk of chilling pro-competitive conduct. Such a prohibition on undertakings with a comparative, but not market dominant, advantage vis-à-vis their trading counterparties, may deter companies from doing business with small- or medium-sized counterparties, distributors or suppliers that the law ostensibly seeks to protect, thereby hurting economic efficiency and consumer welfare, as well as the small businesses that such a prohibition may be intended to protect.

There is also a danger that counterparties that are also competitors will mischaracterize benign actions to attack their rivals or trading partners and seek government intervention to enhance their bargaining position.

While goals such as "social justice" and "social balance" are important, it's unclear that they are goals that are best sought by an enforcement and/or administrative agency rather than the legislature. As Prof. D. Daniel Sokol pointed out, all policy decisions involve tradeoffs, and the question is which tradeoffs are acceptable. It is unclear that competition law is the optimal method to achieve the goal apparently sought by abuse of superior bargaining position provisions. Other policy tools may be better suited to achieve that goal with perhaps less cost in inefficiencies and distortions of the market.

It seems to me that some of the cases that Prof. Andy Chen described, such as in financial markets, could be better handled by mechanisms such as collective remedies. In other contexts, private contractual actions addressing potentially unequal relationships or transactions may suffice to protect businesses against abuses of a superior bargaining position.

Incidentally, Prof. Hou mentioned that China is likely to introduce provisions regarding ASBP in its Anti-Unfair Competition Law. The American Bar Association Sections of Antitrust Law and International Law submitted comments on that draft amendment to China's AUCL,[14] and my comments are consistent with those comments.

Q – What do you think Korea needs to do to improve the performance of the regulation?

Comment:

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[13] See, e.g., FTC 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act. As Prof. Sokol reminded, this consensus emerged only in the 1970s, possibly as a result of the confluence of evolving academic thinking and changes in the U.S. and global economies.

[14] http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20160324_china.authcheckdam.pdf

Again from the U.S. antitrust experience, economic history and economic structure, Prof Chen's suggestions of using the SSNIP test in certain situations, considering substitutability instead of non-deviatory reliance, and treating situations of purported SBP that was recognized pre-contract under contract or standard abuse of dominance principles, may offer promising approaches to improving the regulation of "unfair trade practices", particularly "abuse of superior bargaining position".

Another possibility would be to narrow the scope of what is considered "unfair trade practices" by adding limitations similar to those in U.S. law for "unfair methods of competition", or in the laws of other countries with prohibitions more closely analogous to Korea's law, to reflect the actual enforcement experience under those laws.

The same economic principles and analytical framework that support abuse of dominant position provisions could be applied to abuse of superior bargaining position provisions. Under this framework, when the conduct challenged as an abuse of superior bargaining position does not have an anticompetitive effect and instead results in enhanced efficiency and increased consumer welfare, it should not be deemed abuse of superior bargaining position. If there is to be any residual role outside the abuse of dominant position provision for the abuse of superior bargaining position provision, it should be limited to those circumstances in which multiple upstream suppliers are doing business with entities such as state-owned companies or government-sanctioned monopolies, or vice versa.

Another approach may be to focus on the industries and businesses where concerns seem to be concentrated and adopt laws such as franchise regulatory laws for those industries, establishing ex ante what is legal, rather than trying to determine ex post whether a superior bargaining position existed and was abused. This way, the remedy can be focused on where the problem appears to be, instead of being a universal medicine that is generally unnecessary except possibly in a few problem areas.

Ultimately I join in Prof. Chen's question: Should enforcement resources be devoted to improving the enforcement agency's skill in conducting the SSNIP test, or to enlarging the lists of factors that could be used to infer or mind-guess the existence of a non-deviatory reliance relationship?