
George J. Alexander
CONTROLLING CONCENTRATION: NEW JAPANESE AND PROPOSED AMERICAN ANTITRUST LAWS

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I. INTRODUCTION

Antitrust law is in a state of turmoil. The administration has appointed officials to the Justice Department who have viewpoints which differ radically from those held by prior prosecutors, as well as those developed in decided cases. Professor Baxter, now Assistant Attorney General for Antitrust, has expressed a disinclination to press anti-merger policy. In sharp contrast, some members of Congress press to expand the role of antitrust, both by challenging its present enforcement and by proposing legislation absolutely to limit the size of the country's largest corporations.

A related problem is also enmeshed in present uncertainty. The pricing policies of firms in oligopolistic industries have recently been brought under attack by a new "shared monopoly" theory. Prior law has, for technical reasons, been unavailing. Whether the present administration intends to pursue the theory further is unclear.

These two problems of concentration and imitative pricing patterns, present policy choices both for the United States and for Japan. This article undertakes a comparative examination of proposed solutions in the United States and a solution enacted in Japan.

Antitrust law is designed to promote a free enterprise economy. Consequently it generally satisfies its purpose when restrictions on competition are eliminated. Once such re-
straints are eliminated, free market economics are thought to govern. So long as one is satisfied with the general level of economic concentration in one's country, antitrust need go no further.

This suggested pristine model has been universally disturbed by national planning policy intruding on "free enterprise" rather than by attempts to press antitrust law to its limits. However, in the United States since the Clayton Act Amendment of 1950, and in Japan since the amendment to the Antitrust Law of 1977, antitrust law has appeared to grapple with the problem of corporate "bigness." Size is of concern even though it does not present a threat to a competitive economy in any given market.

II. SIZE AND OLIGOPOLY POWER

In its interpretation of antitrust law, the United States Supreme Court has repeatedly said that size alone is not an offense. The assertion is logically necessary to the structure of the antitrust laws when the laws are perceived simultaneously to promote aggressive competition and to anticipate the maximum benefit of efficiencies of scale. Without knowing the optimal size of a company, it is difficult to justify a position that size alone is offensive from an economic perspective.

1. To the author's knowledge, no one has attempted empirically to verify this rather obvious proposition. Much has been written, on the other hand, regarding the relative effectiveness of antitrust and direct regulation. See, e.g., W. Shepard, THE TREATMENT OF MARKET POWER—ANTITRUST, REGULATION, AND PUBLIC ENTERPRISE (1975).


4. Justice McKenna appears to be the first to have used the phrase in his majority opinion in United States v. United States Steel Corp., 251 U.S. 417, 451 (1920). It has been repeated many times, but by 1948, and in United States v. Griffith, 334 U.S. 100 (1948), the Court added it to the significant follow-up: "But size is of course an earmark of monopoly power." 334 U.S. 100 at 107 n.10.

5. As explained later, other policy considerations come into play in antitrust enforcement. Principal among these are the non-economic goals discussed later in the text accompanying notes. Some have argued that the maximization of consumer welfare should be the sole value guiding antitrust decisions. See, e.g., R. Bork, THE ANTITRUST PARADOX, 50-89 (1978). Whatever attractiveness this view might have, it is clear that since Learned Hand's landmark opinion in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1946), considerations other than consumer welfare have played an important role in the law's development.
For example, it may be true that the cost of capital in an industry, or the intricacies of manufacture, or the transportation costs of raw materials, all make it more efficient for a small number of producers to occupy the market than for the market to be in the hands of a substantially larger number. From an economic standpoint, oligopoly does not present a threat to competition unless additional factors are also present. It is of course true that oligopoly may be a way station to obtaining monopoly power. One of the member firms may decide, through predatory pricing for example, to drive the other from the market. Anti-monopoly law and restrictive trade provisions, however, already punish such behavior. A more intractable problem is presented by conscious parallel pricing. If firms, through price leadership or by careful unilateral adjustment to each others' prices, choose to establish higher than "competitive" prices, they presently escape antitrust censure so long as they do not collaborate. Section 1 of the Sherman Act requires duality: contract combination or conspiracy.

As a general matter, the two aforementioned problems, one resolvable under present law while the other is more problematic, are the major risks to competition created by oligopolies. Neither situation necessarily attends oligopoly. Nonetheless, merger cases have treated the creation of oligopoly power as itself anti-competitive without examining whether any specific anti-competitive acts exist.

A. Shifting Emphasis of United States Law

When the United States enacted the Sherman Act in 1890 and the Clayton Act following it in 1914, it appeared that the acts were principally aimed at prohibiting two kinds of economic behavior: conduct designed to limit competition (restraints of trade) and monopolization. Examples of the

9. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."
former were price fixing and the division of markets among competitors. The latter was usually exemplified by the obtaining of a monopoly by aggressive means. Thus defined, however, the impact of antitrust law on the economy at large tends to be fairly slight. As long as monopolies are defined in a way which requires control of more than three-quarters of the relevant product market, it is possible in most industries to avoid monopoly law by simply keeping several competitors in business.

Firms kept in an industry by sufferance or connivance may present only the facade of competition. If they were truly effective competitors, such firms would likely have remained in business without help. The need for help usually indicates that the company involved has higher costs than the helping firm. Because of those costs they are unable to compete effectively. The assistance they are furnished could moderate any remaining desire to challenge the benefactor firm's pricing structure out of gratitude if not sub rosa agreement.

Anticompetitive conduct is likewise usually easy to avoid and, consequently, its prohibition is not very disruptive. How-

Section 2, 15 U.S.C. § 2, provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

10. See, e.g., United States v. Topco Assoc., 405 U.S. 596 (1972); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1899), modified and aff'd. 175 U.S. 211 (1899). The list of prohibited conduct, of course, is much longer. And given the continued vitality of Chief Justice Hughes' description of the Sherman Act as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions," it will in all probability continue to grow. (Quotations from Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933)).


12. Just when a firm possesses a predominant share of a relevant market has not been mathematically stated by the Supreme Court, but 75% is a reasonable, and safe, approximation. Surely 80% seems to be beyond the threshold, (see American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946)), and less than 50% does not (United States v. Shoe Mach. Corp., 110 F. Supp. 295, 346 (D. Mass. 1953), aff'd per curiam 347 U.S. 195 (1954)). The Ninth Circuit has accepted 65% in Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976). The magic number will in fact vary "with the setting in which that factor is placed." United States v. Columbia Steel Co., 334 U.S. 496, 528, reh'g denied, 334 U.S. 862 (1948).

13. In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), Learned Hand notes, and discounts, Alcoa's argument that it had "positively assisted competitors" to avoid attaining monopoly power. At least in this instance, the "defense" failed. Id. at 431.
ever, there are several noteworthy exceptions. If it is an indefensible violation of antitrust law to try to prevent price gouging by the sellers of one’s own product,\(^4\) then such conduct may be avoided only with difficulty because gouging will result in reduced product sales.\(^5\) The idea that boycotts are violative as restraints of trade also raises a number of problems not easily resolved.\(^6\) In the main it is not necessary to restructure business to avoid collaborating on price setting. One does not have to abandon a competitive posture to avoid prohibited predatory conduct toward competitors. Most significantly, in taking this approach, large size, short of monopoly, does not by itself suffice to establish misconduct. Size is a factor, however, in merger cases.

Since the post-1950 antimerger movement, avoiding antitrust pitfalls has become much harder for large corporations.\(^7\) The 1950 antimerger law revision, with its congressional mandate to decrease economic concentration, was interpreted by the United States Supreme Court to provide the Department of Justice a great deal of latitude in dealing with growth and concentration.\(^8\) If Justice Stewart proved an uncertain prophet in saying the government always wins merger cases,\(^9\) he at least described accurately the success record of the government for a large portion of the Post World War II era.

While merger policy purports merely to forbid incipient

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15. Justice Harlan, dissenting in Albrecht, correctly pointed out the economic distinction between minimum and maximum price maintenance. 390 U.S. at 156. His argument that the latter should only be subjected to rule of reason scrutiny, however, was in vain. The clear rule of law is that a combination or conspiracy to fix maximum prices is a per se violation of § 1. Id. at 153; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).
17. Brown Shoe Co. v. United States, 370 U.S. 294 (1962), was the first case to reach the United States Supreme Court after the 1950 amendments. The quintessential statement of the purposes of the amendments appear in Chief Justice Warren’s opinion for the Court. Id. at 311-23.
18. Id.
20. Id.
monopolization or restraint of trade, it is the most available legal sanction for concentration. Concentration may certainly lead to monopolization and, of course, may not. So long as courts uphold the government’s theories for divining the future effect of present organization, a government bent on doing so can use antimerger policy to achieve greater economic pluralism. Cases from the post World War II period through the 1970’s are easier to reconcile on the basis of such political considerations than with regard to economic theory.

Ultimately, a reduction of the number of firm members in an industry will lead to monopoly. At that point, irrespective of efficiencies, competition will no longer be available as a direct check on pricing.\textsuperscript{21} The state must then deal with these monopolies in one of several ways. In some cases, the most appropriate response is to create a utility and to substitute public management for the force of competition.\textsuperscript{22} The classic illustration of this form of management is in the area of electric, gas, and telephone service. Another way of dealing with the problem is to insist on creating or recreating a competitor, or a number of competitors, thus reintroducing competition as a market force.\textsuperscript{23} American law has done both\textsuperscript{24} and has also applied the remedy to non-monopolies.\textsuperscript{25}

Concerns beyond restoring competition also play an important part in dealing with concentration. In \textit{United States v. Aluminum Co. of America (Alcoa)},\textsuperscript{26} Judge Hand, after disposing of the economic arguments militating against monopol-

\textsuperscript{21} This of course does not imply that the monopolists may not provide the best available consumer prices. They may do so, even without the compulsion of antitrust law, in self interest. That is, the optimal price for a monopolist may be lower than the price that would be competitively arrived at by less efficient firms. See generally R. Bork, \textit{The Antitrust Paradox} 163-97 (1978).


\textsuperscript{23} This is the usual decree when a consummated merger is deemed to have violated \S 7 of the Clayton Act. See, e.g., \textit{United States v. First Nat’l Bank and Trust Co. of Lexington}, 193 ATRR A-10 (E.D. Ky 1965) (order required merged banks to set up an independent competitor). Divestiture has also been a familiar remedy in monopolization cases. See, e.g., \textit{Standard Oil Co. v. United States}, 221 U.S. 1 (1911).


\textsuperscript{25} \textit{Associated Press v. United States}, 326 U.S. 1 (1945). It is significant that as a result of this case, the AP was forced to acquire more members, thus strengthening its dominant position in its industry.

\textsuperscript{26} 148 F.2d 416 (1945).
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oly, addressed political concerns and found them independently sufficient:

We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress, Senator Sherman himself in the passage quoted in the margin showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.²⁷

Judge Hand interpreted the law as rejecting concentration and requiring economic pluralism irrespective of cost. Alcoa did not directly repudiate the notion that size itself was no offense, but it did provide a rationale for considering the absence of small competitors to be objectionable.²⁸ The same rationale was stated by the Court in several other cases. Justice Douglas was its particular champion. He pressed his point in United States v. Columbia Steel Co.²⁹ In United States v. Griffith,³⁰ he opined that size provided the opportunity for abuse.³¹ In Standard Oil Co. v. United States,³² he was driven to dissent from an antitrust finding against Standard Oil of California for fear that Standard would resort to forward vertical integration which would eliminate small service stations from their markets.³³

27. Id. at 428.
28. "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Id. at 429 (emphasis added).
30. 334 U.S. 100 (1948).
31. Id. at 107 n.10.
32. 337 U.S. 293 (1949).
33. Justice Douglas was willing to accept requirements contracts even though "the situation is not ideal," because it would at least preserve service stations "as small business units." He feared the alternative:

The elimination of these requirements contracts sets the stage for Standard and the other oil companies to build service station empires of their own. The opinion of the Court does more than set the stage for that development. It is an advisory opinion as well, stating to the oil companies how they can with impunity build their empires. The formula suggested by the Court is either the use of the "agency" device, which in practical effect means control of filling stations by the oil companies (cf. FTC v. Curtis Co., 260 U.S. 568 (1923)), or the outright acquisition of
Similarly, Justice Frankfurter, in *Standard Oil*, was willing to accept a function of size as a sufficient guarantor of anticompetitive effect of exclusive dealing arrangements, which the Court held otherwise possibly unobjectionable, in accepting the lower court's quantitative substantiality standard. He suggested that the finding of large dollar volume in sales might be as sophisticated a standard as courts could manage.  

The antimerger cases are murkier in their goals. The Clayton Act was designed to reach Sherman Act violations in their incipiency. Consequently, it seems logical that courts should declare illegal, under the antimerger provisions, acts which clearly were not yet full blown restraints of trade, and certainly not yet monopolies. Actually, though, it was not until the 1950 technical amendments to the Clayton Act that the Court took a broad view of the use of antimerger provisions to halt concentration. 

The merger theory purports to deal with corporate acquisition where the effect of the acquisition is likely to create a monopoly or otherwise to restrain trade. In theory, merger policy is consistent with restraint of trade policy. In practice it is not. The United States Supreme Court has upheld merger prosecutions on the grounds that the Clayton Act was designed to reach acts in their incipiency which, when full blown, violate the Sherman Act. Of course, prediction is difficult in general and specifically difficult in economics. None-

them by subsidiary corporations or otherwise. See United States u. Columba Steel Co., supra. Under the approved judicial doctrine either of those devices means increasing the monopoly of the oil companies over the retail field.

*Id.* at 320.

34. 337 U.S. at 310.


36. As passed in 1914, the Clayton Act forbade only the acquisition of stock in another company, where the effect might be to substantially lessen competition or tend to create monopoly. Act of October 15, 1914, ch. 323, § 7, 38 Stat. 730 (codified at 15 U.S.C. § 18 (1976)). Given the variety of ways in which corporations are able to reorganize into a single unit, it was not at all difficult for companies to evade the law's prohibition. See, e.g., United States v. Celanese Corp. of America, 91 F. Supp. 14 (S.D. N.Y. 1950) (asset acquisition not covered by § 7). The Celler-Kefauver Act of December 29, 1950, ch. 1184, 64 Stat. 1125, (codified at 15 U.S.C. § 18 (1976)) broadened the scope of § 7 to prohibit direct and indirect acquisitions of the "whole or any part of the stock or other share capital" or "any part of the assets of another corporation" when the requisite anticompetitive effects were present. *Id.*

37. See supra note 19 and accompanying text.
theless, if one seeks, for example, to find the ability to monop-
olize in a five percent concentration of the market, one must have great confidence in the ability to forecast since having one-twentieth of an extant market rarely, by itself, suggests imminent monopoly power. Nor are twenty firms inherently likely to engage in joint activity such as price fixing which would be anticompetitive. More significantly, perhaps, if they did engage in joint activity or successfully monopolized, they would then be vulnerable for their accomplished acts. The number of instances in which firms with five per cent market control have emerged monopolists or engaged in price fixing behavior is necessarily quite small.

Prediction permits finding future problems that are bel-
ied by the present actions. Justice Stewart pointed out in United States v. Von’s Grocery Co., for example, that the available evidence demonstrated the relevant grocery merger was procompetitive when it occurred; nonetheless, the Court found the merger to be anticompetitive because of its future consequences.

The routine practice of the Supreme Court was to con-
firm the Department of Justice’s selection of defendants. As a result, even the fairly broad potential of the incipiency stan-
dard was enhanced by market definitions that appear difficult to explain, except as being conclusion-oriented. One may puzzle, for example, how the Court found aluminum conductor to be the relevant market in Rome Cable by blithely amalgamat-

38. In Brown Shoe Co. v. United States, 370 U.S. 294, Chief Justice Warren was willing to do so. He cited government figures which purported to show that the Brown-Kinney Merger would give the combined companies in excess of 5% of the market in “one of the relevant lines of commerce” in 118 cities. The Chief Justice continued:

In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5% control were now approved, we might be re-
quired to approve future merger efforts by Brown’s competitors seeking similar market shares.

Id. at 343-44.

39. The economics of cartels is ably summarized in a trilogy of articles appear-


41. See 384 U.S. 270, 301.
ing extant markets.\textsuperscript{42} In this regard, it is difficult not to recall Justice Stewart's comment that the only consistency is that the government always wins.\textsuperscript{43}

Justice Stewart disproved his own prediction, however, in \textit{United States v. General Dynamics Corp.}\textsuperscript{44} in which the Court reviewed the acquisition of some coal mines by the defendants.\textsuperscript{45} Justice Stewart, writing for the majority, asserted that the coal supply acquired was presumed to be finite and nearing the limits of its effect in the distant future (and there certainly was none in the present). The dissenters strongly objected to the Court's refusal to follow the time-honored method of first determining product market and percentage control.\textsuperscript{46} Apparently they did not find it strange to urge that the methodology for determining anticompetitive effect was to be preferred over a finding of effect.

Lest one conclude that the dissent in \textit{General Dynamics} was acting in a peculiar manner, one should note that the antimerger law had become a device for controlling concentration irrespective of its effect on competition. In that respect, the dissenters were acting consistently, given General Dynamics' size.\textsuperscript{47} From the standpoint of reaching the economic goals

\textsuperscript{42} United States v. Alcoa, 377 U.S. 271 (1964) [hereinafter cited as \textit{Rome Cable}]. Professor Sullivan describes the Court as acting on "the exasperatingly irrational proposition that any combination of submarkets could also constitute a relevant product market." L. SULLIVAN, \textit{HANDBOOK OF THE LAW OF ANTITRUST} 608 (1977).

\textsuperscript{43} See 384 U.S. 270, 301.

\textsuperscript{44} 415 U.S. 486 (1974).

\textsuperscript{45} The Material Service Corp., a producer and supplier of building materials, concrete, limestone and coal, had acquired a controlling interest in United Electrical Coal Companies when it was acquired by General Dynamics. The government claimed that the merger would substantially lessen competition in the production and sale of coal in either the State of Illinois only, or in an alternate geographic market consisting of Illinois, Indiana, and parts of six other states. The district court held against the government on the grounds, \textit{inter alia}, that United Electric's coal reserves were too low to make them an effective competitor even if they remained a separate entity. The United States Supreme Court, in a 5-4 decision, affirmed. \textit{Id.}

\textsuperscript{46} The district court rejected the government's proposed product market (coal alone) and instead defined that market to be "energy," including gas, oil, uranium and other fuels. United States v. General Dynamics Corp., 341 F. Supp. 534, 556 (N.D. Ill. 1972). Dissenting, Justice Douglas took issue with the lower court's reading of United States v. Continental Can Co., 378 U.S. 441 (1964), which was relied on to support the broad definition. Douglas read \textit{Continental Can} as requiring the court to consider the coal submarket as the product market even though a broader "energy" market might in fact exist. 415 U.S. at 513-17.

\textsuperscript{47} There is scarce mention of General Dynamics, size in the Court's opinion, but it is described as "a large diversified corporation." 415 U.S. at 489.
of the statute, however, their position is difficult to justify.

In *Brown Shoe Co. v. United States*, the existence of a trend toward concentration in shoe retailing was viewed by the Court as a significant reason to prohibit the Brown-Kinney merger. Further, relatively small incremental shares of the market have been found sufficient to prevent mergers of large companies with other firms in their fields. Companies have also been denied entry into new markets through merger when it was found that alone they might be a potential competitor.

In all of these cases the Court's rationale has been that the arrangement, when full blown, would constitute a monopoly of the industry in question. Courts have denied that antimerger legislation is aimed at minimizing concentration independently of its effect on competition in a given market. It is, in other words, competition, not competitors (to use that classic description of the dichotomy) that is protected. Nonetheless, the forceful language only masks the true ambivalence of courts to reveal whether it is the competition or the competitors that are the true object of their action.

The antimerger provisions thus provide an aspect of established American antitrust law in which size appears to lead to harsher treatment, if not necessarily a finding of illegality. Even where size is tolerated in non-merger cases, courts often

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48. 384 U.S. 270, 301.
49. In *Alcoa (Rome Cable)*, 377 U.S. at 280-81, the Court was willing to prohibit the merger between Alcoa and Rome Cable even though there would be only a 1.3% addition to Alcoa's share of the relevant market.
51. "There is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *Id.* at 577. *See also* United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).
53. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated the occasional higher costs and prices that might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. *Id.* at 344. Four years later, Justice Stewart's dissent in *United States v. Von's Grocery Co.*, 384 U.S. 270, 282 (1966), accused the Court of turning its back on this basic principle. Justice Stewart, however, apparently ignored all but the first sentence of the above quotation.
impose obligations, in the asserted interest of competition, upon those who possess market power which it would not generally apply to others. It seems equally plausible that the decrees are directed at the protection of competitors since courts rarely inquire as to the economic vigor and, hence, competitive potential of those protected. More clearly, the boycott cases express a concern for the abuse of the power of size that does not have any necessary relationship to an effect on competition.

A similar concern is expressed in the tying cases which prohibit the transfer of market power from the market in which a firm is dominant to a market in which it is subject to competitive forces. Exclusive dealing provisions tend to make the same distinction: legality turns on the extent to which the buyer, rather than the seller, is being served by continuous supply.

Finally, and most importantly, despite private treble damage action provisions, the principal thrust of antitrust law has come from government action. The government has usually selected large firms for prosecution. In a manner almost like an administrative agency, the Justice Department has brought pressure on the largest firms and left small firms alone.

In all of these respects, therefore, concern over concentration has been given silent recognition by the courts. Nonetheless, many feel that these measures have inadequately controlled concentration. There is, consequently, a substantial ongoing debate concerning the appropriate response to concentration. The battle lines are easily discerned; one can identify the proponents and opponents of concentration measures with little effort. The weaponry, on the other hand, is not so

clear. Both sides are heavily armed with aggregate concentration statistics and legions of expert economists ready to bless or damn the conglomerate. Yet the very ease with which one can summon a prominent economist to expound a favorable opinion on the subject, or to produce the necessary favorable statistics, suggests the limits of such evidence. As stated by a prominent attorney in this field: "There are feelings about larger mergers, there are emotions about large mergers. There is a suspicion about size and its relationship to the power and politics of society. But there is an almost total lack of responsible research in the area."

The government believes that concentration is increasing. According to the recent testimony of the former Chairman of the Federal Trade Commission before the Senate Subcommittee on Antitrust and Monopoly:

The 200 largest manufacturing firms have increased their share of U.S. industry from 45 percent at the end of World War II to 60 percent today. In 1976, according to our data, 451 major firms controlled 70 percent of all manufacturing assets and earned 72 percent of all profits in the United States. This contrasts with 1960, when comparable firms controlled only about half the Nation's manufacturing assets and 59 percent of profits.

To then FTC Chairman Pertschuk and other supporters of anticoncentration legislation, figures like these clearly represent a threat to the American economic order. To others, however, this data represents only a harmless trend. The data does not suggest that anything evil will come of concentration automatically. In fact, opponents of anticoncentration measures argue just the opposite—that mergers increase efficiency. The truth is that one does not know. Definitive studies do not exist and the argument consequently becomes a political argument, as opposed to an economic one.

59. Statement of Ira Millstein, quoted in Time, May 21, 1979, at 64.
61. Backers of anticoncentration legislation are quick to point this out and often argue socio-politics exclusively. To support their contentions, they routinely cite Learned Hand's discussion of the non-economic concerns of antitrust and law in Alcoa, 148 F.2d 416. See supra text accompanying notes 26-28.
B. United States Legislative Proposals to Deal with Concentration

Several proposals presently before Congress are designed to deal more explicitly with the problem of concentration. Each proposal would impose an absolute size limitation on growth. The Kennedy Bill reintroduced in the House of Representatives appears to be the most popular. It has three major features. The first is a ban on growth through merger by

62. H.R. 4409, 97th Cong., 1st Sess. (1981) (the bill was first introduced by Senator Kennedy as S. 600, 96th Cong., 1st Sess. (1979)). As reintroduced, the bill reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Small and Independent Business Protection Act of 1979.”

Sec. 2 Notwithstanding any other provision of law, no person shall merge or consolidate with any other person engaged in commerce, or acquire, directly or indirectly, such amount of the stock or other share capital of such other person as to enable such person to control such other person, or acquire, directly or indirectly, a majority of the assets of such other person, if—

(a) each person has assets or sales exceeding $2,000,000,000;
(b) each person has assets or sales exceeding $350,000,000; or
(c) one person has assets or sales exceeding $350,000,000 and the other person has 20 per centum or more of the sales during the calendar year immediately preceding the acquisition in any significant market.

Sec. 3. (a) Except as provided in subsection (b), it shall be an affirmative defense to an offense under sections 2(b) and 2(c) that—

(1) the transaction will have the preponderant effect of substantially enhancing competition;
(2) the transaction will result in substantial efficiencies; or
(3) within one year before or after the consummation of the transaction, the parties thereto shall have divested one or more viable business units, the assets and revenues of which are equal to or greater than the assets and revenues of the smaller party to the transaction.

(b) Such affirmative defense shall not be available if one of the parties to the transaction has within one year previous to the transaction been a party to a prior transaction coming within the provisions of section 2(b) or 2(c).

Sec. 4. (a) Authority to enforce compliance with section 2 is vested in the Attorney General of the United States and the Federal Trade Commission.

(b) The Attorney General and the Federal Trade Commission shall adopt procedures by which parties to a transaction within the terms of section 2(b) and 2(c) can ascertain the determination of the Attorney General or the Federal Trade Commission as to whether or not the transaction is within the terms of any of the affirmative defenses set forth in section 3. If the Attorney General or Commission, pursuant to such procedures, advises a party that a transaction is within the terms of any of the affirmative defenses set forth in section 3, the Attorney General and the Federal Trade Commission shall be barred by such ad-
corporations that have assets or annual sales of more than two billion dollars and that wish to acquire firms of similar size.\footnote{63} The second feature is a ban on further growth by merger between corporations that have assets or annual sales of more than 350 million dollars, unless the effect of the merger would substantially enhance competition or provide substantial efficiencies.\footnote{64} Finally, firms with assets or annual sales exceeding 350 million dollars would be prohibited from acquiring a firm having twenty percent or more of the sales of any significant market, unless substantial enhancement of competition or substantial efficiencies could be demonstrated.\footnote{65} The Act further directs the Attorney General and the Federal Trade Commission to establish procedures by which to resolve whether the defenses of “substantially enhancing competition” or “substantial efficiencies” apply.\footnote{66} Private injunctive relief is also provided for by the Act.\footnote{67}

One provision merits further comment. The Act allows firms with assets or sales exceeding 350 million dollars, or one firm of that size and another with 20 percent of the significant market, to escape the Act by divesting sufficient assets to counterbalance the acquired assets.\footnote{68} However, this defense is not allowed a company which has been party to a similar transaction within one year.\footnote{69} If one were really interested in vice in the absence of proof that the determination was based in whole or substantial part on an intentional misstatement by the party requesting such advice.

Sec. 5. Injunctive relief for private parties may be granted under the same terms and conditions as prescribed by section 16 of the Clayton Act.

Sec. 6. (a) As used herein, “efficiencies” shall include economies of scale in manufacturings, marketing, distribution, and research and development.

(b) As used herein, “significant market” means any line of commerce in any section of the country which has annual sales of more than $100,000,000.

Sec. 7. The provisions of this Act are in addition to and not in lieu of other provisions of the antitrust law and nothing in this Act shall be deemed to authorize or make lawful anything heretofore prohibited or made illegal by other antitrust laws.
economic efficiencies, the defensive claim of efficiency would not be limited by the number of transactions that have taken place. In this respect, at least, it appears that the desire to reduce the economic power of large firms is paramount.\textsuperscript{70} The absolute prohibition on the merger of giant corporations points in a similar direction.

C. Comparable Japanese Law

The Japanese Antimonopoly Act\textsuperscript{71} was passed in 1947 during the period of American occupation.\textsuperscript{72} Though there was considerable Japanese opposition to the Act, particularly with regard to a companion proposal for immediate forced deconcentration,\textsuperscript{73} the realities of occupation made that opposition unimportant. The Diet adopted the Act under pressure from the American occupation authorities.

As originally conceived, the purposes of both the Antimonopoly and Deconcentration Laws were clearly political. The allies viewed the \textit{Zaibatsu} as not only having economic power, but as also being the primary cause of Japanese militarism. The dissolution of the \textit{Zaibatsu} was seen as necessary to the success of the occupation and the "democratization" of Japan.\textsuperscript{74}

As with most new laws, there was a period immediately following the passage of the Antimonopoly Act where meaningful enforcement was sought. Prosecution was, however, initiated by Americans, not the Japanese.\textsuperscript{75} Japanese authorities continued to identify with the \textit{Zaibatsu} and remained hostile to the new law. The main reasons for this resistance to antitrust enforcement becomes clear when one contrasts Japanese and American attitudes toward competition. As one commentator has noted:

The American antitrust philosophy which had its roots in Anglo-Saxon individualism was totally alien to the cooperative business philosophy of Japan, where competition means intergroup rivalry for status and prestige. Outside

\begin{itemize}
\item \textsuperscript{70} See supra note 61.
\item \textsuperscript{71} See supra note 3.
\item \textsuperscript{72} See generally E. HADLEY, \\ \textit{ANTITRUST IN JAPAN} (1970) [hereinafter cited as HADLEY].
\item \textsuperscript{73} \textit{Id.} at 107-24.
\item \textsuperscript{74} \textit{Id.} at 3-19.
\item \textsuperscript{75} \textit{Id.} at 147-65.
\end{itemize}
the group, rivalry is fierce; inside it, cooperation rather than competition is the guiding principle. Both the laissez faire, perfectly competitive firm and the pure monopoly are manifestations of Anglo-Saxon individualism; in both cases the firm acts alone. Japan’s social milieu is much more hospitable to groupism; collusive rivalry among oligopolies is the basic rule of behavior. Thus, the occupation-imposed Antimonopoly Law has never agreed fully with its environment ever since it was enacted.\footnote{76}

The Japanese were eager to remove this peculiar American impediment to their economy as early as possible, yet deference to their conquerors made complete rejection of antitrust unacceptable. In 1948, however, a sign that the allies had altered their policy toward Japanese concentration\footnote{77} brought an immediate response from the Diet in the form of proposed revisions. Amendments in 1949 removed the prohibition against certain types of mergers and required only pre-merger notification to the Fair Trade Commission, instead of pre-merger permission from the FTC.\footnote{78}

The end of the occupation and the Peace Treaty of September 1951 provided the Japanese with their long sought opportunity to make more major revisions in the Antimonopoly Act. These sweeping changes were enacted by the Amendments of September 1, 1953 and brought the law “more in line with the national tradition.”\footnote{79}

The provision proscribing disparities in bargaining power was deleted. Resale maintenance was limitedly authorized (copyrighted books, records and commodities which are in daily use by the general consumer and easily identifiable by trademarks and other labels, in free competition with other similar commodities). The flat prohibition on cartels was removed; instead, with the approval of the FTC, two types of cartels were authorized, depression and rationalization. Restrictions on intercorporate stockholding and interlocking multiple directorates were further modified. The stipulation that these not be attained by unfair methods of business was deleted, and the

\footnote{76. K. Haitani, \textit{The Japanese Economic System} 131 (1976) [hereinafter cited as \textit{Haitani}].}
\footnote{77. The sign was a publication by the Deconcentration Review Board known as the “four points.” Hadley, \textit{supra} note 72, at 168.}
\footnote{78. Hadley, \textit{supra} note 72 at 198.}
\footnote{79. Haitani, \textit{supra} note 76 at 132.}
only restriction remaining was that the result would not be a substantial restraint of competition in any particular field of trade. Reporting of intercorporate stock ownership and interlocking directorates was required for companies whose assets were valued at 100 million yen (about $278,000). The Trade Association Law was repealed and some of the prohibited acts were incorporated in a new Article 8 in the Antimonopoly Law.80

Obviously, many of these changes would be unthinkable within the United States.

In the period between 1953 and the mid-seventies, the enforcement of the Japanese antitrust laws was quite lax. Cases were brought, but ordinarily they were resolved by consent. By the mid-sixties, in fact, government policy promoted business at the expense of domestic competition and protected business against foreign encroachment. Export cartels were approved and additional measures were adopted to limit foreign investment in Japanese companies.

The scenario which led to the dramatic reverse embodied in the 1977 amendments began as a response to a pattern of increasing economic concentration throughout the early seventies.81 Concern about this trend, particularly in the manufacturing sector of the economy, moved the Japanese FTC to begin considering new antitrust proposals in late 1973.82 The need for additional legislation was underscored by the inability of then current law to block major mergers which significantly increased concentration.83

A contemporaneous development that added popular support to antitrust was the increasing proliferation of price fixing cartels in violation of the Antimonopoly Act.84 Under the Act as it then existed, the FTC was limited to cancelling acts it found in violation. No punitive, deterrent remedy existed. Consequently, firms which were caught in the act merely continued the cartel price under the guise of indepen-

80. HADLEY, supra note 72 at 199-200.
81. See generally Ariga, Efforts to Revise the Japanese Antimonopoly Act, 21 ANTITRUST BULL. 703 (1976).
82. Id. at 703-05.
83. Former Commissioner Ariga identifies the failure of the FTC to block the 1970 merger between the Yawata and Fuji steel manufacturing companies as being the regulatory failure which highlighted the impotence of former law. Id. at 704.
84. Id. at 705-06.
The fact that much of this cartel activity was centered in the oil industry, resulting in overescalating fuel prices, caused the consumer outrage needed to spur the Diet to act. Antitrust legislation was the response.

The 1977 amendments to the Japanese Antitrust Law have several major features. The two principal ones put a fixed size limit on non-financial institutions and take measures against parallel pricing by the largest corporations. The amendments also create a new definition of a monopolistic situation: a single company owning half of the share of the relevant product market with the two largest companies owning seventy-five percent of the market during a given year. In addition to market share, barriers to market entry must exist and unnatural pricing patterns must exist. Examples of such patterns include remarkably high prices, or a failure to respond to market forces which would seem to require a decrease in price. The Fair Trade Commission is given power to require firms that discontinue unlawful acts to publicize the fact that they have discontinued them. Surcharges are established for unreasonable restraints of trade in international transactions, and a three-year statute of limitations applies. The FTC is also empowered to restore competition to industries with monopolistic situations but is prohibited from destroying substantial scale efficiencies. Financial company holdings in non-financial companies are limited to five percent, although ten percent was permitted under prior law.

The size limitation provisions essentially provide that any company which has capitalization of a hundred billion yen (roughly $44.5 million) or larger, or, alternatively, has annual net assets of thirty billion yen (roughly $14.8 million) is gener-

85. Id.
87. Id. Art. 18-2.
88. Id. Art. 2-7 (1).
89. Id. Art. 2-7 (iii) (b).
90. Id. Art. 6.
91. Id. Art. 7-2 (1).
92. Id. Art. 7-2 (5).
93. Id. Art. 8-4.
94. Id. Art. 11.
ally prohibited from further growth. A number of exemp-
tions, of course, apply. Exemption may be granted by execu-
tive order. Developing industries are exempted where the
cabinet concludes that extra capitalization is required. Transactions involving foreign business loans to foreign gov-
ernments incidental to them are exempted. Joint business
investments with foreign governments are exempted. Stocks
obtained through dividend or stockholder allocations are ex-
empted for two years, as is stock obtained as a result of the
exercise of a property interest (such a lien). Finally, an ex-
emption may be granted for “urgent and imperative circum-
stances” subject to approval by the Fair Trade Commission.
The parallel pricing provisions relate to industries in
which the total sales of goods or services in a given year ex-
ceed thirty billion yen. If, under those circumstances, seven-
tenths of the volume is accounted for by the top three sellers,
and two or more (each with at least five percent of total sales)
make parallel price changes within the three month period,
the Fair Trade Commission may ask the sellers to furnish a
statement of reasons for their conduct. It seems likely that
this provision has more meaning in a Japanese context than it
might have in the United States given the Japanese tradition
of respect for their government. In Japan, the obligation to
report to the Fair Trade Commission is probably a substantial
deterrent.

This brief summary of Japanese law is, of course, only
that. An appendix to this article provides parallel copies of
the Antitrust Law of 1947, with the amendments of 1953, and
1977, contrasted. Reference to these provisions will further
amplify the discussion.

D. U.S. Law Respecting Oligopoly Power

The concern respecting concentration focuses on single
firm size, both absolutely and in relation to competition in the same market. Oligopolies, on the other hand, present problems because of the aggregate size of its members. Quite aside from the concern that members of oligopolies will grow to become monopolists, United States courts express a concern that oligopolies will jointly accomplish monopoly pricing. Monopoly pricing occurs when an industry is reduced to a small number of firms and each, recognizing the advantage of withholding supply and enhancing price, follows the output and price leadership of other firms in the field. The dilemma presented by such conduct is fairly technical. The antitrust laws prohibit monopolies; historically a single firm exercised power and restraints of trade. Restraints of trade require duality. Thus, so long as the firms remain careful to avoid contact with each other in price setting, and so long as each of them does not achieve monopoly power (held at the moment to arise at probably no less than seventy-five percent of market control), they are innocent. Hypothetically, at least four firms, each with twenty-five percent of the market, could each behave as a monopolist by following or initiating price leadership. They would nevertheless be immunized from both section 1 and 2 prosecution. How much price leadership exists is disputed; the empirical studies are in disarray. The


105. The Markovits’ series, supra note 104, establishes this beyond little doubt.


107. Id. at 551.

108. See supra note 12.


110. Markovits’ series, supra note 104.
law, on the other hand, professes to be clear cut, the Court having held: "'Conscious parallelism' has not yet read conspiracy out of the . . . Sherman Act . . . ."

Since this pronouncement, it has not been contended that section 1 restraints of trade can be established simply by a pattern of conscious parallelism.

Although many cases illustrate the viability of section 1 complaints against an apparent conscious instance of parallelism, four cases illustrate the principal theories. In *Sugar Institute, Inc. v. United States*,\(^ {112} \) the government successfully prosecuted members of the trade association which had succeeded in maintaining uniform prices for sugar through a series of price fluctuations. The mechanism used by the group required each member to announce a new price to be charged in advance of adopting it.\(^ {113} \) Others were free, though at least not formally required, to adopt the price.\(^ {114} \) They invariably adopted it.\(^ {115} \) While it is certainly possible that price uniformity under these circumstances was accidental, sugar after all being a fungible product incapable of supporting substantially different prices, the mechanism adopted was designed to accomplish price uniformity. Further, the alternate explanations for the adoption of this price announcement device seemed remote. A trier of fact looking at the arrangement would probably conclude that it included a silent provision requiring price adherence.

In *Interstate Circuit, Inc. v. United States*,\(^ {116} \) the United States Supreme Court held motion picture distributors to be guilty of restraint of trade when they agreed with two large exhibitors, Interstate and Consolidated, to adopt a series of requirements concerning the pricing of motion pictures, double features, and prohibitions and clearance periods between picture runs.\(^ {117} \) At that time, vertically imposed restrictions were generally held unilateral and therefore immune from section 1.\(^ {118} \) Nonetheless, the Court found an agreement
among the distributors to comply with demands of the exhibitors. The exhibitors had the power to exert economic pressure on the distributors because they had an almost complete monopoly on first run theaters in six Texas cities. While Interstate made demands on the distributors independently, each distributor ultimately agreed to identical terms. The Court approved, inferring conspiracy and noting that,

it taxes credulity to believe that the several distributors would . . . have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was a result of mere chance.

Further, the Court listed specifics of the arrangements which made duality even clearer:

The nature of the proposals made on behalf of Interstate and Consolidated; . . . the manner in which they were made; . . . the substantial unanimity of action taken upon them by the distributors; and . . . the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors.

In *American Tobacco Co. v. United States*, the Court approved restraint of trade charges, as well as charges of monopolization and the attempt to monopolize, against the defendant—the three largest tobacco producers. A number of instances of price leadership was presented. Among the most noteworthy was the raising of the price of the defendants' cigarettes in the face of declining demand in the early years of the Great Depression. Also relevant was the precipitous lowering of price by all three companies in the face of an increased market share by less expensive cigarette brands. In both instances the three companies acted in an identical manner, although the government did not prove that there had

120. *Id.* at 223.
121. *Id.* at 221.
122. 328 U.S. 781 (1946).
123. *Id.* at 801.
124. *Id.* at 804-07.
been an agreement to do so. The Court analyzed that fact as follows:

No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. 128

The facts were so unusual, given the pressures of the time, that the court concluded the trier of fact was justified in finding concerted action rather than mere passive following of price setting. They were able to keep a relatively uniform level of profits by further reducing their output in the face of the Great Depression. That would seem to require a degree of self-discipline difficult to believe. Thus, when the trier of fact found that a conspiracy underlay the price uniformity, such a conclusion seemed plausible.

In United States v. Container Corp. of America, 126 the Court confronted an instance of open exchange of pricing and the apparent total absence of any agreement as to price maintenance. Members of the industry would sell corrugated boxes, which were allegedly fungible goods incapable of competing by non-price considerations. Members agreed to provide price information to each other upon request. 127 The government proved that prices had often been exchanged but did not attempt to prove any instances of an agreement on the price to be charged. 128 Prices were, in the main, uniform. 129 That fact is, by itself, not surprising since the fungibility of the boxes would make it difficult to resist the lower price established by a competitor. The Court upheld a finding of a section 1 violation after expressing concern that it not be read to condemn obtaining price information as a restraint of

125. Id. at 809-10.
127. Id. at 335.
128. Id. at 334-35.
129. Id. at 336-37.
It recognized that it is generally essential to competition that those sharing a market have full information about it. Nonetheless, under the peculiar facts of the case, the court concluded that the exchange of information was tantamount to an agreement to maintain price.

The language of the decision is extremely unsatisfying. One would expect it to apply to totally competitive markets which simply had become efficient in exchanging information about prices. Furthermore, since offering price information to each other appeared important to the result, the decision seems easy to avoid by the simple expedient of price shopping by each of the competitors. There would appear little warrant in antitrust law for requiring the additional expense of such shopping since the result would be the same as when prices were exchanged among members. The Court did not accept the government's theory that agreement could be demonstrated by market structure. Yet, the government's case ultimately redeems the Court's decision. Throughout the period of price information exchange, there was slack capacity in the manufacture of corrugated boxes. Yet throughout the period, an increasing number of firms were attracted into the industry. It is difficult to understand how an industry which has slack capacity while behaving competitively would be continuously inviting to newcomers. It is, on the other hand, easy to understand how an industry with monopoly pricing might invite others to share the benefit of the monopoly, even though they ran the danger of the slack capacity. At least if the newcomers were themselves willing to be modest in their claim of a market share, it may well have been in the interest of the extant members to share their pricing structure rather than to compete with the newcomers. Viewed in that perspective, it seems acceptable for a trier of fact to find an agreement underly ing the exchange of information because of the improbability of any other hypothesis.

None of these cases, nor the other cases dealing with conscious parallelism, exclusively concerned oligopoly pricing. In each of them, some additional feature made it possible to infer the existence of an arrangement facilitating the pricing. In

130. Id. at 338-40 (Fortas, J., concurring).
131. Id.
132. The Court concluded, “Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.” Id. at 338.
economic theory, and probably in practice, it is possible to achieve the same result with no artifice. In such instances, the Paramount Theater holding would appear to bar prosecution. Yet such pricing would still constitute undesirable market manipulation. Both proposed American and extant Japanese antitrust law had adopted new provisions designed to cope with the problem.

III. PROPOSED SOLUTIONS TO THE CONSCIOUS PARALLELISM PROBLEM

Both the United States proposals and Japanese law prohibit growth beyond a certain monetary size.\textsuperscript{133} In so doing, they presumably militate against concentration at least in those markets requiring heavy capital investment. Thus, by keeping industry from growing more concentrated, they also keep it from becoming oligopolistic and from using oligopoly pricing strategies. It is, of course, quite possible that smaller industries may be sufficiently concentrated to allow conscious parallelism without exceeding the statutory maximum. Furthermore, the acts are not aimed directly at conscious parallelism but are aimed at all of the abuses believed to run with aggregation of wealth. Anticoncentration law alone, therefore, is not well designed to deal with oligopoly pricing.

In both Japan and the United States, those entrusted with enforcing antitrust laws have attempted to solve the problems relating to oligopoly pricing more specifically. In Japan, the solution was legislative. A procedure to confront oligopolists was written into the 1977 amendments. In the United States, the Antitrust Division and the FTC have suggested ways of dealing with the problem within the framework of existing statutory law.

The 1977 Japanese Amendments provide an administrative procedure for requiring reports from companies found to be charging identical prices consistently.\textsuperscript{134} The companies presumably have the burden of explaining how those prices were determined. In a country heavily influenced by government "advice" in a manner which has no Western parallel, such a reporting provision must be seen as having effect. It would be a clear misconception to equate governmental par-

\textsuperscript{133} See supra text accompanying notes 62-70 and 86-101.
\textsuperscript{134} See supra notes 102-03.
ticipation in such reporting functions with American presidential jawboning or economic guidelines.

In the United States, the Federal Trade Commission and, somewhat later, the Department of Justice have experimented with the doctrine of shared monopoly. By use of that doctrine, the government claimed that it was possible to avoid the need to demonstrate conspiracy, holding those who act in identical ways (albeit by unilateral imitation) to be responsible for the monopoly power they share. The cases brought to date do not suggest a clear pattern. One set of defendants, the cereal manufacturers, are large firms in a large industry. Others have been smaller. Also, it has been difficult to tell under what circumstances the government would conclude that uniform prices are the product of price imitation rather than of effective competition since both would lead to pricing uniformity over time. The courts have so far rejected the shared monopoly theory and it may be abandoned. If still asserted, it would surely require selective application. It would be one thing, for example, to apply a shared monopoly theory in Continental Can as an alternative to finding section 1 duality. Without some basis for inferring a recognized common purpose, the doctrine could bar competitive prices charged in a concentrated small industry. The latter would appear to serve no purpose.

A. The Role of the Executive Branch in Selection of Concentration Cases

Except for the monetary limitations on aggregate size provision, a great deal of discretion is left in the Executive Branch as to the enforcement of the provisions discussed. Selective enforcement is the rule. The courts relinquished


136. The FTC, although technically an "independent" regulatory agency, is generally considered to be under relatively great executive control. The Antitrust Division, of course, is under direct executive control. While it remains unclear for the moment how the FTC will affect enforcement of the new Japanese law, many of its provisions seem to invite substantial executive intervention.

137. Cases of the magnitude needed to significantly affect the nation's overall level of concentration cannot ordinarily be prosecuted by private actions because their length and expense are prohibitive.
supervisory control of section 7 merger cases at least until the mid-seventies.\footnote{138} Exclusive dealing and tying cases reflect similar executive choice. Monopolization cases are no exception.\footnote{139}

Unfortunately, optimism about executive wisdom is likely naive. While one might entrust the selection of antitrust defendants to a truly independent administrative agency sworn to impartiality without concern, the same process can easily be abused when put in the hands of political partisans in the Executive Branch. This by no means suggests that politicians would be corrupt in their administration. The whole criminal justice system depends on a contrary assumption. Nonetheless, where there is great selectivity required and where the law is necessarily vague, considerations of the political consequences of one suit as opposed to another must surely seem a reasonable consideration to those who frequently must return for a popular mandate at the polls. Whether or not such considerations are inevitable, they at least have occurred.\footnote{140} For

\footnote{138. It appears that the present Supreme Court is reviewing § 7 cases with a vigor unknown at the time of Von's Grocery, 384 U.S. 270. See Lurie, Mergers Under the Burger Court: An Antitrust Bias and Its Implications, 23 VILL. L. REV. 213 (1978).}

\footnote{139. E.g., United States v. Griffith, 334 U.S. 100 (1948).}

\footnote{140. President Nixon, for example, personally ordered the Department of Justice to forego an appeal of an unfavorable verdict in a major action against IT&T. The transcript of the meeting in which the order was given provides an interesting example of how political motivations affect antitrust policy. In reading the following discussion, compare Mr. Shultz' rationale with the president's.}

Shultz: If you look at concentration ratios over a period of time, on horizontal integration, if you look at ratios of sales to value added on vertical integration, what you find is no evidence of any increase in, in monopoly in American business. In fact, over a thirty-year period, and I checked this over with my friend, Stigler, who has made a lot of these studies. If anything, you see a decline. And in the conglomerate area is what I think we are witnessing, is, uh, a sort of a reaction to the buildup of conglomerates, which is perhaps affected somewhat by the antitrust. But basically, the market place is taken care of, in a sense that a lot of the firms that acquired businesses that they really didn’t know anything about, are finding that they can’t run those businesses very well and they are getting rid of them. And, uh, so there is a cleansing process taking place. And where you have, uh, where you have a [unintelligible] of conglomerates, I believe, the case can be made, uh, rather readily in, uh, many, many instances, that they add to the sharpness of competition, because they acquire a relatively small firm, they give it muscle and they send it into, into competition and make the market work better. At least this is the, this is the general posture that I’m taking in this, uh, talk. I believe that the evidence—I don’t—I mean I don’t—I’m not a lawyer and I don’t know all of that side of it.
that reason, legislation removing discretion, such as the abso-

Ehrlichman: You're not the only one.
Shultz: From the standpoint of the economics of it, uh, I would be the
last to say we should not continue, uh, to, uh, pursue the antitrust laws
in the proper way, but, the, uh—I think the conglomerates have taken a
bum rap.
President: This is, this is the problem. The problem is McLaren's a nice
little fellow who's a good little antitrust lawyer out in Chicago. Now he
comes in and all these bright little bastards that worked for the Anti-
trust Department for years and years and years and who hate business
with a passion—any business—have taken him over. They haven't taken
him over. Then of course McLaren is the man. They to
into—Kleindienst is busy appointing judges; Mitchell is busy doing
other things so they're afraid to overrule him. By God they're not going
to do it. I mean the point is that on this antitrust they had deliberately
gone into a number of areas which have no relationship with each other,
to—whether it's a question of operating more, efficiently than the rest.
There's simply a question of tactically, they've gone off on a kick, that'll
make them big God damn trust busters. That was all right fifty years
ago. Fifty years ago maybe it was a good thing for the country. It's not a
good thing for the country today. That's my views about it, and I am
not—We've been, through this crap. They've done several of them al-
ready about—They have raised holy hell with the people that we, uh,
uh—Well, Geneen, hell, he's no contributor. He's nothing to us. I don't
care about him. So you can—I've only met him once, twice—uh, we've,
I'm just, uh—I can't understand what the trouble is.
Ehrlichman: Well,
President: It's McLaren, isn't it?
Ehrlichman: McLaren has a very strong sense of mission here.
President: Good—Jesus, he's—Get him out. In one hour,
Ehrlichman: He's got a
President: One hour.
Ehrlichman: Very strong—
President: And he's not going to be a judge, either. He is out of the God
damn government. You know, just like that regional office man in, in, in
San Francisco. I put an order into Haldeman today that he be fired
today.
Ehrlichman: Yeah.

Transcript of meeting between Richard M. Nixon, John D. Ehrlichman and George P.
Shulz at the White House (Apr. 19, 1971).

It is not surprising to find Mr. Schultz viewing conglomerate mergers from an
economic perspective since economics is his discipline. Equally obviously, President
Nixon viewed the matter from his political perspective. The President is, of course,
the final arbiter. One should generally expect that vague provisions of Antitrust Law
will ultimately be interpreted in keeping with the political persuasion of the current
Chief Executive. This comment is not designed to suggest corruption. It is meant
instead to suggest the inevitable price of leaving such broad discretion about the
structure of the business community to the enforcement policy of the Executive
Branch. No documents exist to compare the actions of other Presidents with Richard
Nixon's. If their style might have been more ingratiating than Mr. Nixon's, the thrust
of their decisions could not have differed greatly. The President is expected to make
decisions that will favorably reflect on his political party. If he may not favor individ-
ual friends and harm individual enemies, at least he can determine policy with re-
lute size limitation legislation, may seem preferable to legisla-
tion leaving broad prosecutorial discretion to deal with the
political question of concentration.

B. Prospects for the Changes

Given the prognosis for the immediate future, the United
States’ concern with economic concentration may wane. De-
spite the zeal of several proponents in Congress, United
States’ economic interests, both at home and abroad, are suf-
fering from more aggressive foreign competition than at any
time since World War II. It may no longer be as important to
many that large business aggregations in the United States be
broken up as it is that they become more aggressively compet-
itive with foreign made products. Thus, for example, the auto-
mobile oligopoly may seem acceptable so long as it develops
lighter and more efficient cars to compete with the Japanese
and European imports that have gained so large a share of the
American market. Similarly, many would presumably wish to
halt the shift of electronics from the United States to Asia,
even if it meant a rebirth of the large electrical firms once so
powerful in the United States. The current United States Su-
preme Court, a Court shaped by Republican presidents,\textsuperscript{141} has
taken a more conservative attitude toward antitrust than the
Warren Court before it.\textsuperscript{142} Also, strong forces exist in Ameri-
can public life to moderate the campaign toward reduced con-
centration and to interpret extant antitrust law less expan-
sively. Most notably, the Attorney General and the Assistant
Attorney General for Antitrust have pursued dramatically
limited policies of enforcement. The Assistant Attorney Gen-
eral has, in fact, announced his intention to participate in

\textsuperscript{141} President Richard M. Nixon appointed Chief Justice Burger and Associate
Justices Blackmun, Powell, and Rehnquist. President Gerald R. Ford appointed As-
stitute John Paul Stevens. President Ronald Reagan appointed Associate Justi-
tice Sandra Day O’Connor.

\textsuperscript{142} See Robinson, Recent Antitrust Developments: 1974, 75 COLUM. L. REV.
243 (1975); Lurie, Mergers Under the Burger Court: An Antitrust Bias and its Impli-
cases brought by private litigants that threaten to stretch Antitrust Law beyond the confines he believes appropriate. In the process, the Justice Department has expressly rejected case precedent outlawing vertical relationships (unless they have direct horizontal effect even when they are currently *per se* offenses). Departmental policies have come under attack for members of Congress, but, at this writing, they seem secure. Furthermore, a substantial economic downturn, a move toward decreasing government regulation, and decreasing levels of taxation\textsuperscript{143} make aggressive anti-big-business campaigns appear difficult. Similar concerns apply to Japan's economic situation. While Japan appears to be healthier economically than the United States, substantial segments of Japanese industry are more dependent on foreign markets than is the United States which can rely on its domestic market to support much of its industry. Ultimately, Japan may not be able to limit domestic concentration if world competition requires a larger scale.

\textsuperscript{143} The current proposals to limit FTC rulemaking authority and California's Proposition 13 are just two instances of this trend.
## APPENDIX

**JAPANESE LAW RELATING TO THE PROHIBITION OF PRIVATE MONOPOLY AND METHODS OF PRESERVING FAIR TRADE**

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<td>Article 1. This law, by prohibiting private monopolization, unreasonable restraints of trade and unfair methods of competition, by preventing excessive concentration of power over enterprises, and by excluding undue restrictions of production, sale, price, technology, etc., through combinations and agreements, etc., and all other unreasonable restraints of business activities, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the levels of employment and national income and, thereby, to promote the democratic and wholesome development of national economy as well as to assure the interest of the general consumer.</td>
<td>Article 2. Same.</td>
<td>Article 2. Same.</td>
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<tr>
<td>Article 2. The term “entrepreneur” as used in this Law shall mean a person, natural or juristic, who operates a commercial, industrial, financial or any other business enterprise.</td>
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<tr>
<td>Any officer, employee, agent or any other person who acts for the benefit of any entrepreneur shall be deemed to be an entrepreneur in regard to the application of the provisions of the following subsection and of CHAPTER III of this Law.</td>
<td>Same.</td>
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this Law shall mean any combination or federation of combinations of two or more entrepreneurs having as its principal purpose the furtherance of their common interest as entrepreneurs and shall include one taking either of the following forms: Provided that a combination or federation of combinations of two or more entrepreneurs, which has stock or other share capital of the constituent members, and whose principal purpose is to operate and which is actually operating a commercial, industrial, financial or any other business for profit shall not be included.

i) Any association incorporated or not incorporated of which two or more entrepreneurs are members (including any position similar thereto);

ii) Any foundation with or without legal personality of which two or more entrepreneurs control the appointment or dismissal of directors or managers, the execution or existence of business;

iii) Any partnership of which two or more entrepreneurs are members, or any contractual combination of two or more entrepreneurs.

(3) The term “officer” as used in this Law means a director, a partner with unlimited
The term “competition” or “competitor” as used in this Law shall include potential competition or potential competitor.

(4) The term “competition” as used in this Law shall mean a situation in which two or more entrepreneurs do or may, within the normal scope of their business activities and without undertaking any significant change in their business facilities or kinds of business activities, engage in any one of the following acts: Provided, that paragraph (ii) below shall not apply to such competition as provided in CHAPTER IV:
   i) Supplying the same or similar goods or services to the same customer or customers;
   ii) Receiving supplies of the same or similar goods or services from the same supplier.

The term “private monopolization” as used in this Law shall mean such business activities, by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

The term “unreasonable restraint of trade” as

(5) Same.

(6) Same.

Same as 1953.
used in this Law shall mean such business activities by which an entrepreneur, by contract, agreement, or any other manner, in conjunction with other entrepreneurs, mutually restricts or conducts their business activities, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

The term "undue substantial disparities in bargaining power" as used in this Law shall mean such substantial disparities in bargaining power which, when they exist between an entrepreneur and his competitors, is not justified on technological grounds, and whereby the said substantial disparities in bargaining power are of such extent as to render private monopolization possible for any one of the following reasons:

1) because an entrepreneur controls the business in such particular field of trade or controls the materials used therein to such an extent as to render it extremely difficult for another entrepreneur to start a new enterprise;

2) because an entrepreneur controls the production in a particular field of trade to such
an extent as to render it extremely difficult for another entrepreneur actually to compete;

3) because an entrepreneur restrains or restricts free competition to such an extent as to render private monopolization possible.

(7) The term "monopolistic situation" as used in this Law means circumstances in which each of the following market structures and undesirable market performances exist in any particular field of business where the aggregate total amount of prices (this term refers to the prices of the goods concerned less a sum equivalent to the amount of taxes levied directly on such goods) of goods of the same description (including goods capable of being supplied without making any significant change to their business facilities or kind of business activities; hereinafter referred to as "particular goods") and those of any other goods having a strikingly similar function and utility thereto, which are supplied in Japan (excluding those exported) or the total amount of prices (this term refers to the prices of the services concerned less a sum equivalent to the amount of taxes levied on the recipient of such services with respect thereto) of services of the same description which are supplied in Japan, during the latest one-year period designated by a Cabinet
Order, is in excess of fifty billion yen:

i) Where the market share (this refers to the ratio accounted for by the aggregate volume in case it is not appropriate to be calculated by the quantity, the quantity shall be represented in terms of the amount of their prices; the same shall apply hereinafter in this paragraph) of the particular goods and any other goods having a strikingly similar function and utility thereto or by the volume of the services, which are supplied by the entrepreneur or entrepreneurs concerned, to total volume of those supplied in Japan (excluding those exported) of an entrepreneur exceeds one-half or where the combined market share of two entrepreneurs exceeds three-fourths during a given one-year period;

ii) Where there exists conditions which make it extremely difficult for any other entrepreneur to be newly engaged in the said particular field of business;

iii) Where the increase in the price of the particular goods or services supplied by the entrepreneur concerned has been remarkable or the decrease therein has been slight for a considerable period of time in the light of changes occurred in the supply and
demand, or in the cost of supplying for such certain goods or services during such period, and where, in addition thereto, the entrepreneur has fallen under any one of the following requirements during the said period:

a) That the entrepreneur has an earned profit rate far exceeding that which is established by a Cabinet Order as the norm for the class of business designated by such Cabinet Order to which the said entrepreneur belongs; or

b) That the entrepreneur has expended a level of selling costs and general and administrative expenses far exceeding one which is considered as the norm for the field of business to which the entrepreneur belongs.

(8) In the event any change has occurred in the economic conditions resulting in a drastic change in domestic industrial shipments and wholesale prices, the amount of prices as prescribed in the preceding subsection may be revised by virtue of a Cabinet Order to reflect such a change.

(9) Same as (7) of 1953.
following items:

1) unwarranted refusal to receive from or to supply to other entrepreneurs commodities, funds and other economic benefits;

2) supplying of commodities, funds and other economic benefits at unduly discriminative prices;

3) supplying of commodities, funds and other economic benefits at unduly low prices;

4) inducing or coercing unreasonably customers of a competitor to deal with oneself by means of offering benefits or that of threatening disadvantages;

5) trading with another party on condition that said party shall, without good cause, refuse acceptance of supply of commodities, funds and other economic benefits from a competitor of oneself;

6) requiring another party, being supplied with commodities, funds or other economic benefits to accede to conditions which unduly restrain its relations with competitors, or suppliers, or subject the appointment of its officers and directors to prior approval;

7) methods of competition other than those stipulated by the preceding items which are contrary to the public interest and which are Commission out of those endangering fair competition and coming under any one of the following items:

i) Unduly discriminating against other entrepreneurs;

ii) Dealing at undue prices;

iii) Unreasonably inducing or coercing customers of a competitor to deal with oneself;

iv) Trading with another party on such conditions as will restrict unjustly the business activities of the said party;

v) Dealing with another party by unwarranted use of one's bargaining position;

vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and his customers; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.
designated by the Fair Trade Commission in accordance with such procedure as provided by Articles 71 and 72.

CHAPTER II. PRIVATE MONOPOLIZATION AND UNREASONABLE RESTRAINT OF TRADE

Article 3. No entrepreneur shall effect private monopolization or any unreasonable restraint of trade.

Article 4. No entrepreneur shall participate in any one of the following types of concerted activities:

1) establishment, enhancement or stabilization of prices;
2) restriction on volume of production or that of sales;
3) restrictions on technology, products, markets or customers;
4) restrictions on construction or expansion of facilities or on adoption of new technology or methods of production.

The provisions of the preceding paragraph shall not apply in case the effects of such concerted activities on competition within a particular field of trade are negligible.

Article 5. No entrepreneur shall establish, organize, or become a party to or a member of a juridical person or any other organization

Article 3. Same.

Article 4. Deleted.

Article 5. Deleted.
which controls distribution of all or a part of
materials or products by methods of exclusive
purchase or sale or which undertakes the
allocation of all or a part of materials or
products.

Article 6. No entrepreneur shall participate in
an international agreement or an international
contract with a foreign entrepreneur or partici-
pate in an agreement or contract on foreign
trade with a domestic entrepreneur with regard
to any of the following items:

1) any matter which comes under one of the
   items of Article 4 paragraph 1;

2) an agreement or a contract relating to
   restrictions on exchange of scientific or
   technological knowledge or information nec-
   essary for business activities.

The provisions of the preceding paragraph shall
not apply in case the effects of such agreement
or contract on competition in any particular
field of international or domestic trade are
negligible.

Any entrepreneur, when contemplating partici-
pation in an international agreement or con-
tact with a foreign entrepreneur, or in an
agreement or contract on foreign trade with a
domestic entrepreneur which agreement or con-
tact shall continue for a considerable period of

Article 6. No entrepreneur shall enter into an
international agreement or an international
contract which contains such matters as consti-
tute unreasonable restraint of trade or unfair
business practices.

An entrepreneur who has entered into an
international agreement or an international
contract shall, in accordance with the rules of
the Fair Trade Commission, file a report
thereof with the Commission, accompanied by
a copy of the said agreement or contract (in
the case of an oral agreement or contract, a
document describing the contents thereof),
within thirty days as from the execution of
such act.

The provisions of the preceding subsection
shall not apply to an agreement or contract
regarding a single transaction (excluding such
transactions of which the delivery of the goods
extends over a period of one year), or to an
agreement or contract merely creating an
agency in business matters (excluding an agree-
ment or contract containing conditions that
time (excluding such where delivery of the object due to one transaction takes place over a considerable period of time), shall file an application with the Fair Trade Commission and receive its permission.

In such a case as provided for by the preceding paragraph, an entrepreneur shall not participate in said agreement or contract for a period of thirty days from the day of filing said application.

Article 7. In case there exists any act which comprises a private monopolization or an unreasonable restraint of trade, the Fair Trade Commission may order the entrepreneur concerned in accordance with the procedures as provided for in Section 2, CHAPTER VIII, to cease such acts, to transfer a part of his business, or take any other necessary measures for eliminating private monopolization or unreasonable restraint of trade.

Article 7. In case there exists any act which violates the provisions of Article 3, or paragraph 1 or paragraph 2 of the preceding Article...

...CHAPTER VIII, to file reports, to cease such acts, to transfer a part of his business, or to take any other necessary measures to eliminate such acts in violation of said provisions.

Article 7. Same as 1953 to here...

The Fair Trade Commission may, when it deems particularly necessary, even when an act in violation of the provisions of Article 3 hereof has already ceased to exist, order the entrepreneurs concerned, in accordance with the procedure as provided for in Division II, CHAPTER VIII, to take measures to publicize that the said act has been discontinued and order any other measures necessary to ensure elimination of the said act: Provided, that the foregoing
shall not apply to cases where one year has elapsed since the date of discontinuance of the said act without recommendation being given to the entrepreneur concerned or a proceeding initiated with respect to the said act.

Article 7-2.
1) In case any entrepreneur effects an unreasonable restraint of trade or enters into an international agreement or an international contract containing such matters as constitute an unreasonable restraint of trade, which pertains to the price of goods or services or results in affecting in effect the price of such goods or services by curtailing the volume of supply thereof, the Fair Trade Commission shall order the entrepreneur concerned, in accordance with the procedures as provided for in Division II, CHAPTER VIII, to pay to the Treasury a surcharge of an amount equivalent to one-half of an amount arrived at by multiplying the turnover of such goods or services, computed in accordance with the method prescribed by a Cabinet Order, for the period from the date on which the entrepreneur was engaged in the business practices to the date on which the entrepreneur discontinued such practice (hereinafter referred to as “period of such practice”) by
three percent (or by four percent for manufacturing industry, by two percent for retail business or by one percent for wholesale business): Provided, that in case the amount thus computed falls below two hundred thousand yen, the Commission may not order the payment of such a surcharge.

2) Any who have received an order pursuant to the provision of the preceding subsection shall pay the surcharge as provided for in the said subsection.

3) In case the amount of surcharge computed in accordance with the provision of the first subsection above of this section contains a fraction of ten thousand yen, such fraction shall be disregarded.

4) In case the entrepreneur who has committed an act in violation of the provision of subsection 1) above is a company and if such company has ceased to exist through a merger with another company, the violation of such company shall be considered as a violation of the merging company or consolidated company as a result of the merger, and the provisions of the preceding three subsections shall apply thereto.

5) When a period of three years has elapsed
CHAPTER III. UNDUE SUBSTANTIAL DISPARITIES IN BARGAINING POWER

Article 8. When undue substantial disparities in bargaining power exist, the Fair Trade Commission may order the entrepreneur concerned in accordance with the procedures as provided for in Section 2, CHAPTER VIII, to transfer a part of his business facilities, or to take any other necessary measures for eliminating said substantial disparities in bargaining power.

In issuing an order prescribed in the preceding paragraph, the Fair Trade Commission shall give special consideration to the following items with respect to the entrepreneur concerned:

from the date of expiration of the period of such practice (or when a period of one year has elapsed from the date on which the proceeding ended in case proceedings had been initiated with respect to such a violation (in case the expiration of such one-year period occurs earlier than the date of the expiration of the three-year period following the expiration of the period of such practice, then the date on which the three-year period expired)), the Fair Trade Commission may not order such entrepreneur to pay a surcharge for such violation.

Deleted.
1) capital, reserves, and other aspects of the assets;
2) income and expenditures, and other aspects of operation;
3) composition of officers and directors;
4) location of factories, work yards and offices and other locational conditions;
5) aspects of business facilities and equipment;
6) existence or non-existence of patents, and other details thereof as well as other technological features;
7) capacity for and aspects of production and sales, etc.;
8) capacity for and aspects of obtaining funds and materials, etc.;
9) relations with other entrepreneurs through investments and other means;
10) comparison with competitors on all points enumerated in the above items.

CHAPTER III. TRADE ASSOCIATIONS

Article 8. No trade association shall engage in any one of the following items:
1) substantially restricting competition in any particular field of trade;
2) entering into an international agreement or an international contract as provided for in Article 6 (1);

3) limiting the present or future number of entrepreneurs in any particular field of business;

4) unduly restricting the functions or activities of the constituent entrepreneurs (meaning an entrepreneur who is a member of the trade association; hereinafter the same);

5) causing entrepreneurs to do such acts as constitute unfair business practices.

Every trade association shall, when formed, in accordance with the rules of the Fair Trade Commission, file a report thereof with the Commission within thirty days as from the date of its formation.

When any change has occurred to the matters reported under the preceding subsection, the trade association concerned shall, in accordance with the rules of the Fair Trade Commission, file a report thereof with the Commission, within two months after the end of the business year during which such change occurred.

Every trade association shall, in accordance with the rules of the Fair Trade Commission,
file a report thereof with the Commission within thirty days as from the date of its dissolution.

Article 8-2. The Fair Trade Commission may, when there exists any act in violation of the provisions of the preceding Article, order to file a report, or to cease and desist the said act, to dissolve the said association, and to take any other measure necessary to eliminate the said act pursuant to the proceedings as provided for in Section 2, CHAPTER VIII.

The Fair Trade Commission may, in accordance with the procedure as provided for in Division II, CHAPTER VIII, in ordering a trade association to take any of the measures set forth in the preceding paragraph, when it deems particularly necessary, at the same time order an officer, manager or constituent entrepreneur (including a constituent entrepreneur who is acting for the benefit of another entrepreneur) of the said association to take measures necessary to ensure the measures provided for by the said subsection.

Article 8-2. Changes as noted.

The provision of Article 7-2 shall apply mutatis mutandis to any act in violation of the provisions of paragraph one, subsections 1), 4) or 5) of the preceding Article.

(Add: "the measures set forth in Article 7-2 applied mutatis mutandis under the provision of the preceding subsection . . .")

Article 8-3. The provisions of Article 7-2 shall apply mutatis mutandis to cases where an act
is committed in violation of the provisions of Article 8 1) or 2) (applying only to such an entrepreneur who is a party to an international agreement or an international contract which contains such matters which would constitute an unreasonable restraint of trade). In this case, the term "entrepreneur" appearing in subsection (1) of Article 7-2 shall read "trade association" and the phrase "to entrepreneur" appearing therein shall read "to constituent entrepreneur (other entrepreneur when a constituent entrepreneur is acting for the benefit of the entrepreneur) of the trade association."

[ sic. ]

CHAPTER III-2. MONOPOLISTIC SITUATIONS

Article 8-4. When there exists a monopolistic situation, the Fair Trade Commission may order the entrepreneur concerned, in accordance with the procedure as provided for in Division II, CHAPTER VIII, to transfer a part of his business or to take any other measures necessary to restore competition with respect to such goods or services. However, the foregoing shall not apply to cases where the Commission considers that such measures may reduce the scale of business of the said entrepreneur to such an extent that, the costs required for the
supply of goods or services, which such entrepreneur supplies, will rise sharply, undermine its financial position and make it difficult for the entrepreneur to maintain its international competitiveness, or where other alternative measures may be taken, which the Commission deems sufficient to restore competition with respect to such goods or services.

In issuing an order prescribed in the previous subsection, the Fair Trade Commission shall give consideration to the following items with respect to the smooth conduct of business activities by the entrepreneurs concerned, and those associated with them and the stabilization of livelihood for those employed by such entrepreneurs:

1) Assets, income and expenditures and other aspects of accounting;
2) Officers and employees;
3) Location of factories, work-yards and offices and other locational conditions;
4) Aspects of business facilities and equipments;
5) The substance of patent, trade-mark and other intellectual property rights and the technological features;
6) Capacity for and aspects of production and
CHAPTER IV. STOCKHOLDING, INTERLOCKING DIRECTORATES, MERGER AND TRANSFER OF BUSINESS

Article 9. The establishment of a holding company is hereby prohibited.

The term "holding company" as used in the preceding paragraph shall mean a company whose principal business is to control, by holding stock, (including partnership shares; hereinafter the same) the business activities of another company.

Article 9. Same to here

Any company (including a foreign company; hereinafter the same) shall not operate as a holding company in Japan.

Same, except add company "or companies in Japan" at the end of the paragraph.

Article 9-2. (1) Any stock company whose business is other than financial (this term refers to those engaged in banking, mutual banking, trust, insurance, mutual financing and securities businesses; the same meaning shall apply hereinafter) and whose capital is larger than ten billion yen or whose net assets (this term refers to the sum of an amount arrived at by deducting the total liabilities from the total assets listed in the latest balance sheet and the

sales, etc.;

7) Capacity for and aspects of obtaining funds and materials, etc.;

8) Aspects of supply and distribution of goods or services; [sic]
amount by which the net assets have increased as a result of an issuance of new stock in accordance with the provisions of Article 280-2 of the Commercial Code (Law No. 48 of 1899), or as a result of a merger or the conversion of corporate bonds, if any; hereinafter the same meaning shall apply in this section) are larger than thirty billion yen shall not be allowed to acquire or to hold stock of companies in Japan in excess of its capital or its net assets, whichever is larger (hereinafter referred to as "the base amount"), if by so doing value of such stock if it is listed separately in the latest balance sheet; the same meaning shall apply hereinafter) [sic] which it has acquired or holds exceeds the base amount: Provided, that the foregoing shall not apply to the acquisition or holding of such stock in the cases provided for in any one of the following paragraphs:

1) The acquisition or holding of stock of a company in Japan which has been prescribed by a Cabinet Order and which invested in by a juridical person established by the government or a local public authority, or a juridical person established under a special law, which must be a corporation whose total amount of capital is owned by the government or whose
liabilities may be contractually guaranteed by the government;

2) The acquisition or holding of stock of a company in Japan, as prescribed by a Cabinet Order, engaged in a business contributive to the development of industries and the progress of economic societies requiring large sums of funds which are of such a magnitude as to make it difficult to procure by ordinary means;

3) The acquisition or holding of stock of a company in Japan whose purpose is to engage in any one or two or more of the following businesses, and which perform business activities pursuant to the objective thereof:

   (a) Business undertaken outside Japan (including the business undertaken in Japan which is closely connected with, and incidental to, such business);

   (b) Business of investment or long-term loans to foreign governments or foreign juridical persons (including those businesses which are closely connected with, and incidental to, such busi-
nesses, hereinafter referred to as "investment and financing business";

(c) Investment and financing business catering to the companies provided for in the preceding paragraph; or

(d) Investment and financing business catering to the companies which fall under the purview of this paragraph;

4) The acquisition or holding of stock of a company in Japan, as prescribed by a Cabinet Order, engaged in the business provided for in paragraph (2) above, and in the investment and financing business as provided for in the preceding paragraph;

5) The acquisition or holding of stock of a company in Japan, established by partially separating the business actually performed by itself, whose issued stock is wholly acquired or owned immediately after the establishment; provided, that this shall apply only to cases where such stock is held within two years after its establishment;

6) The acquisition or holding of stock of
a company in Japan, established by joint investment with a foreign government, foreign juridical person or foreign national (referred to as "co-investment company" in subsection (5) below when it is particularly necessary for the operation of its business to take the form of such a co-investment company therein; provided, that this shall apply only to such cases where prior approval of the Fair Trade Commission is obtained in accordance with the Rules of the Commission;

7) The acquisition or holding of new stock acquired or held due to a stockholder allocation or stock dividends on currently held stock (excluding the stock held under the provision of the paragraphs (1) to (4) of the preceding paragraph); provided, that this shall apply only to cases of stock held for less than two years from the date of its acquisition;

8) The acquisition or holding of stock as the result of the enforcement of a lien, pledge, mortgage, or as the result of payment in kind; provided, that this shall apply only to cases of stock
held for less than two years from the date of their acquisition (or for less than one year from the date on which it is decided to conclude rehabilitation proceedings, in case the stock is deemed to have been acquired through payment in substitute under the provision of Section 265 of the Company Rehabilitation Act (Act No. 172 of 1952)); or

9) The acquisition or holding of stock of a company in Japan for an imperative reason; provided, that this shall apply only to cases where prior approval of the Fair Trade Commission (or without delay after the acquisition of such stock, in case they are acquired under urgent and imperative circumstances) is obtained, in accordance with the Rules of the Commission, and where such stock is held for less than the period stipulated by such approval.

(2) If, as a result of a decrease in the base amount of the stock company as provided for in the previous subsection, the total amount of the acquisition price of stock held in companies in Japan (excluding the holdings which fall under any one of the paragraphs of the said subsection; the same
shall apply in the following subsection) turns out to be in excess of the base amount, the total amount of such acquisition price shall be deemed as the base amount for the purpose of applying the provisions of the preceding subsection during the five years beginning from the date on which the acquisition price exceeded the base amount.

(3) In case the base amount decreases still more during the period under the preceding subsection, the base amount determined prior to such decrease or the total amount of the acquisition price of stock held in companies in Japan as of the date on which the period as provided for in the preceding subsection expired, whichever is the smaller, shall be considered as the base amount for the purpose of applying the provisions or subsection (1) above during the five-year period. The same shall apply to cases where the base amount decreased still more during the five-year period immediately following such decrease.

(4) The provisions of the preceding two subsections shall not apply to cases where the base amount has increased beyond the amount which is considered as the base amount then effective under these
provisions.

(5) When the Fair Trade Commission grants approval under subsection (1) 6), it shall consult with the Minister of Finance and the competent minister having jurisdiction over the business in which the co-investment company is engaged.

(6) When the Fair Trade Commission grants approval under subsection (1) 6) or acknowledgement under paragraph 9) of the said subsection, the Commission shall, in advance, consult with the minister or ministers who are empowered by virtue of a special statute to make recommendations or give instructions with respect to the financial management of the companies which seek to acquire stock and are subject to such approval or acknowledgement.

(7) In case a company which falls under subsection (1) 3) above ceases to become subject thereto, the provisions of said subsection shall not apply to the holding of stock of such company for one year immediately following the date on which such company ceased to fall thereunder.

(8) In case any company acquires stock of another company in Japan under urgent and imperative circumstances subject to an
Article 10. Any company whose business is other than financial (the definition of which shall be banking, trust, insurance, mutual financing or securities business; hereinafter the same) shall not acquire stocks (excluding those without voting rights; hereinafter the same) of another company.

The provisions of the preceding paragraph shall not apply to such a case where the Fair Trade Commission has concluded, when it receives

ex post facto acknowledgement under subsection (1) 9) above and fails to obtain such acknowledgement, the provision of the said subsection shall not apply to the holding of such stock for one month immediately following the date on which such company failed to obtain such acknowledgement.

(9) In the event, as a result of a change in economic conditions, any drastic increase or decrease occurs in the amounts of capital and net assets of the stock companies which rank among the largest two hundred in terms of the size of their capital and net assets (excluding those engaged in financial; the same shall apply in this subsection), a separate provision may be instituted with respect to the amount mentioned in subsection (1) by virtue of a Cabinet Order.

Article 10. No company shall acquire or own stock of a company or companies in Japan in the event that the effect of such acquisition or owning of stock may be substantially to restrain competition in any particular field of trade, or that such acquisition or owning of stock is made through unfair business practices.

Every company in Japan whose business is other than financial (banking, mutual banking, trust, insurance, mutual financing or securities

Article 10. Same as 1953, with the exception of changes as noted.
application for acquisition of the whole stocks of a company which comes under all of the following conditions from a company (excluding one principally engaged in buying and selling of goods), that it does not constitute a substantial restraint of competition in any particular field of trade, and thereby is not contrary to the public interest and has granted permission:

(1) a company which stands in continuous close relation with regard to the supply of raw materials, semi-finished products, accessories, parts, by-products, waste material or goods other economic benefits necessary for its business activities, or a company which stands in relation of utilization of patent invention or model utility,

(2) a company which does not own stock in another company.

In addition to such a case as presented in the preceding paragraph, in case a company (in case of acquisition of stock of an existing company, the company which desires to acquire stock and the company issuing the stock) desiring to acquire stock has explained the fact that such acquisition of stock complies with the conditions contained in each of the following items, the provisions of the preceding paragraph shall apply if it complies with other

(1953)

business; hereinafter the same) and whose total assets (total amount of the assets according to the latest balance sheet; hereinafter the same) exceed one hundred million yen, or every foreign company whose business is other than financial, shall, in case it owns stock of another company or companies in Japan (including such cases wherein the trustor is the beneficiary and exercises the voting right in the security trust), submit a report on such stock owned or entrusted by it as of the end of every business year to the Fair Trade Commission within two months therefrom in accordance with the provisions of its Regulations.

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increase to “exceed two billion yen”

increase filing date to within three months therefrom.
Article 11. Any company whose business is financial shall not own stock in a company with which it is competing and which operates in the same field of financial business.

No company whose business is financial and whose total assets (excluding unpaid up capital stock, unpaid up partnership share) exceed five

Article 11. No company engaged in financial business shall acquire or own stock in another company or companies in Japan in the event that it may be to [sic] own stock of the said company or companies exceeding ten percent of the total outstanding stock thereof, provided that the foregoing shall not apply to such cases as the approval of the Fair Trade Commission

Article 11. Same as 1953, with changes as noted.

Change maximum amount of stock ownership to five percent (ten percent in the case of insurance company) of the total outstanding stock.
(1947) million yen shall acquire stock of another company in case by so doing it holds in excess of five percent of the total issued stock of said company.

The provisions of the preceding two paragraphs shall not apply to such a case coming under any one of the following items:

1) in case of ownership of stocks by a company engaged in the securities business in the normal course of its business;

2) in case of ownership of stocks by a company other than one engaged in the securities business and whose business is financial by underwriting for the purpose of public sale;

3) in case of ownership of stocks by acceptance of security trust wherein the trustor is the beneficiary; provided, that the foregoing shall apply only when the trustor exercises the voting right;

In case of ownership of such stocks as coming under item 1 or item 2 of the preceding paragraph, said ownership of stocks for a period in excess of one year from the date of acquisition of said stocks shall be limited to such a case where previous permission of the Fair Trade Commission has been obtained.

(1953) Commission is beforehand obtained pursuant to the provisions of its Regulations, or as the acquisition or owning thereof comes under any one of the following items:

1) in case the acquisition or owning of stock is made as the result of the enforcement of bona fide liens or of receipt of payment in kind;

2) in case the acquisition or owning of stock is made by a securities business in the course of its business;

3) in case the acquisition or owning of stock is made by acceptance of security trust wherein the trustor is the beneficiary. However, it shall apply only in case the trustor exercises the voting right.

Any company whose business is financial intending to own stock of another company or companies in Japan over the period of one year as from the date of acquisition of stock in excess of ten percent of the total outstanding stock in the case of items 1) and 2) of the preceding paragraph shall obtain the prior approval of the Fair Trade Commission pursuant to the provisions of its Regulations. In such case, the approval of the Fair Trade Commission shall be made by providing therein that the company engaged in financial business shall

(1977) Change maximum amount of stock ownership to five percent of the total outstanding stock.
Article 12. No company shall own debentures (excluding bank financing debentures) of another company in case by so doing it holds in excess of an amount equivalent to twenty-five percent of the capital (the definition of which shall be total capital stock, total amount of partnership shares, aggregate amount of total capital stock and total amount of partnership shares, or total fixed funds) of said company.

The provisions of paragraph 3 and paragraph 4 of the preceding Article shall apply mutatis mutandis to such a case as provided for by the preceding paragraph. In this case “stocks” shall read “debentures.”

Article 13. No officer or an employee (the definition of which shall be a person other than an officer in the regular employment of a company in business) of a company shall hold concurrently a position as an officer in another company in any one of the following cases:

1) in case both of the companies are in competition with one another;

(1953)
promptly dispose of the said stock.

The Fair Trade Commission shall, when intending to grant the approval as prescribed in the preceding paragraphs, beforehand consult with the Minister of Finance.


(1977)


Article 13. Neither an officer nor an employee (meaning in this section a person other than officers in the regular employment of a company) of a company shall hold at the same time a position as an officer in another company or companies in Japan whenever the effect of such an interlocking directorate may be substantially to restrain competition in any particular field of trade.

Article 13. Same as 1953, changes as noted.
2) in case one-fourth or more of the officers of either of the two companies are holding concurrently positions as officers in a third company.

No officer of a company shall in any case hold a position of officer in a company in four or more companies.

Article 14. No person shall acquire stock in two or more companies in competition with one another when the effect of such ownership will substantially restrain competition in any particular field of trade and thereby is contrary to the public interest.

Any person whose ownership of stocks of two or more companies in competition with another will be in excess of ten percent of the issued stock of said companies shall receive the permission of the Fair Trade Commission with

(1953)

No company shall coerce another company or companies in Japan in competition with it in Japan, through unfair business practices, to admit one of its officers concurrently to the position of an officer or an employee of the latter company or companies, or to admit its employee, concurrently to the position of an officer of such company or companies.

Every officer or employee of a company who holds concurrently the position of an officer in another company or companies in Japan in competition with it in Japan, shall, in case the total assets of either company exceeds one hundred million yen, file, in accordance with the Rules of the Fair Trade Commission, a report thereof within thirty days as from the date of assuming the position of an officer.

Change total assets to two billion yen.

Article 14. Change to "No person other than a company" and add a prohibition against the acquisition of such stock by unfair business practices; otherwise, the same.

Article 14. Same as 1953.
regard to acquisition of said stocks.

No officer of a company shall acquire stock of another engaged in competition with said company.
In case an officer of a company, when assuming his position as an officer in said company, owns stock of another company in competition with said company, he shall file a report of said fact with the Fair Trade Commission.

The Fair Trade Commission may, in case it receives such a report as provided for in the preceding paragraph, and when it deems that such ownership of stock may substantially restrain competition in any particular field of trade and thereby be contrary to the public interest, order the disposal of the whole or a part of said stocks or to take any other necessary measures.

Article 15. No company shall effect a merger without the permission of the Fair Trade Commission.
The Fair Trade Commission, in case it receives an application for permission as provided for by the preceding paragraph, shall not grant permission when the said merger falls under any one of the following items and thereby is

Add "within thirty days from the date of such acquisition."
Delete from here to the end of this article.

Same as 1953.

Article 15. No company in Japan shall effect a merger in any one of the following cases:

1) in case a substantial restraint of competition in any particular field of trade may be caused by the merger;

2) in case unfair business practices have been employed in the course of merger.
deemed to be contrary to the public interest:
1) in case the merger does not contribute to
the rationalization of production, supply or
management;
2) in case substantial disparities in bargaining
power will arise due to the merger;
3) in case the merger may cause a substantial
restraint of competition in any particular
field of trade;
4) in case the merger has been coerced by
unfair methods of trade.

Article 16. No company shall, without receiving
permission of the Fair Trade Commission,
receive transfer of the whole or a part of the business of another company, lease the whole of the business of another company, receive entrustment of the management of another company, or enter into a contract which provided for a joint profit and loss account with another company.

The provisions of paragraph 2 of the preceding Article shall apply mutatis mutandis to such a case as provided for in the preceding paragraph; provided, that "said merger" shall read "said act."

Article 17. No acts in whatever form or manner, shall be committed to evade such prohibitions or restrictions as provided for in Article 9 to the preceding Article inclusive.

Article 17-2. In the event that there exists any act in violation of the provisions of Article 10, Article 11 paragraph 1, Article 15 paragraph 1 (including such cases where the said provisions shall apply mutatis mutandis in Article 16 for the preceding Article) or the preceding Article, the Fair Trade Commission may, in accordance with the Act, institute proceedings to restrain such violation.

of a company coming under any one of the following cases:

1) Acquiring the whole or a substantial part of the business in Japan of another company;

2) Acquiring the whole or a substantial part of the fixed assets used for business in Japan of another company;

3) Taking on lease of the whole or a substantial part of the business in Japan of another company;

4) Undertaking the management of the whole or a substantial part of the business in Japan of another company;

5) Entering into a contract which provides for a joint profit and loss account for business in Japan with another company.

Article 17. Same.

Article 17-2. Same as 1953, with the addition of Article 9-2, paragraph 1 to the list of Articles with possible violations.
Article 18. The Fair Trade Commission may, when a company is established in violation of the provisions of paragraph 1 of Article 9, or when companies have merged in violation of the provisions of paragraph 1 of Article 15, institute a suit to have said establishment declared null and void.

CHAPTER V. UNFAIR BUSINESS PRACTICES

with the procedures as provided for in Division 2, Part VIII, order the entrepreneur concerned to file a report, or to dispose of the whole or a part of his stocks, or to transfer a part of his business, or to take any other measures necessary to eliminate any such violation.

In the event that there exists any act in violation of the provisions of Article 9 (1) or (2), 13, 14 or the preceding Article, the Fair Trade Commission may, in accordance with the procedures as provided for in Division 2, Part VIII, order the person violating such provisions to submit or file a report, or to dispose of the whole or a part of his stocks, to resign from his position as an officer in a company, or to take any measures necessary to eliminate such violation.

Article 18. Same.

CHAPTER IV-2. PARALLEL PRICE INCREASES

Article 18-2. If, in any particular field of business where the total price of goods (this
term refers to the price of the goods concerned less an amount equivalent to the amount of taxes levied directly on such goods) of the same description supplied in Japan (excluding those exported; hereinafter the same in this section) or the total prices of services (this refers to the price of the services concerned less an amount equivalent to the amount of taxes levied on the recipients of such services with respect thereto) of the same description supplied in Japan during a one-year period, designated by a Cabinet Order, is in excess of thirty billion yen, the ratio of the total amount of such goods or services supplied by the three entrepreneurs, which rank among the three largest entrepreneurs on the market in terms of volume of supply (this refers to the quantity of goods or services of the same description which one entrepreneur supplies during a given one-year period, and in case it is not appropriate to be calculated by the quantity, the quantity shall be represented in terms of the amount of their prices; hereinafter the same meaning in this section) to the aggregate volume of such goods or services of the same description supplied in Japan during such one-year period (hereinafter referred to as "the aggregate volume") exceeds seven-tenths, and if two or more major entrepreneurs (including the largest one)
(this term refers to the five entrepreneurs each of which account for one twentieth or more of the aggregate volume and rank among the five largest entrepreneurs on the market; hereinafter the same meaning in this section) raise the price they use as the base of their transactions in such goods or services of the same description by an identical or similar amount or percentage within a period of three months, the Fair Trade Commission may ask such major entrepreneurs for a report, furnishing a statement of reasons for such a raise in the price of such goods or services; Provided, that this shall not apply to price increases effected by entrepreneurs whose price of such goods or services is approved or authorized by, or registered with, the competent minister having jurisdiction over the business in which the entrepreneurs are engaged (in case such price is registered with the competent minister, this shall apply only to such cases where the competent minister has the authority to order a change in such registered price.)

In the event any change has occurred in the economic conditions resulting in a drastic change in domestic industrial shipment and wholesale prices, the amount of prices as prescribed in the preceding subsection may be revised by virtue of a Cabinet Order to reflect
CHAPTER V. UNFAIR METHODS OF COMPETITION

Article 19. No entrepreneur shall employ unfair methods of competition.

Article 20. In case there exists an act in violation of the preceding Article, the Fair Trade Commission may order the cessation of such act in accordance with the procedure provided for by section 2 of CHAPTER VIII.

CHAPTER VI. EXEMPTIONS

Article 21. The provisions of this law shall not apply to such business activities relating to production, sales, or supply of persons or parties operating railroad, electricity, gas, and other enterprises whose business constitutes, by the very nature of said business, a monopoly.

Article 22. The provisions of this Law, in case a special law exists for a certain enterprise, shall not apply to such legitimate acts of an entrepreneur as are executed in accordance with the provisions of said law or order under said law.

Such special law as mentioned in the preceding paragraph shall be stipulated by separate law.

(1947)

CHAPTER V. UNFAIR BUSINESS PRACTICES

Article 19. Same, but change unfair methods of competition to unfair business practices.

Article 20. Same.

(1953)

CHAPTER VI. EXEMPTIONS AND EXCEPTIONS

Article 21. Same.

Article 22. Same.

(1977)

such change.

Article 19. Same as 1953.

Article 20. Add to the power of the Fair Trade Commission to order the cessation of the act, the power to "delete the clauses concerned of the contract and to take any other measures necessary to eliminate the said act."

CHAPTER VI. EXEMPTIONS

Article 21. Same.

Article 22. Same.

(1982)
<table>
<thead>
<tr>
<th>Year</th>
<th>Article 23. Same.</th>
</tr>
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<tbody>
<tr>
<td>1947</td>
<td>The provisions of this Law shall not apply to such an act as recognized to be within the execution of rights under the Copyright Law, the Patent Law, the Model Utility Law, the Design Law, and the Trademark Law.</td>
</tr>
<tr>
<td>1953</td>
<td>Article 24. Same.</td>
</tr>
<tr>
<td>1977</td>
<td>Change &quot;unfair methods of competition&quot; to &quot;unfair business practices.&quot;</td>
</tr>
<tr>
<td></td>
<td>Same as 1953.</td>
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1) the purpose shall be mutual aid among the small-scale entrepreneurs or consumers;

2) establishment shall be voluntary, and participation in and withdrawal from membership shall be at will;

3) each member shall possess equal voting rights;

4) in case distribution of profits among members is executed, limits for distribution shall be fixed by law or order, or under the articles of association.
Article 24-2. The provisions of this Law shall not apply to justifiable acts to be undertaken by an entrepreneur, who produces or sells a commodity which is designated by the Fair Trade Commission and the identical quality of which can be easily recognized, for the purpose of fixing and maintaining with the entrepreneur of the other party selling the said commodity the resale price thereof (such shall mean price of the commodity to be sold by the entrepreneur of the other party, or to be sold by an entrepreneur who purchased it from the entrepreneur of the other party offering to sell; hereinafter the same); Provided, further, that nothing herein contained shall be lawful in the event that the said act may unduly injure the interest of the general consumer, or may be contrary to the will of the entrepreneur producing the commodity in the case of the entrepreneur offering to sell.

The Fair Trade Commission shall not designate a commodity under the provisions of the preceding subsection unless it fulfills each of the following requirements:

1) The commodity shall be for the daily use by the consumers in general;

2) Free competition shall exist with respect to the commodity.
The designation of a commodity under the provisions of the first paragraph shall be made by notification.

Legitimate acts performed by an entrepreneur whose business is to issue publications or by an entrepreneur whose business is to sell such publications, in order to fix and maintain with another entrepreneur who buys such article, the resale price thereof, shall be exempted from the application of the provisions of this Law.

The organizations formed in accordance with the provisions of any one of the following Acts shall not be included in the term of "another entrepreneur" who buys commodities or copyrighted works as provided for in subsection 1 or the preceding subsection: Provided, that the foregoing provisions shall, in the case of the organizations formed under the provisions of any one of the Acts mentioned in paragraphs (8) and (8)-2 hereunder, only apply to cases where a business cooperative, a minor business cooperative, a federation of cooperatives, a commercial and industrial association or a federation of commercial and industrial associations purchases such commodity as provided for in subsection 2 above or copyrighted works as provided for in subsection 4 above, for the
consumption of persons directly or indirectly constituting the said business cooperative, federation of cooperatives, commercial and industrial associations or federation of commercial and industrial associations:

1) The National Public Service Law;
2) Agriculture Cooperative Association Law;
3) National Public Service Mutual Aid Association Act;
4) Consumer Cooperatives Act;
5) Fishering Cooperatives Act;
6) Public Corporation Labor Relations Act;
7) Labor Unions Act;
8) Small and Medium-sized Enterprise, etc., Cooperatives Act;
9) Local Public Service Act;
10) Forestry Act;

3) 2 Mutual Aid Association of Public Corporation Employees Act;
3) 3 Local Public Service, etc., Mutual Aid Association Act;
When an entrepreneur as specified in subsection 1 above has fixed the resale price under the said subsection and has entered into a contract for the purpose of maintaining it, he shall, in accordance with the Regulations of the Fair Trade Commission, file a report thereof with the said Commission within thirty days from the date of the conclusion of the said contract: Provided, that the foregoing shall not apply if the Fair Trade Commission stipulates otherwise in its Regulations.

Article 24-3. The provisions of this Law shall, in the event that circumstances falling under the following, each item having risen because of greatly unbalanced demand and supply of the specific commodity, not apply to such concerted activity (including activity of a trade association to have its constituent members undertake concerted activity, hereinafter the same) as approved in accordance with the following paragraph or paragraph 3, of entrepreneurs producing such commodity, or of a trade association constituted by such entrepreneurs as its members (hereinafter referred to as "producers, etc."): Provided, that nothing contained herein shall be lawful in the event that unfair business practices are used, or entrepreneurs are compelled to undertake activity coming under unfair business practices.

Article 24-3. Changes as noted.
CONTROLLING CONCENTRATION

1) Prices of the said commodity are lower than the average production cost thereof, and there exists the possibility of endangering the continuation of enterprise on the part of the majority of said entrepreneurs;

2) It is difficult that such circumstances as mentioned in the preceding item can be overcome by the enterprise rationalization.

Producers, etc., desirous of carrying out concerted activity (excluding that of prevention of renewal or improvement of facilities) regarding the limitation on volume of production and sale, or on facilities in order to overcome such circumstances as described in the preceding paragraph, may beforehand obtain the approval of the Fair Trade Commission according to its Regulations.

Producers, etc., intending to undertake concerted activity to fix prices in such a case as provided for in paragraph 1, and as deemed extremely difficult to limit the volume of production of a commodity in the said enterprise due to the technical reasons, may beforehand obtain the approval of the Fair Trade Commission in accordance with its Regulations. After concerted activity has been undertaken by the approval as provided for in the preceding paragraph, producers, etc., desirous of
simultaneously undertaking concerted activity to fix prices together with concerted activity as stipulated in the preceding paragraph in the event that it is extremely difficult to overcome such circumstances as mentioned in paragraph 1 only by such concerted activity as provided for in the said paragraph, may, also, obtain the approval in the same manner as stipulated therein.

The Fair Trade Commission shall not grant approval as provided for in the preceding two subsections unless the concerted activities approval is [sic] requested fall under the conditions provided for in the preceding two subsections and conform with each of the following requirements:

1) that they do not exceed the action necessary to overcome the circumstances provided for in subsection 1 above;

2) that there is no fear of unduly injuring the interests of the consumers in general, and of related entrepreneurs;

3) that they are not unjustly discriminatory;

4) that they do not restrict unreasonably participation in or withdrawal from such activities.

When the Fair Trade Commission has approved or dismissed an application for approval
under subsection 2 or 3 above, or has taken action pursuant to the provisions of Article 66 (1) with regard to approval under subsection 2 or 3 above, it shall without delay make public the fact showing the reason for the said action. In the event that producers, etc., carrying out concerted activity with the approval obtained pursuant to the provisions of paragraph 2 or paragraph 3 above, discontinued the said concerted activity, they shall without delay file a report of that effect with the Fair Trade Commission.

Any interested person aggrieved by the approval as indicated in paragraph 2 or paragraph 3 may appeal to the Fair Trade Commission within thirty days as from the day of the approval by filing a petition in writing stating the substance of his grievance.

The Fair Trade Commission upon the receipt of such petition for appeal as indicated in the preceding paragraph, shall render its ruling after an open hearing pursuant to the provisions of its Regulations, and shall inform the petitioner of it in writing.

The Fair Trade Commission shall, prior to making such approval under paragraph 2 or 3 above, or to rejecting an application therefore, consult with the competent minister in charge of the trade concerned. The same shall apply

Combine this paragraph and the next to read: "The Fair Trade Commission shall, where an objection to approval under subsection 2 or 3 above has been made, conduct a public hearing in accordance with the Rules of the Fair Trade Commission."
when the Fair Trade Commission takes action provided for in Section 66 (1) with respect to such approval under paragraph 2 or 3 above.

Article 24-4. The provisions of this Act shall not apply to concerted activities of producers approved in accordance with the following subsection, where they are found particularly necessary for effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency and any other rationalization of enterprises.

Producers desirous of undertaking concerted activities regarding restrictions on technology or kinds of product, utilization of facilities for storage of raw materials or products or for transportation thereof, or utilization or purchase of by-products, waste, or scrap in the case provided for by the preceding subsection, may obtain prior approval from the Fair Trade Commission in accordance with the Regulations of the Fair Trade Commission.

The Fair Trade Commission shall not grant approval under the preceding subsection unless concerted activities applied for fall under the conditions provided for in the preceding subsection, and conform with each of the following requirements:
1) That there is no fear of injuring the interests of customers;
2) That there is no fear of unduly injuring the interests of consumers in general and of related entrepreneurs (excluding customers);
3) That they are not unjustly discriminatory;
4) That they do not restrict unreasonably the participation in or withdrawal from such activities;
5) That where restrictions on kinds of product are imposed differently on participants in the concerted activities, such differentiation is not designed to unduly concentrate production of a particular kind of product in the hands of any one entrepreneur.

The provisions of the proviso to subsection 1 and of subsections 5 to 8 of the preceding section shall apply mutatis mutandis to the concerted activities as provided for in subsection 2.