Regulatory Approach and Specification of Unfair Trade Practices in Uzbekistan: Comparison with Japanese Law

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Abstract

Current regulation of Unfair Trade Practices (hereinafter UTP) in Uzbekistan has a "fragmental" character, which includes separate provisions from "Law On Competition", 2012 (hereinafter Competition law) and Rules of Retail Merchandizing in the Republic of Uzbekistan, 2003 (hereinafter

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Rule of Merchandizing). Competition law designed UTP within the category of "Unfair Competition", while the Rule of Merchandizing determined UTP as "illegal trade". Moreover, our analysis of legislative provisions shows that UTP is not clearly classified and distinguished form other categories of competition law such as monopolization, unreasonable restraint of trade in Uzbekistan. Therefore, the regulatory approach of UTP in Uzbekistan lacks a clear legal framework and enforcement mechanism. This article uses methods of comparative analysis, interpretation and constructive criticism to describe present regulatory approach and provides main structural suggestions to improve the regulatory and enforcement system so as to effectively deal with UTP in Uzbekistan.

Keywords: Unfair Trade Practices, Competition law, regulation, Uzbekistan

I. Definition of Unfair Trade Practices (UTP)

The category "unfair trade practices" generally means any conduct which has a tendency to impede fair competition.[(1)] This means that as long as there is a *possibility*, not probability, for such impediment, the requirement is satisfied.[(2)] In a broader sense, the definition of "unfair trade practices" encompasses various deceptive, fraudulent, or otherwise injurious trade practices and mainly refers to practices that directly affect consumers (in "business-to-consumer" relation), such as misleading advertising, customer inducement by unjust benefits, tie-in practices etc. On the other hand, the term can also encompasses unfair practices towards competitors or other

(1) Miwa Yoshiro, *State Competence and Economic Growth in Japan*. Routledge, 2004.

(2) For the Japanese context, see Willem Visser t'Hooft, *Japanese Contract and Anti-Trust Law: A Sociological and Comparative Study*. Routledge, 2003. p. 51.

business entities (in "business-to-business" relation), such as abusing bargaining position, resale price maintenance etc. This category can be seen as a legal standard of competition law, adopted by some developed countries, including Japan.

However, Uzbekistan adopted a different approach which cannot clearly define "unfair trade practices" as anti-competitive behavior. Some of these practices, stipulated in Art. 13 of Uzbekistan competition law, are evaluated as "illegal trade", but most of them are considered as "unfair competition". Therefore, legislative body of Uzbekistan designed this kind of practices in the category of unfair competition. Thus, we will start analyzing from the definition of "unfair competition" for the purpose to understand the legislative approach of Uzbek Parliament.

Art.4 of the "Law on Competition[3]" defines "unfair competition" as "the action of business entity or the groups of persons directed on gaining advantages in an economic activity which contradicts the legislation or customs of business practices, and can cause losses to other business entities (competitors) or put or can cause injury of their business reputation". Theoretically, any conduct which tends to injure the competitor (or consumer) and to restrict free competition can be considered as "unfair competition[4]". Uzbekistan competition law (Art. 13) provides: (i) Distribution of the false, inexact or deformed information capable of causing losses to other undertaking or damaging its business

(3) See *Law "On Competition" of the Republic of Uzbekistan* Article 1 of the Law sets out as follows; "The present Law determines organizational and legal bases of the prevention, restriction, and suppression of monopolistic activity and unfair competition, and directed towards providing conditions for formation and effective functioning of the competitive relations in the markets".

(4) Murodov, J. "Definition and Significance of Unfair Competition amongst Entrepreneurs (Тадбиркорлар Ўртасидаги Инсофсиз Рақобат Тушунчаси Ва Аҳамияти)," 134. Tashkent: Tashkent State Institute of Law, 2010.

reputation; (ii) Sale of the goods with illegal use of intellectual properties; (iii) Confusing consumers concerning character, way and place of production, quantity and quality of the goods; (iv) Incorrect comparison by the undertaking, including during its advertising activity, of goods made or sold by it with the goods of other undertakings; (v) Reception, use, disclosure of the scientific and technical, industrial or trade information, including trade secret, without the consent of its owner; (vi) Creating barriers to the market of goods and services to the new undertaking. However, the question here is how to define the category of "unfairness" in this legal concept. There are two features to the concept of "unfairness": First, the legislative body intended to express the "unfairness" by the phrase "actions .... directed on the gaining advantages". This conduct requirement needs the method, which can be evaluated as "unfair methods of competition". Additionally, the actions which contradict the legislation or customs of business practices can be considered as "unfair competition".

In accordance with Civil Code of Uzbekistan, customs of business practices shall be deemed to be a rule of behavior which has been formed and extensively applied in any domain of entrepreneurial activity and is not provided for by legislation irrespective of whether it has been fixed in any document (Art. 6)[(5)]. In other words, fair customs of business practices are not necessarily designed by any legislation. However, some forms of violation listed in the "Rules of Retail Merchandizing in the Republic of Uzbekistan"[(6)] such as unreasonable increasing of price; refusal to supply or

(5) William Elliott Butler, *Civil Code of the Republic Uzbekistan*. Kluwer Law International, 1999. p. 5.

(6) *"Rules of Retail Merchandizing in the Republic of Uzbekistan"* (*Вазирлар Маҳкамасининг 2003 йил 13 февралдаги 75-сон қарорига 1-ИЛОВА "Ўзбекистон Республикасида чакана савдо Қоидалари,"* 2003. http://www.lex.uz/pages/getpage.aspx?lact_id=243235#465357 (accessed August 31, 2016).

service consumers; sale of product without information about brand name, origin or location of manufacturer, are likely to be viewed as "unfair" business practices. This shows that above conducts are mostly considered as the violation of the subordinate rules, not competition law, in Uzbekistan.

In this way, the main forms of unfair competition, especially unfair business practices may arise from inconsistency with legal order. "Unfairness" in Uzbek Competition Law is Stipulated in subordinate legislation such as Rule of Merchandising. This legislation seems to be contradictory. Particularly, the actions listed in the Art.13 regarding "Law on Competition" of the Republic of Uzbekistan, although established as unfair competition, mainly are stipulated in the subordinate law of Rule of Merchandising.

Ⅱ. The Goals and Importance of Prohibition of UTP

The faster the markets grow, the faster the participants may face to unfair trade practices. The main issue here is how to keep the balance of economic power among participants in the market. However, in most cases the economic position of consumers seems to be weak in comparison with that of producers and suppliers. On the other hand, not only consumers, but also the other market participants can be injured.[(7)] Thus, the importance of the prohibition of unfair trade practices in Japan lies in the three main areas:

First, the control of unfair trade practices is regarded as a precautionary

(7) *International Trade and Competition Law in Japan*. https://global.oup.com/academic/product/international-trade-and-competition-law-in-japan-9780198254409（accessed August 31, 2016）.

measure to the prohibition of private monopolization.

Second, the prohibition of unfair trade practices can be a function of consumer protection law.

Third, the prohibition of unfair trade practices also can be a function of small business protection law[8], especially in the regulation of Superior Bargaining Position.

The goals of unfair trade practices regulation are to preserve the following three situations:

a) preservation of free competition, i.e. free competition among undertakings is not restricted and an undertaking is not prevented from entering into a market freely.

b) maintenance of fairness in competitive process, i.e. competition is focused on price, quality and other conditions, thus fair method of competition is employed.

c) maintenance of the basis of free competition, i.e. undertakings can engage in transactions based on free and voluntary decision making, thus the basis of free competition is maintained[9].

In Uzbekistan, the goals of regulation were broadly established in Art.1 of

(8) See ibid.

(9) The JFTC issues guidelines with regard to Unfair Trade Practices namely "The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices (July 11, 1991)" (hereinafter referred to as "Distribution Guideline"). The Distribution Guideline says above a), b) and c) as follows;

[I]t is essential to promote free and fair competition and enable the market mechanism to fully perform its functions: more specifically, to make sure that a, firms be not prevented from freely entering a market, b, each firm can freely and independently select its customers or suppliers, c, price and other transaction terms can be set via each firm's free and independent business judgement, and composition be engaged in by fair means on the basis of price, quality and service.

See Introduction of the Guidelines Concerning Distribution Systems And Business Practices Under The Antimonopoly Act, July 11, 1991 by Secretary General, Fair Trade Commission.

"Law on Competition". According to this article, the aim of this law targets regulation of the relations concerned with competition.[10] This general aim can be interpreted as:

1) prohibition of the actions which restrict or tend to restrict the competition in the commodity and financial markets (Art. 3), that is to say, preservation of free competition.

2) prohibition of the actions which can cause injury or discredit the competitors (Art. 13). It serves to keep fair methods in competition.

Furthermore, the "Law on Competition" provides free competition focused on price, quality, services, and based on free decision making in any transactions.

If we analyze the importance of prohibition of unfair business practices in Uzbekistan, we can see that the scope of regulation is *not* wider than Japanese Anti-Monopoly Act. The "Law on Competition" does not cover the category of "private monopolization", instead, it regulates "abusing of dominant position" as the first pillar of anti-competitive behaviors. To put it differently, the regulation of unfair trade practice is regarded as a measure to prevent abuse of the dominant position. In Uzbekistan, the prohibition of unfair business practice is a part of the law of small business protection and the law of consumer protection. However, in the case of consumer protection, the regulatory function of "Law on Competition" becomes weak, and the "Law on Protection of consumers' rights" shows its enforcement power in practice.

(10) See *Law "On Competition" of the Republic of Uzbekistan.*

Ⅲ. Legal Regulation and specification of UTP

Unfair Trade Practices in Japan were originally incorporated into the Anti-Monopoly Act by an amendment in 1953. Originally, the Anti-Monopoly Act did not prohibit 'unfair trade practices' but instead prohibited 'unfair methods of competition,' influenced by Section 5 of the US Federal Trade Commission Act (hereinafter FTC Act), which also prohibits unfair methods of competition.[11] Furthermore, the related provisions of the Anti-Monopoly Act were again amended in 2009.

Particularly, in the 2009 amendment, the revisions in terms of reinforced deterrence of the New Act are presented.[12] The party subject to surcharge is redefined, including the 5 categories prescribed as follows:

a) A surcharge system was introduced against the exclusionary type of private monopolization. The amount of surcharge is the amount obtained by multiplying the sales of the goods or services concerned by six

(11) Simon Vande Walle, and Tadashi Shiraishi. "Competition Law in Japan." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, July 1, 2015. http://papers.ssrn.com/abstract=2219881 (accessed August 31, 2016).

(12) Under the Antimonopoly Act, the JFTC conducts necessary investigations based on Article 47. If it finds any violation, the JFTC notifies the person who is to be the addressee of the cease and desist order of such matters as the expected content of the order (Paragraph 5 of Article 49) and gives the person an opportunity to express an opinion and to submit evidence (Paragraph 3 of Article 49) before issuing the cease and desist order in consideration of the opinion and evidence. Even if the JFTC does not have enough evidence to take legal measures, when it identifies any suspicions of violations of the Antimonopoly Act, it issues warnings and instructs the parties concerned to take measures. In addition, the JFTC issues cautions as a means of preventing such violations when it does not have enough evidence to specifically identify a violation of the Antimonopoly Act, but is only able to recognize certain conduct that could lead to violations. For example, out of 32 examinations concluded by the JFTC in 2008, it took legal measures in 21 cases (cease and desist orders in 20 cases and a surcharge payment order without a cease and desist order in one case). The JFTC also issued warnings in 3 cases in which it identified suspicions of violations of the Antimonopoly Act, issued cautions in 5 cases, and terminated examinations in 3 cases in which it was unable to uncover evidence of illegal conduct.

hundredths (two hundredths for retailers and one hundredth for wholesalers)[13].

b) An undertaking that repeatedly commits violations in the form of concerted refusal to supply, discriminatory pricing, unjustly low price sales, or resale price restriction shall be subjected to the surcharge system. The amount of surcharge shall be the amount obtained by multiplying the sales of the goods or services resulting from the pertinent violation by three hundredths (two hundredths for retailers and one hundredth for wholesalers).

c) An undertaking that continues to abuse its superior bargaining position shall be subject to the surcharge system. The amount of surcharge shall be the amount obtained by multiplying the amount of the pertinent violating transaction with its counterparty by one hundredth.

In Uzbekistan, prohibition of unfair competition is based on the principle of prohibition of "unfair methods of competition"[14]. Especially, unfair business practices are regulated under the category of "unfair competition" and there are no specific legal clauses (framework) which clearly describe unfair business practices as a pillar of competition law. The reason is because Competition Law itself is relatively new field in legal system of Uzbekistan.

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(13) Any undertaking who engages in exclusionary private monopolization shall be ordered to pay a surcharge of an amount equivalent to 6% (2% in the case that the undertaking engages in retail business or 1% in the case that the undertaking engages in wholesale business) of the amount of sales, pursuant to the provisions of paragraph (4), Article 7-2 of the Antimonopoly Act. Any undertaking who engages in private monopolization by controlling and excluding business activities of other undertakings shall be ordered to pay a surcharge of an amount equivalent to 10% (3% in the case that the undertaking engages in retail business or 2% in the case that the undertaking engages in wholesale business) of the amount of sales concerning the private monopolization by control, pursuant to the provisions of paragraph (2), Article 7-2 of the Antimonopoly Act.

(14) Omanbay Okyulov, and Komi Mansurov. *Competition Law* (***Конкурентное право***). Tashkent: Tashkent State Institute of Law, 2008. p.36.

It has been still developing to reach the international standards as well as to find a balance between "the protection of national market" and "to be in harmony with international business environment". For this purpose, Uzbekistan stepped forward and developed the legislation according to "Uzbek model of market economy". This "path" of formation and developing of legal rules on unfair competition (unfair business practices) can be conventionally divided into the following periods.

The first stage (*1991-1996*) is characterized by the formation of basic rules and organizational-legal issues of unfair competition regulation in the Republic of Uzbekistan. This stage began in 1991 with adoption of the first "Law on Enterprises", which established the legal and economic facilities of entrepreneurship. Art. 32 of the Law forbids any undertaking to discredit competitor's reputation, to conquer the market and divide it by oligopolies, to maintain the monopoly price and any other concerted actions which restrict a free competition.[15] It means that the legislative body attempted to set up a general clause of prohibition of *unfair business practice* in the earliest stage of independence. In order to enforce this clause, the "Law on Restriction of Monopoly Activity" listed unfair competition behaviors without definition or other specific rules.[16] There were only two actions which can be evaluated as unfair business practices: (i) dissemination of

(15) *Law "On enterprises in the Republic of Uzbekistan"* (*Ўзбекистон Республикасининг Қонуни Ўзбекистон Республикасидаги Корхоналар тўғрисида*), 1991. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993643168&query=корхоналар&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3968&action=show_result (accessed August 31, 2016).

(16) *Law of the Republic of Uzbekistan "On restriction of monopolistic activity"* (*"Монополистик фаолиятни чеклаш тўғрисида»ги Ўзбекистон Республикасининг Қонуни*), 1992. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993643168&query=монопол&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3968&action=show_result (accessed August 31, 2016).

misleading information which discredits competitors, and (ii) restriction to enter the market. However, the second one is very general and can overlap with other pillars of competition law as well. Furthermore, the Civil Code of the Republic of Uzbekistan designed the definition of business practice in 1996, but it was titled "customs of business turnover". According to Art. 6 of the Civil Code, customs of business turnover shall be deemed to be a rule of behavior which has been formed and extensively applied in any domain of entrepreneurial activity and is not specified in any legislation.[17] The first stage was completed with the formation of a special Committee for anti-monopoly and competition development.[18] The Anti-monopoly Committee was empowered to prevent unfair competition. However, this authority of the state body was not functioned, because at that time there was no mechanism of legal assessment of unfair competition behaviors as well as unfair trade practices in Uzbekistan.

The second stage (1996-2003) started with an adoption of special act in 1996. At this stage the national legislation developed a special "Law on Competition and Restriction of Monopoly Activity in Commodity Markets".[19] This special act designed the definition of *unfair competition* for the first

(17) William Elliott, Butler, *Civil Code of the Republic Uzbekistan*. Kluwer Law International, 1999. p. 5.

(18) *Decree of the President of the Republic of Uzbekistan "On formation Committee of anti-monopoly and improving competition"* (*Ўзбекистон Республикаси Молия Вазирлиги хузурида Монополиядан чиқариш ва рақобатни ривожлантириш қўмитасини ташкил этиш тўгрисида*), 1996. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993643168&query=монопол&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3973&action=show_result (accessed August 31, 2016).

(19) *Law "On competition and restriction of monopoly activity in commodity markets"* (*«Товар бозорларида монополистик фаолиятни чеклаш ва рақобат тўгрисида»ги Ўзбекистон Республикасининг Қонуни*), 1996. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993643168&query=монопол&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3968&action=show_result (accessed August 31, 2016).

time in the legislative history of Uzbekistan. However, this definition has two components of unfair competition which the current legislation does not have, i. e., actions which (i) restrain competition, and (ii) can effect to (inventory) turnover of undertakings. It means, at that time, the definition of unfair competition overlapped unfair business practices as well. Moreover, decrees and regulations during this period deals with the prevention of monopoly and M&A issues, because the processes of privatization had increased dramatically in Uzbekistan at that time.

The third stage (2003-2012) can be called "sorting period" of unfair business practices. This stage started with adoption of the "Rules of Retail Merchandizing in the Republic of Uzbekistan"[(20)], which separated the category "business torts" from "unfair business practices". Particularly, the Rules of Merchandizing listed some forms of violation which can be evaluated as "unfair business practices". For instance, actions such as unreasonable increasing of price; refusal to supply or deal with consumers; selling product without information about brand name, origin or location of manufacturer, are more related to "unfair business practice" rather than "business torts" practices. On the other hand, the Rules of Merchandizing also has trading rules which show the actual meaning of "business torts" in practices.

The forth stage (2012-present) can be conventionally called "developed period of legal regulation" of unfair competition. This stage relates with an adoption of the "Law on Competition"[(21)] based on modern competition law

(20) See *Rules of Retail Merchandizing in the Republic of Uzbekistan.*

(21) The law determines organizational and legal bases of the prevention, restriction, and suppression of monopolistic activity and unfair competition, and directed towards providing conditions for formation and effective functioning of the competitive relations in the markets. New concepts for Uzbekistan such as "financial service", "relevant market", "state authorities", "anticompetitive actions", "coordination of economic activity", "agreement", "concerted actions", and "economic concentration" were also introduced. Furthermore, a separate chapter of the law is devoted to the anti-competitive actions. It prohibits unfair

framework and new legislation tendency in Uzbekistan. The Law adopted a modern approach on unfair competition. Furthermore, it listed anti-competitive actions as well as unfair competition behaviors. However, listed unfair competition actions cover particularly IP related actions and partly unfair business practices. The examples of unfair business practices keep the general meaning such as "make a barrier for undertaking to enter commodity or financial market".

Ⅳ. Basic Categories of UTP

In Japan, The Anti-Monopoly Act[(22)] provides five types of unfair trade practices and the JFTC designates additional 15 types of acts under the General Designations, which are applicable to any and all industries. However, there are some differences between Japanese and Uzbek Competition law on the types of unfair business practices. Therefore, we will analyze the common types of UTP for both countries in accordance with the following table.

	Japan（Unfair Trade Practices）	Uzbekistan（Anti-Competitive Actions）
1.	Abusing Superior Bargaining Position	Abusing Dominant Position
2.	Refusal to Supply and Discriminatory Treatment	
3.	Unreasonable Low Price Sales	

competition, as well as coordinated actions and deals of economic entities, acts and actions of state bodies, and associations of legal entities that restrict competition.

（22） For general introduction of Japanese law, see Doing Business in Japan. DLA Piper. 2013. https://www.dlapiper.com. accessed on June 3（accessed August 31, 2016）.

4.	Resale Price Maintenance	Concerted actions of undertakings directed to restrain competition
5.	Exclusive Dealing Arrangement	
6.	Territorial and customer Restriction	
7.	Deceptive customer inducement	Incorrect (misleading) Advertising Unfair competition

4.1. Abusing Superior (Bargaining) Position

In general economic inefficiency may justify government intervention. The reason for this is that the benefit of competitive markets tends to come from the fact that economic agents enter into mutually beneficial transactions on such markets, and that the clearing price for such transactions is what guides the allocation of resources in the economy in a way which maximizes social welfare. Sometimes, undertakings are not fully informed or there is some kind of asymmetry of information on the market. And we know that in those cases, competition will not necessarily lead to the expected benefit. However what is more often discussed is the case where some undertakings are coerced into entering in to a particular type of transaction. In general, this problem of coercion is not completely ignored by anti-trust law. There are circumstances where transactions or the refusal by one party to enter into a transaction has to be monitored to make sure that they do not destroy the efficient functioning of markets. In such circumstances, there are high switching costs for consumers. For example, it is quite difficult to make competition work among the suppliers and therefore, even if there is a competitive structure of the industry, it may not be true that these will lead to welfare maximization.

In Japan, Abusing Superior Bargaining Position is regulated by the section 2 (9) (v) of the Antimonopoly Act[(23)]. Competition policy is really

(23) See also JFTC "Guidelines for the Exclusionary Private Monopolization under the

designed to preserve the competition process and not individual competitors. Even if individual suppliers do suffer harm by inferior bargaining position, it may be difficult to sustain an argument that competition has suffered in any market. As a result, many competition authorities do not see it as their role to protect small suppliers but instead the competitive process. Under this position, most breaches of contract that leave an individual supplier at some economic disadvantage would not be dealt with under competition law system that would scrutinize every breach of contract in the world of commerce as a way of examining possible competitive harms.

Large companies organized a group of subcontractors consisting of various small and medium sized companies whose wages were relatively low and whose working conditions were inferior in Japan. Because the subcontractors invested significantly in transaction-specific assets (physical as well as human) and became dependent on the large companies, the large companies often took advantage of this position in order to reduce their costs. These large companies nevertheless sometimes gave financial and technical assistance to their subcontractors. The problem for the JFTC then was exploitative conduct by large companies and unjustly disadvantageous contract terms of the subcontractors. Most victims would like to remain anonymous, at least in Japan.

In Uzbekistan, Competition Law designs Abusing Dominant Position as the first category of anti-competitive actions. However, this category is wider than "bargaining position" in Japan. In accordance with the Art. 6 of the "Law On Competition" of the Republic of Uzbekistan, dominant position is an exclusive position of the undertaking (or group of the undertakings)

Antimonopoly Act" (hereinafter referred to as the "Monopolization Guidelines") issued on October 28, 2009.

in the commodity or financial market that gives the undertaking (or group of the undertakings) an opportunity to render decisive influence on restriction of competition, to limit other undertakings' access to the market, or otherwise limit freedom of their economic activity. A market position is classified as dominant when an undertaking (or group of the undertakings) has a market share of 50 percent or more. The position of an undertaking (or group of the undertakings) with a market share in a range from 35 percent to 50 percent can also be classified as dominant, if (i) stability of a market share of the undertaking in the market continues at least during one year, (ii) the size of the market shares of other competitors is relatively small, and (iii) the undertaking can influence the entry (access) to the market.

The dominant position can be evaluated as abusive when the undertaking makes a restriction of the competition by conducting any of the following actions:

a) to decrease size of product turnover through making it deficit in the order to increase the price;

b) to set monopoly (low or high) price;

c) to apply the discriminatory (or obligatory) treatments in contracts;

d) refusal to supply;

e) to make a restriction to access the market for other undertakings.

To conclude, in order to classify a dominant position, the Competition Law of Uzbekistan sets up a quantitive criterion such as 50 percent (or 35-50 percent) of market share.

4.2. Refusal to Supply and Discriminatory Treatment

In principle, selection of purchasers and establishment of supply conditions independently made by an undertaking should be viewed as the

discretion of undertakings. Accordingly, whether or not refusal to supply and discriminatory treatment by a single undertaking falls under Unfair Trade Practices should be assessed especially prudently.[24]

In Japan, Section 2 (9) (i) and (ii) of the Antimonopoly Act deals with concerted refusal to supply and discriminatory treatment.[25] If an undertaking, in concert with competitors, carries out refusal to supply, imposes restriction on the quantity or contents, or applies discriminatory treatment to the condition or implementation of supply in the upstream market (hereinafter referred to as ―Refusals) concerning a product necessary for the trading customers to carry out business activities in the downstream market, such conduct may cause difficulty in the business activities in the downstream market of the trading customers who are unable to easily find an alternative supplier in the upstream market, and may undermine competition in the downstream market. Thus, carrying out Refusals, in concert with competitors, concerning a product necessary for the trading customers to carry out business activities in the downstream market may fall under Unfair Trade Practices.

In Uzbekistan, as mentioned above, Refusal to Supply and Discriminatory Treatment are established as actions (methods) of Abusing Dominant Position. For instance, Art.10 of the "Law on Competition" defines "Discriminatory Treatment" as the following actions:

1) to apply the discriminatory treatment in contract, which means

(24) As for Single Refusal to Supply and Discriminatory Treatment, an undertaking basically has the discretion to select to whom and on what conditions it supplies products. Accordingly, if an undertaking independently selects a party to whom the product is supplied and determines the conditions for supply in consideration of the details and results of transactions for supply to the trading customers (including entrants intending to be supplied with the products; the same shall apply hereinafter), it does not fall under Unfair Trade Practices in principle.

(25) See also Monopolization Guidelines.

making restriction to purchase or realize products of other competitors;

2) to apply the obligatory treatment in contract, in other words, to bind the contracting party by obligation on terms and conditions which is not a subject matter of contract. It might be transfer of other property rights, other financial operations or other clauses which are not related to contract, and consequently, can restrict competition;

3) to sign the contract only with condition that contracting party should do something or refrain from some actions. In the most cases, contracting (weak) party should purchase or sell product to an undertaking which was chosen by the first party, or refrain from merchandizing of the product when the first party limits it.

Although Refusal to Supply is classified as Abusing Dominant Position, it is regulated by legislation *in a fragmental way*. The main action of Refusal to Supply is described by "Law on Competition". According to this Act, there is Refusal to Supply when a manufacturer refuses to make (sign) a contract, even if it is able to manufacture or realize that product (Art. 10). On the other hand, "Rules of Merchandizing[(26)]" classifies refusal to provide service to consumers as a refusal to supply under the category "business torts". For instance, refusal to provide an opportunity to check quality and weight of product, refusal to replace defective or missing products; refusal to receive the payment with credit cards are evaluated as "refusal to supply consumers". However, "Law on Competition" deals with "refusal to supply undertakings" as competitors.

4.3. Unreasonably Low Price Sales

Free competition economy is based on the assumption that supply and

(26) See *Rules of Retail Merchandizing in the Republic of Uzbekistan*.

demand is left to market mechanisms and undertakings have the freedom to decide their prices in accordance with supply and demand. Price-cutting competition based on companies' own efforts essentially constitutes the core of competition on the merits that competition policies intend to maintain and promote. Therefore, intervention in price-cutting competition should be kept at a minimum in the light of the objective of the Antimonopoly Act to promote fair and free competition. However, depriving competitors' customers by setting prices lower than the cost required for supplying the product would not reflect business efforts or the normal competition process and would cause difficulty to the business activities of an equally or more efficient competitor. Thus, setting a product's price lower than the cost required for its supply (hereinafter referred to as the "unreasonably low price sales") may fall under Unfair Trade Practices.

In Japan, unreasonably low price sales is regulated in the section 2 (9) (iii) of the Antimonopoly Act.[27] Three requirements have to be met for conduct to be judged unreasonable low price sales, i.e., (1) supplying commodities or services at markedly lower prices than the cost of supply; (2) continuing such supply; and (3) tending to cause difficulties to the business activities of other undertakings. The prices in (1) mean those far lower than the gross cost of sales. In normal retail trade, these are generally prices that are lower than purchase prices. Regarding (2), if the conduct is done for a short period of time or as a single act, it will have less influence on competition, while in general conduct that continues for a considerably long period falls under unreasonably low price sales. As mentioned above, continuous selling below the purchase price is a typical case of unreasonably low price sales. In view of the characteristics of commodities

(27) See also Monopolization Guidelines Part II.

or the purpose and effect of unreasonably low price sales, selling at slightly above the purchase price or a single conduct of unreasonably low price sales could be regarded as a problem. This is because some cases that do not meet the requirements of (1) and (2) may still be likely to impede fair competition. The result of conduct falling under (3) is required. Any conduct that meets the above requirements is prohibited in principle as an unreasonably low price sale. Nevertheless, if there is proper justification objectively, the conduct does not fall under unreasonably low price sales. A good example is selling commodities at marked-down prices, such as perishable food with a short shelf-life.

In Uzbekistan, setting of monopoly high or low prices is considered as a method of Abusing Dominant Position. For instance, if an undertaking (with dominant position) sets the high price by which intends to cover unreasonable expenses and get extra profits from the decreasing quality of product, this price is classified as "Monopoly High Price". However, this legal clause cannot be applied to stock exchange trading. The monopoly price in financial market is regulated with "Regulation on identification of the monopoly high and low prices of services in financial market"[28]. In accordance with this Regulation, the monopoly high price can be considered if two and more undertakings are operated in financial market, and service price which determined by undertaking with dominant position is more than 10 percent higher than the average price of other undertakings.

(28) "Regulation on identification of the monopoly high and low prices of services in financial market". *Decree of the Government "On measures of improving antimonopoly regulation in commodity and financial markets"* (***Товар ва молия бозорларида монополияга қарши тартибга солишни такомиллаштириш чора-тадбирлари тўғрисида***), 2003. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993643168&query=монопол&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3972&action=show_result (accessed August 31, 2016).

"Monopoly Low Price" in commodity and financial market occurs when the undertaking with dominant position sets the price lower than cost price of product and its realization effects the debt (lost), and consequently it restricts the competition.

4.4. Resale Price Maintenance

Resale price maintenance is in principle illegal and is considered as an unfair trade practice. This per se illegality treatment is in accord with other countries.

In Japan, the section 2 (9) (iv) of the Antimonopoly Act deals with resale price maintenance. Accordingly, restriction on resale price is found not only when there is any explicit or implicit agreement on the price level between upstream and downstream parties, but also when an upstream party takes any artificial means to have a downstream party follow the price set by the upstream party (e.g., refusal to deal, rebate, price patrolling and surveillance). The JFTC has found more violations in resale price maintenance than in any of the other vertical restraints. This does not necessarily mean that treatment of per se illegality lowers the standard of proof.

In Uzbekistan, resale price maintenance is qualified as a form of concerted actions (cartel). Concerted actions is defined in Art 4. of "Law on Competition", and its identification mechanism is set up in "Regulation on identification procedure of concerted actions and transactions directed to restrict competition" (hereinafter, Regulation[29]). The Regulation classifies two types of cartel: horizontal and vertical. Accordingly, collusion can be

(29) "Regulation on identification procedure of concerted actions and transactions directed to restrict competition". See Decree of the Government "On measures of improving antimonopoly regulation in commodity and financial markets".

conducted horizontally or vertically. This kind of vertical agreements are legally the same as resale price maintenance. The Regulation defines a "vertical agreement" as concerted action or collusion between manufacturer (or wholesaler) and distributor (or retailer). In accordance with Art.11 of "Law on Competition", the vertical agreement can be evaluated as anticompetitive action, which restricts or tends to restrict competition, if:

a) it restrains the party from independently determining distribution territory or consumers in order to resale the product (territorial and consumer restriction);

b) it sets a limitation on the resale price of products (price restriction);

c) it prohibits purchasing the products from other competitors (exclusive dealing).

Comprehensive analyses upon types of vertical restraints are individually discussed as the following.

a) **Exclusive Dealing Arrangement**[30] It is a typical example of vertical non-price restraints in Japan. Vertical non-price restraints are to be judged by a case-by-case approach, which weighs procompetitive with anticompetitive effects. Even if an undertaking engages in a dealing on the condition that its trade partner will not purchase the products from its competitor, the competitor is able to continue its business activities in the market based on the competition in prices, product quality or other factors if it is capable of easily finding a supply destination as an alternative to the said trade partner. Therefore, such conduct itself does not necessarily fall under Unfair Trade Practices. However, when an undertaking engages in trade on the condition that trade with competitors be prohibited or restrained, such conduct may cause difficulties to the business activities of

(30) See also Monopolization Guidelines Part II.

a competitor that cannot easily find a supply destination as an alternative to the said trade partner, and therefore may undermine competition. Trading on condition for prohibiting or restraining the trade with the said undertakings' competitor as described above may fall under Unfair Trade Practices.

Exclusive Dealing which an undertaking obliges its trading partners to deal only in its commodities and not to transact with its competitors shall be unlawful if it tends to foreclose the opportunity for competitors to transact or to prevent competitors from entering into the market. Exclusive Dealing includes not only the conduct of making it clear in the contract that the trade partner shall not have dealings with one's competitor, but also conduct of prohibiting or restraining dealings with one's competitor as a substantial condition for the dealing. For example, when achievement of a specific quantity of trade is required for dealings and the said quantity of trade is close to the maximum quantity that the trade partner is capable of dealing (or selling), such conduct can be deemed as prohibiting or restraining dealings with one's competitor as a virtual requirement for the dealing. Thereby such conduct falls under Unfair Trade Practices.

In general, exclusive Dealing includes three kinds of arrangements, that is a) exclusive supply arrangement, b) exclusive buying arrangement, and c) reciprocally exclusive arrangement. Market foreclosure is the main anticompetitive concern here. So, for example, when exclusive supply arrangements are employed by small and medium sized firms or new entrants, they may have procompetitive effects in that they enable those firms to sustain their position as viable competitors by reducing sales promotion cost and by attaining efficient production. According to the Distribution Guideline in Japan, it was deemed that foreclosure will not occur when this conduct is done by an undertaking whose market share is

less than 10 percent or whose position is fourth or lower. On the other hand, where exclusive supply arrangements are widespread in an industry, they are more likely to reduce competition by foreclosing the market.

b) **Territorial and Customer Restriction** It includes innumerable varieties, so this paper will only explain typical ones. The main concerns are "lessening competition in the market" and "the price level of the product covered by the restraint is likely to be maintained," which are evaluated by the following factors.

i. Market share, rank and overall business capability of the relevant firm

ii. Situation of interbrand competition (market concentration, characteristics of the product concerned, degree of product differentiation, etc.)

iii. Impact on intrabrand competition (degree and type of restriction, characteristics and number of distributors subject to the restriction)

A primary responsibility area clause refers to assigning a specific territory to each distributor as the area of primary responsibility and to require the distributor to carry out active sales activities within each territory. A location clause refers to restrictions on the area where a distributor may establish business premises such as stores, or to designate the place where such premises are to be established. These two restraints have little impact on interbrand and intrabrand competition. Further, these restraints are quite often conducted for the purpose of developing an effective sales network or securing a better system for after-service. Therefore, these restraints are generally legal.

An *exclusive territory clause* refers to assigning a specific area to each distributor and to prohibit the distributor from selling outside the area. This restraint has a stronger influence on intrabrand competition and may make it easier for a manufacturer to charge higher prices. If a manufacturer with

a substantial market power assigns exclusive territory to distributors and if the price level of the product covered by the restraint is likely to be maintained as a result of lessening competition, such restraint is illegal. However, in case of a low-ranked or new manufacturer entrant whose market share is less than 10 percent and whose rank is fourth or lower, the price level of the product is unlikely to be maintained.

The Distribution Guidelines in Japan enumerates three types of *customer restrictions* which are more restrictive on competition. If as a result of such restrictions the price level of the product is likely to be maintained, such restrictions are illegal: (i) a manufacturer makes each wholesaler designate retailers whom it deals with, thereby disabling retailers to deal with other wholesalers than the designating wholesaler; (ii) a manufacturer prohibits distributors from buying and selling products among themselves; (iii) a manufacturer forbids wholesalers to sell to price-cutting retailers.

In Uzbekistan, the Regulation clarifies the characteristics of vertical restraints, especially resale price maintenance. They are: a) to maintain (increase or decrease) the price during 30 days; b) to determine the discounts for like products at the same price and and the same time; c) to refuse to sign a contract on the same terms and conditions with other competitors; d) to stop selling products in the related territory. As the facts (evidences) of this vertical restraint can be served (i) any agreement on the distribution volume of the product, (ii) agreement on artificial means to decrease or increase the price, (iii) documents (pledge, price report, price-list) on application of the indicated price.[31]

(31) See Regulation on identification procedure of concerted actions and transactions directed to restrict competition.

4.5. Misleading Advertising

In Japan, misleading advertising is regulated by a specific law called Premiums and Representations Act ("Act against Unjustifiable Premiums and Misleading Representations"). It prohibits indications that mislead consumers about contents of goods or services which represent the products substantially better than they actually are. Also the Unfair Competition Prevention Act addresses product imitations and packaging that can cause consumer confusion as well as product claims that are untrue or misleading about products' contents, quality, place of origin, or other characteristics.

Article 5 of Premiums and Representations Act states that misleading advertising is considered to occur in the case of any representation:

(*i*) *where the quality, standard or any other particular relating to the content of goods or services is portrayed to general consumers as being much better than that of the actual goods or services, or are portrayed as being, contrary to fact, much better than those of other Entrepreneurs who supply the same kind of or similar goods or services as those supplied by the relevant Entrepreneur, thereby having a tendency to induce customers unjustly and to interfere with general consumers' voluntary and rational choice-making;*

(*ii*) *Any representation by which price or any other trade terms of goods or services could be misunderstood by general consumers to be much more favorable than the actual goods or services, or than those of other Entrepreneurs who supply the same kind of or similar goods or services as those supplied by the relevant Entrepreneur, thereby having a tendency to induce customers unjustly and to interfere with general consumers' voluntary and*

rational choice-making; or

(iii) *In addition to what is listed in the preceding two items, any representation by which any particular relating to transactions of goods or services is likely to be misunderstood by general consumers and which is designated by the Prime Minister as such, and considered likely to induce customers unjustly and to interfere with general consumers' voluntary and rational choice-making.*

In Uzbekistan, misleading advertising is regulated with the "Law on advertising". In accordance with Art 13. of Law, misleading (unfair, false) advertising is (i) the advertising which (ii) actually deceives or tends to deceive consumers (iii) as a consequence of inaccuracy, ambiguity, exaggeration, omission, or (iv) as a result of violation of requirements to time, place and way of dissemination of advertising.[32] In this definition, if the elements (ii) and (iii) are "Deception Standards", the element (iv) is "technical requirements" of the advertisement, which cannot actually mislead the consumers. In other words, the article consists of two alternative parts: the first part establishes "misleading standard", and the second sets out the "technical requirements" to advertisement. Unfortunately, the enforcement agency (Antimonopoly Committee) of Uzbekistan can use the legislative standards alternatively. Consequently, in practice, this ambiguous norm might cause misclassification about misleading advertising and tends to assess technical violation as misleading.

(32) *The "Law On advertising" of the Republic of Uzbekistan* (*Ўзбекистон Республикасининг Қонуни "Реклама тўғрисида"*), 1998. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993643168&query=реклама&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3968&action=show_result (accessed August 31, 2016).

4.6. Other types of UTP

In this part, we will analyze the other types of unfair trade practices such as "Tie-in Arrangement" and "Interference with a Competitor's Transactions" which have *not* been yet regulated in Uzbekistan, but they are very common issues in Japan. The purpose of this part is to conduct a hypothetical analysis through the policy-making tactics, which might be useful for the further elaboration of Competition Policy in Uzbekistan.

Tie-in Arrangement is a sale or lease of one product or service on the condition that the buyer takes a second product or service as well. The former product is called tying product and the latter one is called tied product. Tie-in may allow a product manufacturer with substantial market power to foreclose other sellers of the tied product from an opportunity to compete for patronage on the independent merits of the tied product, or might prevent a company from entering the market of the tied product.

Adding new value by offering multiple products tied together to trade partners is a method of technological innovation and sales promotion. Therefore, such conduct in itself does not necessarily become Unfair Trade Practices. However, supplying one product (tying product) on the condition that trade partners also purchase another product (tied product) may cause difficulty to a competitor incapable of easily finding alternative trade partners in the market of the tied product, and therefore may undermine competition in the market of the tied product. Supplying or purchasing only on the condition that trade partners also purchase or supply another product is likely to fall under Unfair Trade Practices.

Tying includes dealing only on the condition that the trade partner purchases particular products in the market of supplementary products that will be needed after the product is purchased, known as the so-called "aftermarket". The primary concern is foreclosure and market access, which

are similar to exclusive dealing arrangements. But, there are some justifications in such cases that tie-in is indispensable to ensure the safety or quality of tying products.

Interference with a Competitor's Transaction: It is illegal for an undertaking to unjustly interfere with a transaction between another undertaking who is a competitor and its other party to such transaction, by preventing the formation of a contract, inducing the breach of a contract, or by any other means. This provision is unique to Japan. This provision appears to be very comprehensive and include private disputes like torts. In practice, however, undue or unfair interference with competitive process is the main concern here.

In one example of interference with a competitor's transaction, a Japanese company, being the sole agent in Japan of a famous European porcelain tableware company, became aware that parallel imported goods of the European company were sold in bulk at a discount of 30 percent or more in 1992. The Japanese company decided to patrol the parallel importers' shops, and found out the country where the parallel imported goods were shipped, notified the European company of the result and finally asked the European company to take appropriate measures to stop the parallel import. As a result, the parallel importers became unable to obtain those goods from the European company's sole agents abroad. The JFTC found that the Japanese sole agent unreasonably obstructed transaction between the Japanese parallel importers and the European company's sole agents abroad.

V. Enforcement Issues

The main principles of enforcement of Unfair Trade Practices are

efficiency, transparency and legitimacy of enforcement system. Of course, these principles are not for Unfair Trade Practices but cover other types of violation. In this part of article we will briefly analyze the main elements of the enforcement system in Uzbekistan in order to evaluate the efficiency of enforcement mechanisms.

Institutional framework: In Uzbekistan, the authorized body on enforcement of Unfair Trade Practices is the State Committee for Privatization, Demonopolization and Development of Competition. It is a controversial issue to call this state body "independent" Anti-Monopoly Committee.[33] The main reason is that the previous Anti-Monopoly Committee was merged into the State Committee on Management of State-Owned Property in 2012.[34] Since that time the new organized Committee has dual functions in privatization and competition policy. It has negative impact on the institutional and functional independence of the Committee. Thus, for the purpose of ensuring an effective enforcement of Unfair Trade Practices the authorized State Committee should be institutionally and functionally independent.

Legal framework: One of the main factors which has impacts on the efficiency of enforcement is clarity and conciseness of legal framework. In Uzbekistan the legal framework of unfair trade practices has a "fragmental"

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(33) Before 2012, many Uzbek scientists stated that Antimonopoly Committee is not independent state body in Uzbekistan. See: Okyulov, Omanbay, and Komil Mansurov. *Competition Law* (*Рақобат ҳуқуқи*). Tashkent: Tashkent State Institute of Law, 2007. p.16.

(34) *Decree of the President of the Republic of Uzbekistan "On organization of State Committee for Privatization, Demonopolization and Development of Competition"* (*Ўзбекистон Республикасининг Хусусийлаштириш, монополиядан чиқариш ва рақобатни ривожлантириш Давлат Қўмитасини ташкил этиш тўғрисида*), 2012. http://www.lex.uz/pages/SearchResult.aspx?f=1&sid=-993623082&query=монопол&titleonly=1&exact=0&a1=1&a2=1&a3=1&a4=1&regnummj=0&form_id=3973&action=show_result (accessed August 31, 2016).

character without unified standard. In other words, unfair trade practices are regulated by competition law and consumer protection law as different categories. Moreover, it is difficult to distinguish the category "unfair trade practices" from other categories overlapped by "anti-competitive actions". Therefore, unfair trade practices need to be categorized as an independent sub-set of anti-competitive actions within unique and systematic legal framework in prospect of effective enforcement.

Policy instrument: One of the primary instruments, by which the State Committee implements competition policy is the State Register of Enterprises with the Dominant Position.[35] According to this instrument, all enterprises that are considered as having "Dominant Position" should be listed on the State Committee Register. Therefore, they must declare their price and profits for the State Committee's approval. However, this policy instrument addresses only on "Abusing Dominant Position" and is not enough for enforcing other forms of unfair trade practices. In the future, State Committee for Privatization, Demonopolization and Development of Competition should shift its policy instrument from "CIS" (Commonwealth of Independent States) approach of this kind of registration system to modern market economy approach.

After the structural issue, the next important issue is *policy measures* of effective enforcement, which depends on the economic situation of the particular country. The question is how can we reach effective enforcement concerning Unfair Trade Practices Regulation and what kind of conditions we should take into account?

(35) "Regulation on Determination of Undertakings with the Dominant Position and Operation of State Register of Dominant Position in Commodity and Financial Market". See Decree of the Government "On measures of improving antimonopoly regulation in commodity and financial markets".

First of all, we have to take into account the purposes of Unfair Trade Practices regulation. Economic inefficiency is one concern, but other goals such as dispersion of economic power, freedom and opportunity to compete on the merits, satisfaction of consumers, protection of competitive process and protecting fairness of trade might be considered as other important factors.

Although competition law is the law for eliminating obstacles for free and fair competition, the protection of small sized companies could not be a direct objective of our competition policy. As a result of free and fair competition in the markets, even if strong companies will become stronger and smaller and weaker firms are driven out of the markets, it is quite natural in the competition process. Hence, any provisions in competition laws protecting weak and small firms usually work in a way as to regulate free and fair competition. As the result of such *protectionism* regulation, socially inefficient resource allocation may arise. Competition law does not protect competitors but competition itself, as other most nations' competition laws hold the same philosophy.

However, on the other hand, the objective of competition law is not the protection of the consumers' interest only; it should preserve the rights of all the players on the same level playing field.

In reality in Uzbekistan as well as Japan, we have a very serious problem, particularly in the retail field. Now, we have many supermarkets in various retail sectors and they are making large benefits. If their benefits are because of an efficient distribution system or the efficient logistics and so forth, then it is preferable. However sometimes their profits came from the abuse of their superior bargaining power. It does not make sense not only from a societal perspective but also economics. It is indispensable to consider fairness in competition law.

We agree that competition authorities should protect competition instead of competitors but if they allow abusing superior bargaining position to prevail, fairness of competition will be undermined. It is not a natural result of economies of scale. The small ones disappear because they do not have the sufficient market position. They have to merge or be bought by the big ones. Maybe this asymmetry in bargaining position forces small competitors to go out the market. It is not a product of efficiency or economies of scale.

It is necessary for us to decide how we can reconcile these various goals and which goal or goals take priority over the others. Furthermore, with regard to economic efficiency, economic theory has shed much light on unfair trade practices (for example, resale price maintenance) but is not in agreement, and there are not many conclusive empirical studies. Unfair trade practices are mainly related to excluding the business activities of other undertakings. However, in every competition process, a product of an undertaking (including lending of money, granting a patent license, etc., granting of a license to use facilities and equipment, and other services; the same shall apply hereinafter) can naturally be driven out of the market as a result of business activities of other undertakings. Therefore, due to the difficulty in distinguishing exclusionary conduct from exclusions of other undertakings resulting from normal business activities, there was an opinion that inclusion of some kind of unfair trade practices in violations subject to surcharge might cause a so-called "chilling effect" for undertakings and therefore interfere with fair and free business activity.

Moreover, we see a fundamental difference between the definition of the abuse of superior bargaining position versus abuse of dominant position. The first one seems to concentrate on asymmetry of bargaining power, reallocation of welfare which can be quite different from jurisdiction to jurisdiction and country to country. Most of the victims of the abuse of

superior bargaining position remain anonymous. This means that they particularly would not like to go to court and seek redress. So, these different circumstances perhaps lead to different conclusions from jurisdiction to jurisdiction and the best advice would be to keep different issues, different goals separately and use separate instruments.

Then, the best way would be to study other countries' law and enforcement records and learn from their success and failure. Each country has different political and economic situation. Therefore, we have to grasp the actual situation and choose the appropriate regulation from other countries' experience. As the situation changes, regulation should be re-evaluated to adjust to the most recent situation from time to time. This strategy will work until the time when the catch-up stage accomplishes. After that, pioneering and more innovative frame of reference will be needed.

The second consideration is enforcement costs. In this regard, we should consider: a) cost of analysis and litigation for competition policy agency and business, b) cost of time element, and c) cost of legal uncertainty for business. Simple and clearly-articulated rule is preferable, but rules of complete per se illegality or legality may heavily cost the society. Consequently it might be proper that most cases are decided by rule of reason under which all of the circumstances of a case are weighed. However, even if this is the case, there are several ways to reduce these enforcement costs. For example, the government can define some safe harbors where it will not challenge unfair trade practices or it can announce the enforcement policy which clearly states factors to be considered (e.g., their relative weight to be evaluated) in consideration of each category of unfair trade practices.

The third is enforcement methods which are closely related to the second

factor. There may be various enforcement methods available for unfair trade practices, such as formal investigation, private damages and injunction, surcharge, informal investigation and preventive methods (consultation, guideline etc.). To employ the proper method, the State should significantly take objectives of regulation and enforcement costs into account. We admit that there may be an unavoidable trade-off between these two considerations in certain circumstances which is to be solved by compromise.

Ⅵ. Concluding Remarks

The scope of unfair trade practices is very broad, particularly covering a wide range of conducts as "catch-all provisions". Therefore, these practices are more difficult to recognize than other pillars of competition law. In this regard, the determination of this category is different from country to country based on legislation or a case-by-case basis.

In the case of Uzbekistan, taking into account the facts mentioned precedingly, legislature should change the regulatory approach from "CIS approach" to free and fair competition based market economy approach based on the following main principles.

First, concerning principle of classification, unfair trade practices actually have not distinguished from other categories as an independent pillar of competition law. It has still overlapped by anti-competitive actions, particularly has a mixture form with other pillars such as Abusing Dominant Position and unreasonable restraint of trade (cartels). Therefore, the regulatory approach, in this case, should clearly classify "unfair trade practices" as an independent pillar of competition law.

Second, regarding principles of "regulatory method" and "clear legal

framework", in Uzbekistan, prohibition of unfair trade practices is based on the principle of prohibition of "unfair methods of competition". In this regard, the legislative body and Antimonopoly Committee have an approach to regulate unfair trade practice within the framework of "unfair competition". Otherwise, there is no specific legal framework for unfair trade practices yet. Therefore, the "Law on Competition" needs to elaborate the legal framework for unfair trade practices within the legal clauses that clearly determine which unfair methods of competition are indeed unfair trade practices.

The third principle is "an effective enforcement". As mentioned earlier, the efficiency of enforcement of unfair trade practices in Uzbekistan relies on institutional framework and policy instrument of the enforcement system. The first problem that Antimonopoly Committee does not have institutional and functional independence, has a negative influence on the enforcement mechanism. Also, policy instrument for unfair trade practices focuses on "Abusing Dominant Position" only and is not enough on other types of practices. Thus, the Antimonopoly Committee should expand its policy instrument which will encourage enforcement against all forms of unfair trade practices.

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【附記】

田井義信先生には、学部生時代、演習等で御指導をいただき、この上なくお世話になった。

私は甚だしく不勉強な学生であったが、それでも、民法の授業で欠かさず聞いていたのが、田井先生の授業と今般同じく御退職なさる錦織成史先生の不法行為法の授業であった（当時私は、今出川にある同志社の地の利を生かして、隣の京都大学の講義を「聴講」していた）。錦織先生の不法行為法の授業と田井先生の同法の授業とでは、それぞれ趣をかなり異にし、当時学部生の私には非常に難しく、理解できないことも多かったが、それでも学者の「威風」というものを肌で感じることのできる貴重な機会であった。その後私は、故あって、大学院は京都大学へ進み、専攻も民法から経済法へと変更することとなったが、田井先生からは、卒業後も曳航会（ゼミＯＢ会）等の場で、その都度御指導をいただいてきた。両先生の御退職記念号に執筆の機会をいただけるのは、感激とともに感慨一入であるが、先生におかれては、どうか御自愛専一をお願い申上げるとともに、益々の御活躍をゼミ生ＯＢとして切に願うものである。