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Rescuing Comparative Law and Economics?
Exploring Successes and Failures of an Interdisciplinary Experiment

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COMPARATIVE LAW AND ECONOMICS IN THE FIELD OF MODERN COMPETITION LAW

Koki Arai[1]

TABLE OF CONTENTS

This study provides an overview of the relationship between comparative law analysis and the economic analysis of law in competition law and offers some perspectives for the future. In the United States, it has been argued that market power has expanded since deregulation was implemented and that this expansion has not been accompanied by long-term improvement in consumer welfare. The reasons for this are the Chicago School's reform of antitrust laws and changes in the technological environment of the economy. There is a certain convergence in the institutional and enforcement landscape of competition law today. The paper then puts forth the argument of the increasing trend of market power in today's economy from a bird's eye view and presents an alternative view to empirical industrial organisation theory. The dominant method in law and economics today is the latter, which has been applied as comparative law and economics. Based on this, I point out that comparative law and economics require a discussion of the nature of competition law and discuss the importance of returning to the basics of empirical industrial organisation.

I. INTRODUCTION

This paper provides an overview of the relationship between comparative law analysis and economic analysis of law in the field of competition law and looks towards a more fruitful direction for the future. Among the developments in law and economics in competition law, two influential books written by Robert Bork and Richard Posner on antitrust law and policy in the late 1970s are particularly important[2]. With them, the influence of the Chicago School became pervasive. Today, however, it is argued that market power in the United States, which has expanded since deregulation was implemented, has not been accompanied by long-term improvements in consumer welfare. One reason for this, it is argued, is that the Chicago School reformed antitrust laws. Another reason is change in the technological environment of the economy. The technology giants of today did not exist when Bork and Posner were writing, but these giants have grown since they emerged. At present, the debate between law and economics over competition and antitrust is in the direction of convergence. This paper points out the importance of going back to the basics of empirical industrial organisation

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[2] R. H. Bork. *The Antitrust Paradox: A Policy at War with Itself* (New York, NY: Basic Books, 1978); R. A. Posner. *Antitrust Law: An Economic Perspective* (Chicago, IL: University of Chicago Press, 1978).

and, accordingly, reconstructs the position of antitrust economics and 'law and economics in the modern economy.'

In the development of law and economics in competition law, the respective publications of Robert Bork and Richard Posner have shaped the entire field and have been unparalleled in their influence. Bork, a graduate of the University of Chicago, and Posner, a professor at the University of Chicago, published books analysing antitrust law based on economic analysis and proposed an antitrust law that emphasised efficiency and aimed at consumer welfare. They argued that some of the regulations in antitrust law hindered business and prevented companies from becoming more efficient, which could have a negative impact on the economy. Against this backdrop, deregulation was promoted under the national administration of President Reagan[3].

However, in response to the current economic situation, empirical studies in macroeconomics have discussed the trend of increasing price markups and market power in the United States and other countries worldwide. Here, US price markups are summarised based on the relationship between macroeconomics and market power[4]. One reason for this is that the Chicago School reformed antitrust laws, and the other is the changing technological environment of the economy. The most highly regarded technology giants in today's financial markets did not exist during the Chicago School's deregulation drive. It is also said that companies from all sectors are investing in information technology and that many new and difficult competition policy issues have arisen with the development of the technology economy.

For this reason, two books that echo Bork's and Posner's work and that are considered particularly important today for an overview of the future of antitrust law, are Herbert Hovenkamp's antitrust enterprise[5] and Jonathan Baker's antitrust paradigm[6]. The former answers the question of whether the antitrust regulations raised there are excessive and whether they need to be analysed in detail. The latter directly answers the question of whether antitrust regulations need to be more stringent in light of the current economic situation. It is interesting to note that although both books are considered specialised books on antitrust

[3] See T. Kirat, F. Marty, *How Law and Economics Was Marketed in a Hostile World: l'institutionalisation du champ aux Etats-Unis de l'immédiat après-guerre aux années Reagan*, GREDEG Working Paper No. 2021-03. 2019, available at: http://www.gredeg.cnrs.fr/working-papers/GREDEG-WP-2021-03.pdf (accessed January 1, 2022).

[4] See S. Basu, *Are Price-Cost Markups Rising in the United States? A Discussion of the Evidence*, in 33(3) J. Econ. Persp. 3–22 (2019); C. Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, in 33(3) J. Econ. Persp. 23–43 (2019).

[5] H. Hovenkamp, *The Antitrust Enterprise Principle and Execution* (Cambridge, MA: Harvard University Press, 2006).

[6] J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Cambridge, MA: Harvard University Press, 2019).

law, they can be evaluated in the context of law and economics and show how good empirical approaches can be utilised in law and economics.

Section II provides an overview of competition law and its global trends, which are the subject of this study. In this section, I outline the converging trends of competition law institutions and enforcement worldwide and explain their response to today's digitalised social economy. Section III touches on the debate about the trend towards increasing market power in today's economy from a bird's eye view and presents an alternative view from empirical industrial organisation theory. This analysis then explains that the dominant methods in law and economics today are positioned as the latter and have been applied as comparative law and economics. Section IV describes the reality of competition law in the world and how today's comparative law and economics have responded to the digitalised social economy. Finally, Section V concludes the paper.

II. Concepts in Competition Law

Today, competition law is largely based on regulations common around the world. For example, considering the prohibition of cartels, cartels are typically regulated by the Japanese Antimonopoly Law under the unfair restraint of trade. The same is true in US antitrust law and European competition law. Furthermore, competition laws worldwide are increasingly regulating the same types of conduct. The two main pillars of competition law are cartels and the abuse of market power (exclusion and exploitation by monopolies), and merger control and other ancillary regulations have been institutionalised to complement these two pillars. These regulations have been enacted and enforced in the United States, the EU, and other major countries such as Japan, China, and Russia. As for legal systems, EU-type legislation has been accepted in many countries because it is transnational in origin, and in fact, it has spread widely in China, India and other developing countries. In addition, the procedures for enforcement (on-site inspections, reporting orders, and requests for submission of materials) have become similar, with various exceptions. In addition, a special enforcement system, the leniency system (an exemption from sanctions for those who report cartel violations), has been introduced in many countries in recent years. This is, in part, an example of the success of comparative law and economics, as the United States, which is seen as successful in enforcing competition law, has been active in exporting the system, which has led to the spread of comparable systems in other countries. In this case, economic analysis has been

used to explain the merits and demerits of enforcement, and this is an area where comparative law and economics are most often used.

In addition, international cooperation in this competition law enforcement field is progressing. Discussions in the International Competition Network are actively conducted, and many workshops are held in addition to annual general meetings[7]. Cooperation among enforcement authorities is also taking place in the investigation of individual cases.

Suppose law is an instrument of social discipline. In that case, economics can provide theoretical support for such policies and a measure for their evaluation and analysis of their actual effects. For this purpose, economics uses models that abstract from reality: the models perform econometric analysis using actual statistics and aggregate figures. For example, in economics, the idea that "competition is desirable" is as follows. The first theorem of welfare economics shows that perfectly competitive markets lead to Pareto-efficient resource allocation. This is achieved when demand is adjusted such that the marginal rate of substitution equals the price ratio on the demand side and when production is adjusted so that the marginal rate of transformation equals the price ratio on the supply side. In this perfectly competitive equilibrium, the social surplus, the sum of producer and consumer surplus, is maximised. However, if there is only one business in the market, the social surplus may be less than the level of perfect competition due to the control of price or quantity by that business.

In law and economics, actual laws and precedents are used as materials for economic examination, and the analysis of problematic issues in the science of legal interpretation is partly conducted from the perspective of economics in the field of competition law. The effects of system design on legislation are often discussed using models. In the field of antitrust law, economic analysis is used in specific cases, such as when assessing changes in economic conditions as indirect evidence when proving a cartel case or estimating the amount of damage in a violation case. In particular, economics is often used to judge business combinations. In the case of mergers, when defining the market, the concept of 'a small but not substantial temporary increase in price' for individual cases is presented (small but substantial and non-transitory increase in price [SSNIP] test)[8], and ex-post reviews of changes in the market environment after a merger are conducted. Game theory has also been repeatedly used in decisions related to the leniency system (exemption system), and

[7] See https://www.internationalcompetitionnetwork.org/ .

[8] See Japan Fair Trade Commission, *Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination* (2004, rev. 2019).

economics and game theory approaches have also been used in discussions on how to report the illegal activities of cartel participants.

The economic analysis of theory and empirical evidence for each of these realities is important in practice, but this is discussed in Section IV on the subject of platform companies and the regulatory framework for them. The overall economic and social trends surrounding competition law in recent years, needed to understand the framework of comparative law and economics, are examined next.

III. Discussion on Market Power

This section discusses the impact and limitations of the law on today's economic situation. Specifically, we look at research on price markups and the increasing trend of market power in the United States and other countries worldwide. The situation illustrates how the subject of this study, comparative law and economics, has been forced to respond. That study explains the dynamic relationship between comparative law and economics, including empirical industrial theory and the real economy.

Three methods have been used to estimate markup trends in the US economy. In the first method, economic profit is estimated using aggregated or enterprise-level data, and the estimation value of the markup size is deduced assuming a fixed yield based on the scale. The second method estimates the production function of enterprises and departments based on the movement of various inputs. The third method restores the markup from the optimisation condition for one input. The portion of pricing above the marginal cost is a basic measure of market power. In perfect competition, a company that maximises profit sets a price equal to the marginal cost, and the markup is 1. In imperfect competition, marginal revenue produces an amount equal to the marginal cost, and the price exceeds the marginal cost. When attempting to measure markup, the immediate hurdle is how to measure marginal cost. Cost minimisation frameworks are usually used to comprehensively estimate markups for most or all of the economy.

All three methods begin with the hypothesis that firms minimise costs using a given input price. This hypothesis is powerful, but it does not cover all cases. Qualitatively, if a firm has the power to set some factor prices, the effect of the market forces described above does not change much. In most cases, such factor market power drives a wedge between marginal

product and factor prices, reinforcing the above conclusion in the case of only market power in the goods market[9].

The assumption of cost minimisation enables us to derive the relationship between the three parameters (return on size, markup, and economic profit margin). Assuming that the rate of return on scale is constant, the calculation of economic profit enables the estimation of the markup. This method is applied to US national accounts data to obtain the estimated gross profit margin or the average profit of the whole economy, and it has been employed to calculate the value-added profit margin from 1984 to 2014[10]. Since the early 1980s, companies have dramatically reduced their labour and capital costs and increased their pure profits. In this period, pure profit has increased dramatically. In the major specifications, the share of pure profit (the ratio of pure profit to gross value added) increased by 13.5 percentage points. Profit margins, price-cost margins, and market concentration have risen since 2000. This upward trend is accompanied by declines in investment, enterprise entry, and labour distribution rates. If the average level of market power increases overall, key indicators of overall economic welfare, such as investment, innovation, gross production, and income distribution, are likely to decline.

The results of these macroeconomic analyses have been used to explain various factors. Something flattened firms' residual demand and marginal cost curves, increased economies of scale and network effectiveness, and increased consumers' ability to find low-cost or high-quality firms. These changes have led to an increase in concentration but do not necessarily imply growth in market power. The expansion of the scale economy has also been brought about by reducing marginal costs, which reduces the inputs required for production and improves efficiency. On the other hand, in economies of scale, firms need sufficient market power in equilibrium to pay fixed costs and production costs within sectors. Network effects affect both efficiency and market power. Although consumers can benefit from the network effect of utilities, the network effect causes lock-ins and provides pricing power to enterprises. Improving consumers' ability to choose who to buy from would increase efficiency. This increase in efficiency may be due, for example, to changes in search, transport, and trade costs.

Much of the recent work on markups, however, has adopted an analytical approach that was widely rejected in the field of industrial organisation theory more than 30 years ago, namely the 'structure-conduct-performance' paradigm. First, regression analysis is conducted using left-sided variables indicating outcomes such as markups and profits, right-sided variables

[9] See Basu, *supra* note 2.

[10] See S. Barkai, *Declining Labor and Capital Shares*, in 75(5) J. Fin. 2421–2463 (2020).

indicating indicators of market concentration, and various control variables. An early empirical study of industrial organisation theory from 1950 to 1970 investigated how competition affects market outcomes, using the structure-conduct-performance paradigm. The following regression analysis was typically carried out as a demonstrative technique for this paradigm. The dependent variables were market outcomes, such as profit, value, and price. The important explanatory variables tried to grasp the market structure, using the scale of concentration (e.g. the Herfindahl-Hershman index, which is usually the sum of the squares of market shares). The regression also included variables aimed at capturing other exogenous reasons for variability. Thus, the structure is related to performance, and (unobservable) conduct is captured as an estimated relationship between structure and performance. The purpose of this regression analysis was to understand how the intensity of competition changes as the degree of market concentration changes; however, in industrial organisation theory, the structure-conduct-performance approach is not credible[11]. Much of the recent interest in increasing markup and other market outcomes has focused on this reasoning. Such research continues without addressing the issues that have led the field of industrial organisation theory to reject the structure-conduct-performance approach. Given the intuitive relationship between market concentration and enterprise performance, it is necessary to explain why industrial organisation theory rejected the structure-conduct-performance paradigm. The most important point is that there are multiple causal relationships between the degree of concentration and the results of other markets. This means that the question of "What is the impact of concentration on prices and price increases?" has not been sufficiently addressed.

Unfortunately, there is no clearly defined causal effect of concentration on prices; rather, only a set of hypotheses can explain the observed correlations in the simultaneous determination of price, measured markup, market share, and concentration. The impact of concentration cannot be properly interpreted without a clear focus on balanced oligopolistic demand and supply, including the list of marginal cost functions and the nature of oligopoly. Industry research in industrial organisation theory, as a whole, provides evidence in several simple or stylised models. These studies deny a model close to perfect competition. Similarly, these studies highlight the important features of a game-theoretic oligopoly in the market and reject simple interpretations related to antitrust and the Chicago School. Rather, these industrial organisation studies suggest a subtle reality that large enterprises have changed their

[11] T. F. Bresnahan, *Empirical Studies of Industries with Market Power*, in R. Schmalensee, R. Willig (eds.), *Handbook of Industrial Organization*, vol. 2 (Amsterdam: Elsevier. 1989), 1011–57; R. Schmalensee, *Inter-industry Studies of Structure and Performance*, in Schmalensee, Willig, *ibid.*, 951–1009.

products and production methods over time, including how marginal and fixed costs should be. Fixed cost is often a sunk cost accumulated over time through network investments, product quality, and geographic location. How the reallocation from marginal to fixed costs affects labour demand is an interesting question. Another important issue is whether the labour share of variable costs is higher or lower than fixed costs. These studies imply that to fully answer questions about overall markup trends, we must address a broader area of the economy as a whole. As for the level of markup, many studies have been conducted at the industry level based on existing theory of industrial organisation, studies focusing on the trend of markup to clarify why and where markups are increasing. This has been discussed in recent developments in law and economics[12]. For example, the cost of decision-making concerning the regulatory decision-making process in the energy sector is being examined analytically and in the creation of indicators that take into account various factors in consideration of regulators in providing a framework[13].

Another factor to consider is that some of the basic structures of modern industrial organisation theory, such as cost conditions, demand conditions, and price environment, have changed significantly in the last 10–15 years. For example, the adoption of information technology is often a fixed cost associated with hardware, such as servers or software, and software that operates internal resources. As described above, in companies and industries where the importance of information technology has increased, fixed costs increase, leading to an increase in the profit rate, and one or a few large companies dominate the market. On the demand side, when the importance of the network effect increases, one company or a few companies dominate the market and charge a higher price. As for corporate behaviour, the increased exploitation of managers due to market power may increase value. It has also been pointed out that antitrust enforcement in the United States is declining moderately[14].

In this regard, the fields of empirical industrial organisation theory, comparative law, and economics also directly discuss answers to the concerns of macroeconomics. There are arguments that US antitrust enforcement needs to be revitalised in three areas[15]. The first area where antitrust enforcement is too lax deals with mergers. Accumulating evidence indicates that competition is protected and facilitated if the Department of Justice and the Federal Trade Commission are willing to block more horizontal mergers. The second area where antitrust enforcement has become inadequate is the treatment of exclusionary

[12] K. Arai, *Law and Economics in Japanese Competition Policy* (Singapore: Springer Nature, 2019).
[13] See G. Bellantuono, *Comparing Regulatory Decision-Making in the Energy Sector*, in 1(2) Comp. L. Rev. 1–64 (2010).
[14] See Baker, *supra* note 4.
[15] C. Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, in 33(3) J. Econ. Persp. 69–93 (2019).

practices by dominant firms. A fundamental problem in this field is that the Supreme Court has dramatically narrowed the scope of application of antitrust law over the past 40 years. The third area concerns the market power of employers as buyers in the labour market. To date, antitrust enforcement has largely ignored the labour market. It is too early to know whether stronger antitrust enforcement in the US labour market makes a big difference in wages for employees, but more attention to and oversight of antitrust law is needed.

In addition, from the viewpoint of the history of the United States, there is an assertion that a firm must operate with two basic principles at its core[16]. First, firms can grow significantly through innovation and integration with competitors. Second is that even the most innovative firms may rely on anticompetitive tactics to maintain their market position. The balance between these competing principles has long been a cornerstone in the context of US antitrust law, as the fear of large companies has faded, and companies have learned to stabilise their industries without violating antitrust authorities and to compete on dimensions other than price. However, it is difficult to strike the right balance, and policymakers have lost their commitment to long-term principles. At first, they went to the extreme that 'big was bad' and had to be dealt with, and conversely, they went to the other extreme that it was never a problem as long as it brought benefits to consumers. Perhaps now is the time to return to the task of assessing the behaviour of large enterprises. Otherwise, it is argued, successful large enterprises prevent innovative challengers.

IV. COMPETITION LAW'S RESPONSE TO DIGITAL PLATFORMS

How should these debates about market power be reframed in the context of comparative law and economics in today's digitalised social economy? With regard to the development of rules for digital markets, in addition to the issues in the United States, the establishment of online platform economic monitoring committees and ways to promote platform fairness and transparency are being addressed in Europe. In Japan), the establishment of a specialised organisation (the Digital Market Competition Headquarters), the development of rules to ensure transparency and fairness in transactions between digital platform companies and users, and the promotion of data transfer and disclosure are being considered[17]. In addition, from the perspective of law and economics, there is a need to promote a broad analysis and

[16] N. R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33(3) J. Econ. Persp. 94–117 (2019).
[17] Rules for the Digital Market, Japan Growth Strategy Portal Site.

study of such institutional design and rule operations and to consider proposals based on empirical analysis.

A recent paper addresses the state of today's global economy and the place of competition law within it, identifying three key signs and three approaches[18]. It explores ways to apply the competition law of the industrial capitalist era to the 'next generation of competition' of post-industrial information capitalism, pointing out the lags in response but sending a positive message that competition law can be transformed to address the value of innovation in the digital economy. From the perspective of Lianos' methodological approach, the way to accumulate the approach, and three perspectives to go further, the study examines the issue of competition law litigation against giant digital platform operators in the United States, which is currently under discussion. It argues for the necessity and effectiveness of academic examination in reality by showing how the methodology can be useful in analysing and repositioning real-world cases, and what is required as a criterion for judging individual issues.

Lianos' argument first points out that competition law has been slow in responding to the development of digital capitalism. He then states that competition law scholars are attempting to theorise the impact of technology on competition while exploring the applicability of existing frameworks. However, he mentions the emergence of new concepts such as diminishing returns, leverage points, tipping points, and path dependence and states that factors such as multifaceted markets have made the interaction among competitive participants more complex.

His discussion goes beyond merely highlighting the points to keep in mind when enforcing competition laws in the wake of digitalisation. It emphasises the need to consider new factors and develop new decision-making frameworks that can be regarded as highly useful and practical. However, the study fails to capture existing efforts and innovations in competition law enforcement; second, the necessary and sufficient conditions for this new approach are not clearly stated, making it difficult to see how the approach can capture the complex economic reality and why such an approach would be beneficial. It is difficult to determine how this approach can capture complex economic realities and why it is beneficial.

In light of these criticisms, this section describes three methodologies that complement the approach identified by Lianos and deepen the study of competition law. The first perspective is research that is aware of the necessary and sufficient conditions. When analysing competition law enforcement, various new concepts may emerge and need to be examined from this perspective. The second perspective is the provision of appropriate decision criteria

[18] I. Lianos, *Competition Law for a Complex Economy*, in 50 IIC-Int. Rev. Int. Prop. and Comp. L. 643–648 (2019).

from evidence-based research. This issue arises when analysing law enforcement, especially when it involves new concepts. Care must be taken to balance a principles-oriented approach with a case-by-case approach. The goal should be to provide criteria from research that distinguish between evidence-based, principle-oriented phases and individual judgment-oriented phases. The third perspective is 'futurism', which Lianos also mentions. It is important to balance the research substance and logistics to achieve this. To study the laws of competition in a complex economy, it is necessary to acquire knowledge of digital platforms and cybernetics that can be applied to demand management, including algorithms, in addition to traditional research methods centred on neoclassical price theory (plus game theory and new empirical econometrics).

With regard to platform giants and antitrust law, based on the arguments in Section III, there has recently been an antitrust crackdown on platform giants such as Google and Facebook in the United States. On October 20, 2020, the US Department of Justice (DOJ) and 11 US states filed a lawsuit against Google in the US District Court for the District of Columbia for allegedly violating Section 2 of the Sherman Act. On December 9, 2020, the US Federal Trade Commission (FTC) filed a lawsuit against Facebook for alleged violations of Section 5(a) of the FTC Act based on violations of Section 2 of the Sherman Act, which was dismissed in June 2021 but was re-filed in August. Other state lawsuits have also been filed, but this study does not go into the details of these lawsuits. Instead, it discusses the perspectives necessary for antitrust enforcement in these cases.

In the discussion of comparative law and economics, in light of the constituent requirements of Section 2 of the Sherman Act, there are five key issues in these lawsuits: identification of the relevant market; presumption of monopoly power; creation, maintenance, and enhancement of market power; analysis of consumer harm; and measures to resolve the problem. These issues serve as the basis for judgements in individual cases as well as points to keep in mind when considering the future development of competition law research.

The first issue is identifying the relevant market, which seems to be the biggest barrier to competition analysis. Usually, the definition of a market is based on the cross-price elasticity of demand among products to determine a particular product group. For example, the SSNIP test is an indicator for this purpose. However, further discussion is needed to determine whether the markets discussed here have market power. The second issue is the presumption of monopoly power. In both cases, if we consider each market separately, it is clear that Google and Facebook occupy the dominant share. However, there are many arguments, such as the different barriers to entry for each service. For example, in the US Supreme Court

decision in the Amex case[19], the market definition that separates the merchant-to-market and cardholder-to-market markets and demarcates them as one relevant market rather than as separate relevant markets was the one justices voted 5–4 to adopt. Researchers are, however, divided. The third issue is the formation and maintenance of market power. As for unfair exclusion, for example, stating in a contract clause that the company cannot do business with other companies in the same industry is not considered unfair by itself because it does not explicitly exclude other companies. The fourth issue is whether there is any damage to consumers. Stifling innovation or hindering consumer choice is certainly a factor. The principle tenet of antitrust law is that if competition is restricted, the law has been violated. It does not matter whether it has caused damage. The destruction of the competitive order itself is a violation of the law. However, this is a matter of legal dogma, and in the real world of law enforcement, especially when discussing law enforcement against giant corporations, the important question is how much actual harm is caused to consumers. Fifth, there is a debate about whether antitrust remedies are necessary and what measures should be taken to resolve this issue. It is generally argued that a finding of illegality, an injunction against conduct, and future inaction are necessary. Also, to what extent should structural measures (so-called corporate divestitures) be taken into account? For example, in Microsoft litigation in the 2000s, Microsoft argued that the Operating System business (Windows) and the application business (Word and Excel) were complementary, and after the monopoly was granted, it was argued that these businesses should be split up when considering the elimination of market power. In the end, however, this did not happen, and measures were limited to behavioural aspects.

A discussion of the nature of competition law is necessary for the discussion of comparative law and economics. These five elements indicate the essence of competition law in a digitalised social economy. It is then necessary to conduct an economic analysis based on these discussions. This requires a discussion beyond the structure-conduct-performance framework and empirical analysis based on actual data. Furthermore, concerning futurity, we need to know what will be realised through competition. For example, we need to discuss consumer welfare and the extent to which remedies should be sought.

These are also dealt with in the discussion by Hovenkamp and Baker, as mentioned in Section 1. Hovenkamp's book takes the same position as Bork, in principle. He argues that the Supreme Court was overprotective of small businesses in the 1960s and the 1970s and that reforms are needed to review the overprotection and restore lost vitality[20]. By also pointing

[19] *Ohio v. American Express Co.*, 138 S. Ct. 2280 [2018].
[20] Hovenkamp, *supra* note 3.

out that some members of the Chicago School had gone too far and became too pro-business, he made it clear that this would not be tolerated by the uncritical Chicago School. Hovenkamp argued that control in a deregulated industry is more appropriately borne by antitrust law rather than government regulation but that more precise enforcement of antitrust law is desirable for that purpose. The Supreme Court also stated that difficult oversight is desirable and that several technical issues are to be considered.

Furthermore, Baker's work is particularly relevant to recent socioeconomic conditions[21]. In addition, his book, *The Antitrust Paradigm*, emphasises rethinking the power of antitrust, with Bork's book in mind. He states that it is possible and necessary to reverse the trend of non-enforcement by strengthening antitrust laws. In other words, the current environment and new forms of business driven by information technology pose new competition problems. He then states that market power has become a very important political issue and that economic progress has brought us face-to-face with market power. He argues that industrial organisation theory has been thoroughly restructured using game-theoretic arguments and that new empirical tools have made it possible to measure incentives, behaviour, and effects more precisely, which would further increase the use of antitrust economics. He argues that while it is true that antitrust rules have been heavily influenced by the Chicago School of economic thought, one of the reasons for this is that many antitrust enforcers and officials have not been able to fully absorb the results of new theories and discoveries.

Finally, based on the various insights gained thus far, we contrast Japanese Antimonopoly Law and US Antitrust Law from the perspective of law and economics analysis. In particular, this part outlines the law enforcement in the digital field as an example. As mentioned above, the US Antitrust Law discusses law enforcement in the digital field from the viewpoint of five issues. In contrast, Japan's Antimonopoly Law adopts a different approach from that of the US with respect to these five issues. The first issue is relatively the same type of law enforcement. The second and third issues are regulated and enforced differently. Different approaches are taken in the fourth and fifth issues. First, the consideration of the relevant market in Japan is discussed in the same way as in the US, and it can be mentioned that the data distribution market in Japan has been delineated and law enforcement has been conducted in the merger control field in recent years. Second, with respect to the presumption of monopoly power, there are differences in the legal system, with regulation of articles of the abuse of superior bargaining position in Japan, and more interventionist enforcement of competition laws than in that of the US. Third is the detection of forming,

[21] Baker, *supra* note 4.

maintaining, and strengthening market dominance. In this issue, for example, interventionist regulations in Japan have been applied to Amazon and Apple ahead of other enforcements, and detection of violations of the regulation has not been litigated as in the US. As for the fourth point, consumer damage, and the fifth point, remedies, they have not been realized in litigation in Japan, but have been enforced through policy, and there has been prior policing through industrial survey researches and regulation formulation. This Japanese approach can be positioned as aiming for EU-type law enforcement rather than US-type. From an economic evaluation, the social cost of conflict of EU-type approach is likely to be lower than that of US-type approach if the case were litigated. On the other hand, US-type ex post enforcement is considered to have a better chance of creating a dynamic that generates innovation.

V. CONCLUSIONS

This study provides an overview of the relationship between comparative legal analysis and the economic analysis of law in the field of competition law and an outlook for the future. Today, it is argued that since deregulation was implemented in the United States, market power has expanded and has not been accompanied by a long-term improvement in consumer welfare. The reasons for this are the Chicago School's reform of antitrust laws and the changing technological environment of the economy. At present, the state of institutions and enforcement of competition, antitrust, and antimonopoly laws are also moving in the direction of convergence. While keeping this in mind, this paper points out the importance of going back to the basics of empirical industrial organisation in the discussion of comparative law and economics, citing the need to discuss the nature of competition law.

The significance of this study is that it clarifies the position of comparative law and economics, including the field of competition law, in light of more comprehensive economic trends, and points out the importance of considering necessary and sufficient conditions, which are particularly important in such discussions, as well as the importance of enforcement, planning, and future orientation based on empirical analysis to understand the actual state of the market. As for its policy implications, it explains the contemporary need for comparative law and economics based on historical positioning.

The limitations and future challenges of this study are that it mainly focuses on economic analysis of the United States, and more information needs to be collected and organised on the economic situation and the development of competition law in other jurisdictions, such as the EU, Japan, and China.