Regulating Unfair Competitive Practices through Competition Law: Is "Unfairness" in the Eye of the Beholder?

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Abstract

Mainstream thinking in competition law has been criticized for over-emphasizing the importance of efficiency in constructing competitive rules and standards. According to the efficiency hypothesis, the legality of competitive conduct should be determined predominantly by the overall net welfare effect, estimated under the assumption of uniform preferences across market participants. The failure of the efficiency hypothesis to account for interpersonal divergence of value has prompted skeptics to criticize it as naively adhering to a methodology that reflects only part of the interest that competition law aims to protect. The regulation of unfair competitive practices such as false advertisement, passing off, or free riding on a competitor's reputation by competition law offers a clear illustration of this methodological debate. Skeptics have argued that in practice the assessment of unfair-competition practices is a conduct-based rather than an effect-based review process. It is ad hoc in nature because the meaning of "unfairness" can vary with the heterogeneity of preferences toward a conduct undertaken by parties with highly diversified sociocultural backgrounds.

We revisit this debate in this paper. We first evaluate the validity of the aforementioned view of legal relativism in the context of competition law. We defend the conventional efficiency-based approach because conducting subjective and interpersonal comparison of value among parties is extremely difficult for competition authorities and tends to be error-prone in practice. Based on this reason, we describe in Part III how "unfairness" can be modeled within an efficiency-based enforcement structure to properly regulate unfair competitive practices, in particular the envy-free hypothesis for "fairness" proposed by several renowned economists. In Part IV we describe the two main regulatory measures for implementing the envy-free hypothesis in unfair-competition law. Here, we use the legal tenet and enforcement experience of the Taiwan Fair Trade Commission to clarify our

arguments. We conclude by proposing qualitative policy suggestions in Part V.

I. INTRODUCTION

There is a long running debate regarding the purpose of enacting competition law. Some commentators approach this debate from a more economic-oriented perspective and argued for an efficiency-based analytical framework for understanding and applying the law.[1] According to the efficiency hypothesis, the legality of business conduct under competition law is determined predominantly by the overall net welfare effect, estimated under the assumption of uniform preferences across market participants. By contrast, there were antitrust scholars who maintained that the ultimate goal of competition law is to disperse economic power[2] or to facilitate wealth redistribution.[3] They criticized the efficiency hypothesis for being biased against those non-economic goals in constructing competitive rules and standards. In particular, the failure for the efficiency hypothesis to account for interpersonal differences in value has prompted skeptics to question it as naively adhering to a methodology that reflects only part of the interest that competition law aims to protect. One of the examples illustrating the inadequacy of the efficiency hypothesis is the regulation by competition law of the unfair-competition practices, such as false advertisement, passing off, or free riding on a competitor's reputation. Those practices are conventionally governed by business torts; however, they are also subject to concurrent regulation by competition law in several jurisdictions including Taiwan. Unlike the regulation of cartel, abuse of monopoly power, or mergers, the review of unfair-competition practices under the competition law is frequently a conduct-based rather than an effect-based process in those jurisdictions. Namely, the enforcement agencies need only decide whether the alleged business conducts are indeed against certain properly defined business ethics, and would be unfair to their competitors. Market impacts from the unfair conduct or the market structure in which the conduct is carried out are not crucial to the determination of its legality. As the meaning of "unfairness" varies with the heterogeneity of preferences toward a conduct undertaken by parties with highly diversified sociocultural backgrounds, it is improper to have one uniform standard such as efficiency to dominate the reviewing process.

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[1] *See e.g.* RICHARD A. POSNER, ANTITRUST LAW, CHAPTER 1 (2nd ed. 2001).
[2] Robert Pitofsky, *The Political Content of Antitrust* 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1051 (1979).
[3] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenge*, 34 HASTINGS L. J. 65 (1982).

We examine this issue in this paper. Part II evaluates the validity of the aforementioned view of legal relativism in the context of competition law. We defend the conventional efficiency-based approach because conducting subjective and interpersonal comparison of value among interested parties is extremely difficult for competition authorities and tends to be error-prone in practice. On this basis, we then detail how "unfairness" can be modeled within an economically oriented enforcement structure to properly regulate unfair competitive practices in Part III. We begin with a brief introduction of the envy-free hypothesis for "fairness" proposed by several renowned economists. According to this hypothesis, fairness denotes a scenario of resource allocation in which "none envies the bundles another has." The implication of such a statement is that unfair-competition law serves to remove the market conditions conducive to the intensification of envy among market participants and thereby incentivize efficient voluntary transactions. In Part IV we describe the two main regulatory measures for implementing the envy-free hypothesis in unfair-competition law: realigning property rights to narrow the gaps in the bargaining positions between transacting parties and maintaining a transparent business environment that ensures opportunity for all. The former mechanism includes several commonly observed pre-contractual obligations such as disclosure of material information by the better-positioned party to assist its less-informed counterpart to assess the consequences of transactions. The latter mechanism can be further classified into rules aiming to mitigate the information-asymmetry problem (false advertisement or malicious disparagement of competitors) and the diseconomies from externalities (e.g., passing off). We provide the enforcement experience of the Taiwan Fair Trade Commission in this section to clarify our arguments. We conclude by proposing qualitative policy suggestions in Part V. In brief, this section presents our view in favor of the efficiency-based approach, as detailed in Part II, and provides arguments for prioritizing the use of transparency-maintaining mechanisms for enforcing unfair-competition law.

II. Efficiency v. Non-efficiency Explanation of Competition Law

Despite the ongoing debate concerning the goal of competition law, economic analysis has become an indispensable methodology for the interpretation and application of the law to each of its covered topics. There are various approaches that economic analysis is applied; however, those approaches in essence center on a common theme: the promotion of market efficiency. In general, economic analysis asks first whether the practices under review might

have the effect of reducing production costs or encouraging innovation. Positive results from the previous inquiry will then be counteracted by the potential anticompetitive harms resulting from the practices to reach their net competitive effects and the conclusion of lawfulness. There are two major operational principles to incorporate economic assessment into competition-law analysis. The *total welfare* test investigates the aggregated welfare changes caused by the practices on the premise that law treats all members in society equally.[4] Therefore, the prediction of post-merger price increases alone may not justify the prohibition of the merger so long as the gains from cost reduction to merging parties outweigh the deadweight loss caused by a more concentrated market.[5] The loss of consumer surplus resulting from the increased prices is treated as a wealth transfer and would not be factored into the analytical process under the total welfare test. By contrast, the *consumer welfare* test asks whether the efficiency gains could be realized without diminishing the benefits or "surplus" initially captured by consumers.[6] If the consumers are worse off due to the implementation of the alleged practice, the practice should therefore be prohibited even though it has net welfare-enhancing effect.

The economic explanation has been criticized for holding too narrow a view towards the function and purposes that competition law aims to serve. For example, the former U.S. FTC Chairman Robert Pitofsky had proposed that the original purpose of enacting antitrust law of the United States was to avoid the concentration of economic power that will destabilize a democratic society. In the words of Professor Pitofsky, Congress has exhibited a clear concern when enacting competition law that "an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime."[7] Alternatively, Professor Robert Lande challenged the efficiency explanation of antitrust legislation as being in conflict with the legislative intent of the U.S. Congress. He proposed that the overriding concern of the Congress was with protecting consumers from paying higher prices generated

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[4] Robert H. Bork, THE ANTITRUST PARADOX 110-112 (1978). Although Professor Bork used the term "consumer welfare" to describe his idea regarding the legislative goal of Sherman Act in the United States, he was actually not referring to either the "protection of consumers" or the maintenance of "consumer surplus." Rather, it was the overall net effect from the alleged practices that he deemed to be crucial.

[5] This is the famous "Williamson's Tradeoffs" in antitrust economics. *See* Oliver E. Williamson, *Economies as an Antitrust Defense*: *the Welfare Tradeoffs*, 58 AMERICAN ECONOMIC REVIEW 18 (1968).

[6] Although the term "consumer welfare" has been widely used by antitrust commentators, what constitutes a "consumer" under this test has never been precisely defined. *See* Gregory J. Werden, *Consumer Welfare and Competition Policy*, *in* COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS 11, 13-15 (Josef Drexl, Wolfgang Kerber, & Rupprecht Podszum ed., 2011).

[7] Robert Pitofsky, *The Political Content of Antitrust* 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1051, 1054 (1979).

by anticompetitive arrangements. The Congress founded such a concern on the belief that "illegally acquired supracompetitive pricing constituted an 'unfair' transfer of purchasers' property to firms with market power."[8] Economic efficiency was not the primary concern for enforcing competition law in the United States.

The idea of using competition law to maintain fair transfers of social wealth could also be theoretically appealing for efficiency-minded economists. This was clearly illustrated by the testimony provided by the economist in a famous Canadian merger case, *Commissioner of Competition* v. *Superior Propane Inc*..[9] Canada adopted the total-welfare standard for merger review. Section 96 of its Competition Act states that a proposed merger will be allowed to proceed if the efficiency gains uniquely attributable to the merger are greater than any lessening of competition caused by the proposed merger. In *Superior Propane*, the economist representing the Commission questioned the total welfare test for failing to distinguish between *shareholders* of the merged firm and *consumers* of the product of the merged firm. He argued that the redistributive effects arising from a merger could be regressive, i.e. transferring wealth to the better-off group, the shareholders of the merged firm, from the less well-off group, the customers of the merged firm. It would be unfair and socially adverse. Hence, he invited the Tribunal to attach a "balancing weight of unity" to all producer gains from a merger because information on individually affected consumers was usually lacking.

The regulation of unfair competitive practices by competition law offers a much sharper contrast between the efficiency and non-efficiency views towards competition law. In a nutshell, the efficiency view is frequently effect-based, and would evaluate the overall market impacts from the alleged unfair practices. It includes the assessments of how and to what extent *market competition*, not *individual competitors* would be adversely affected by the said practice. Instead, the redistributive view on competition law is usually conduct-based. Under this view, the priority for the competition agency is to review the characteristics of the practices to see whether they have the potentials of unfairly deprived competitors' business opportunities with consumers. The determination of "unfairness" usually begins with the distinction of "strong" and "weak" market participants based on a prescribed criterion. Then, the enforcement agency would consider whether the intervention of competition law could make the sort of redistribution of wealth and resources that would enable the weak to be stronger. Efficiency consideration frequently plays only a complementary or no role at all in

[8] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenge*, 34 HASTINGS L.J. 65 (1982).
[9] 2000 CANADA COMP. TRIB. 16 (April 4, 2002).

unfair-competition cases.

Take the regulation of false advertisement as an example. Under the wealth-redistributive view, misleading information disseminated by an advertisement would be sufficient to establish the liability of the advertiser under the competition law. It is not necessary to evaluate the degree to which the advertisement would affect market competition. And as consumers are usually assumed to be less informed than the selling advertiser, it also appears to be reasonable to presume that the marginal benefits for the consumers to be better-informed would outweigh the marginal cost from banning the whole advertisement or requiring the advertiser to verify and ensure the truthfulness of the disseminated information. Alternatively, in addition to the number of the consumers that will be misled by the advertisement, the efficiency view would balance the misleading costs with the gains that information provided from the truthful part of the advertisement would create for the society. The efficiency view would also take into account whether the misleading effect from the advertisement could be less costly avoided by the customers. For example, the misleading costs could be neutralized if the provision of truthful information could be encouraged through "information competition" among sellers.

The non-economic explanation, in particular the wealth-redistributive view, faces the following challenges if it is to become the operational standard for competition law.

First, the incorporation of redistributive effects into the analysis of competition issues requires not only the wealth of the *final consumers*, but also the wealth of the *shareholders* of the firms undertaking the anticompetitive practices. If wealth transfers from the groups of wealthy individuals to those that are less wealthy are preferable and will be accounted for in competition analysis, then the analytical result for a specific business activity would vary with the identity of the individuals that undertook the activity. As Professor Mathewson and Winter vividly illustrated in their analysis of the *Superior Propane*, if redistributive effect were to be consistently considered in each merger case, then "a merger that was unacceptable when wealthy Canadian families closely held the merging firms would suddenly become acceptable if a teachers' pension fund bought the shares."[10] This would turn competition analysis into an unmanageable and highly complicated process.

Second, the redistributive consideration will encourage inefficient and welfare-reducing

[10] Frank Mathewson & Ralph Winter, *The Analysis of Efficiencies in* Superior Propane: *Correct Criterion Incorrectly Applied*, 20 CAN. COMP. REC. 3 (2000), *available at* http://www.chass.utoronto.ca/~rwinter/papers/efficienc.pdf.

business practices as long as those practices can promote positive redistribution of wealth. For example, cartels could therefore be allowed if cartel members could show that by fixing the market price above the competitive level, it could maintain or even increase corporate revenues for cartel members not to lay off their less-wealthy employees. Redistributive consideration might also distort the reviewing rule or standard in competition law. For example, assume that the competition enforcement agency considers environmental protection a value worth protecting by competition law. Assume further that the agency considers the polluters, big paper-cup manufacturing companies to be the "stronger" party in business interactions than those individuals likely to be affected by the pollution. The redistributive consideration may require the competition law to be enforced in a manner that would facilitate the "wealth", broadly defined to include legal entitlements, to be transferred from the stronger to the weaker. The competition enforcement agency may therefore conclude that paper cup produced by the companies should not be included in the same "relevant market" as cups made of other materials because the production of paper cups are environmentally more unfriendly. This conclusion will be an obvious deviation from the current standard for delineating relevant market in competition law, which is based on the economic "substitutability" among the products supplied in the market.

Finally, the competition authorities or the courts are ill equipped to deal with interpersonal comparison of preference or value. Therefore, the result from taking into consideration of the non-economic goals for competition law inevitably tends to be error-prone. It is especially the case when competition authorities assign uniform criteria to facilitate the implementation of redistributive goal. As we will show later,[11] a uniform criterion for wealth redistribution or resource allocation neglects that the same degree of allocation could create very divergent marginal utility among the resource or wealth recipients. The probability of over-enforcing or under-enforcing the competition law is high.

In August 13, 2015, the Federal Trade Commission of the United States issued a "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act",[12] which in our opinion brought the U.S. legislation on unfair competition closer to the efficiency explanation. In the Statement, the Federal Trade Commission maintained that it would follow the following enforcement principles when

[11] *See* the discussion in Part III.

[12] Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act, *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (last visited on August 30, 2015.)

enforcing Section 5: "…the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]"

III. Conceptualizing Unfairness for Unfair-competition Law within the Efficiency-based Perspective of Competition Law

If the efficiency explanation were the more preferable view concerning the goal of competition law, then the next question would be to ask how "unfairness" could be conceptualized within this framework of understanding. This is especially an important question for countries whose competition law is designed to resolve both antitrust and unfair-competition issues, and who have demonstrated the penchant to approach the later issue from wealth-redistribution perspective. However, it needs to be pointed out first that the difficulty in conducting redistributive analysis of unfairly competitive practices is not equivalent to the irrelevance of fairness in the analysis of market transaction and competition. Experimental economists have shown that even profit-maximizing firms have the incentive to act in a manner that would be perceived as fair if their transacting counterparts are willing to resist unfair transactions or to punish unfair firms at some costs to themselves.[13] What needs to be done is how the insistence on fair trading or despise for unfair exploitation could be translated into parameters of the efficiency-based analytical framework.

1. Envy minimization as the benchmark for conceptualizing unfairness

The concept of "fairness" is conventionally a subject discussed in moral philosophy or theology. Under the theme of this paper, modeling fairness for the purpose of enforcing competition law should start with an attempt to avoid making interpersonal comparison of value. Specifically, the purpose of this approach is to search for a general depiction of fairness "without ascribing to a particular moral viewpoint regarding 'who deserves what' or which values are more important than others."[14] One of the frequently discussed theories in economics that deal with this topic is the *envy-minimizing* or *envy-free* hypothesis of fairness. According to this hypothesis, a fair society is a non-envy society. It refers to a fair allocation of property that "no trader would prefer another bundle of goods to his own, and a fair trade

[13] *See* Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 THE JOURNAL OF BUSINESS 285 (1986).
[14] ADI AYAL, FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK 164 (2014).

is a trade with the property that no trader would prefer another's *exchange* to his own, providing that he could have made it."[15] This sort of understanding of fairness is appealing for economists because it depends on individual tastes and endowments rather than interpersonal comparison of value.

On the basis of the envy-free hypothesis, economists have formulated various approaches that may facilitate the arrival of an envy-free society. Conceptually, the most straightforward way to construct an envy-free society is to allocate the initial endowments among individuals *equally*. Professor Varian argued further that a fair allocation of social resources required them to be distributed equitably and fairly. An allocation is *equitable* when "no agent prefers another agent's bundle to its own at a given allocation", and *fair* when the allocation is equitable and Pareto efficient.[16] If each individual in a society could get an equal share in each goods, they could use the market to exchange the goods that they value less for those they treasure more. Although equal division of initial endowments is by definition fair, it may not necessarily be envy-free. This is especially the case when different individuals place divergent value on the same goods. Therefore, the equal-division approach may need to respond to the challenges that an envy-free society is attainable even when the initial division is unequal. For example, the study by Schmeidler and Vind focused on the surplus gains from voluntary exchanges rather than equal allocation of goods to investigate their impacts on reducing unfairness. They found that a market with unrestrained price mechanism would be sufficient for an envy-free society to exist even when the initial allocation is unequal.[17] Nevertheless, Feldman & Kirman concluded in their study that equal division of initial endowments could make subsequent market exchanges more stable than when the goods are unequally allocated.[18] The later case tends to increase the probability that the subsequent exchanges will be envy-inducing and unfair.

2. Implications for the designs of regulatory mechanisms

The policy implications from the envy-free hypothesis of fairness for the designs of mechanisms to control unfair competitive practices in the competition law could be summarized into the followings.

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[15] Allan Feldman & Allan Kirman, *Fairness and Envy*, 64 AMERICAN ECONOMIC REVIEW 995, 997 (1974).
[16] Hal R. Varian, *Equity, Envy*, and *Efficiency in* VARIANTS IN ECONOMIC THEORY: SELECTED WORKS OF HAL R. VARIAN 9, 10 (2000).
[17] *See* D. Schemeidler & K Vind, *Fair Net Trade*, 40 ECONOMETRICA 637 (1972).
[18] Feldman & Kirman, *supra* note 14, at 999 ("When it's defined as the total absence of envy, fairness is a fragile condition. It is apt to disappear if people engage in trade for private benefit.")

In its most general sense, the envy-free hypothesis suggests that unfair-competition law serves to remove the market conditions conducive to the intensification of envy among market participants and thereby incentivize subsequent efficient voluntary transactions. With regard to the specific measures likely to facilitate the implementation of the envy-free hypothesis, two major mechanisms are readily derivable from the previous discussion. The first mechanism is to *directly realign property rights to narrow the gaps in the bargaining positions* between the strong and the weak in transactions. This mechanism resonates with the view of using the equal-division approach to solve the problem of unfair competition. Several commonly observed pre-contractual obligations such as disclosure of material information by the better-positioned party to assist its less-informed counterpart in evaluating the outcomes of transactions are rules that might be classified into this regulatory category. The second mechanism is to *maintain a transparent business environment that ensures opportunity for all*. This mechanism reflects the view that safeguarding a competitive process for market exchanges is more crucial than ensuring equal allocation of initial endowments in fostering a fair society. It could be further classified into rules aiming to mitigate the information-asymmetry problem (false advertisement or malicious disparagement of competitors) and the diseconomies from externalities (e.g., non-competition covenant or passing off).

We illustrate how these two mechanisms function in practice by introducing the enforcement experience of the Taiwan Fair Trade Commission (TFTC) in the following section.

IV. The Experience of the TFTC as an Illustration

The TFTC is an independent and the most important government agency responsible for the enforcement of the competition law of Taiwan, the Taiwan Fair Trade Act (TFTA). The TFTA comprises two main parts. The chapter on "restrictive competition" deals with *antitrust* issues such as cartel, abuse of monopoly power, and merger review. Alternatively, certain practices such as counterfeiting, false advertisement, dissemination of disparaging statements, and deceptive or patently unfair conducts are reviewed under the chapter on "unfair competition." In terms of unfair competition, the most frequently applied provisions are Article 21 and 25. The most important requirements in Article 21 of the TFTA provides that "No enterprise shall make or use false or misleading representations or symbol as to price, quantity, quality, content, production process, production date, valid period, method of use, purpose of use, place of origin, manufacturer, place of manufacturing, processor, or

place of processing on goods or in advertisements, or in any other way making known to the public." Article 25 is frequently dubbed by researchers of competition law as the "emperor provision" of the TFTA due to its broad coverage of the types of violations that could be investigated by the TFTC. The Article provides that "In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order."

1. The mechanism of direct realignment of property rights

The most obvious example demonstrating the mechanism of direct realignment in antitrust disputes is the "divesture" order aimed to rectify the competitive harms from abuses of monopoly power. The enforcement agency could order the defendant monopolist to divest its assets to its competitors to enhance their ability to compete with the monopolist. Divesture is also a popular structural remedy for merger review. The competition agency could require the merging firms to divest part of their assets or rights in exchange for the approval of their proposed mergers. By mandating the transfer of property rights, the agency expects the divesture could hold in check the post-merger market power held by the merging firms, and reduce their ability to engage in post-merger exclusionary conducts.

Regarding unfair-competition practices, the TFTC has imposed a duty on the franchisor to disclose the information that is material to the operation of the franchise business to its franchisees before the franchise contract is executed. In its Guidelines on the Business Activities of the Franchisor, the TFTC specifies the information that needs to be disclosed as to include the estimated amount of the expenses that will be incurred by the franchisees (loyalties, expenses for commodity and capital equipment etc.), the intellectual property rights held by the franchisor, the training and assistance that will be provided to franchisees, the total number of franchisees in the previous year, the restrictions on the franchisees during the contractual periods and the manners that termination of the contract will be handled.[19] Failing to meet the requirements will be treated as a patently unfair practice and is a violation of Article 25 of the TFTA. The Guidelines reveals the belief of the TFTC that due to the information-asymmetry problem, franchisees are disadvantageously placed to be unable to negotiate with the franchisor on equal footing. Wealth redistribution in the form of transferring *property rights on information* from the franchisor to the less-informed franchisees can catalyze the envy-reducing process towards a fairer society and more efficient transaction outcome.

[19] Point 3 of the Guidelines (Amended and Promulgated in March 12, 2012).

2. The mechanism of maintaining a transparent business environment that ensures opportunity for all

Unlike the right-realignment mechanism, the transparency-maintaining mechanism focuses more on the removal of the obstacles that might hinder negotiation between contracting parties to make efficient exchanges of goods. The question of whether the initial allocations are equal is not dispositive for the outcomes of the cases. Under the TFTA, there are two main "*obstacles*" that concern the TFTC.

The first is the information-asymmetry problem, most evidently illustrated by the cases of false advertisement and malicious disparagement of competitors in Article 24.[20] For cases falling within this category, the sanctions applied by the TFTC are usually pecuniary penalties on companies who have disseminated false or misleading information regarding prices or quality of products or qualifications of rivals. Seldom would the TFTC require the violating companies to take further corrective actions such as providing truthful information or offering apologies. The TFTC may believe that the origin of the competitive problems in those cases is the distorted information and its potential in misleading the less-informed parties to miscalculate the costs and benefits from buying certain products or contracting with certain sellers. Subsequent market exchanges base on these miscalculation inevitably will be allocatively inefficient and envy-inducing.

The second is the problem associated with the *diseconomies from externalities*. The disputes concerning non-competition covenant and "passing off", i.e. unauthorized uses of trademarks or trade dress, belong to this group of cases. Non-competition covenant is a contract between an employee and his employer to promise not to compete with the employing company within a specific time period after the termination of the employment. As a recent U.S. case involving a collusive agreement among high-tech companies not to "poach" employees from member companies has shown,[21] non-competition covenant could become an antitrust issue. Non-competition covenant could also be characterized as a patently unfair practice under Article 25 of the TFTA if the non-competition period is deemed to be unreasonably long. Passing-off practices are similarly prohibited and

[20] Article 24 of the TFTA provides that "No enterprise shall, for the purpose of competition, make or disseminate any false statement that is able to damage the business reputation of another."

[21] In re High-Tech Employee Antitrust Litigation, U.S. District Court, Northern District of California 11-cv-2509 (2014).

sanctioned according to Article 22 of the TFTA.[22] From economic perspective, the two provisions deal with the same economic issues: *externality*. Article 22 is a clear recognition by the legislators of the need to prohibit free-riding behavior on intellectual properties held by enterprises. Otherwise, not only will the positive spillover effects to society from the implementation of those property rights will not be maintained, the free-riding competitors could also capture additional unfair gains resulting from the inefficient market transactions with confused or misguided customers.

The case of non-competition covenant could be understood along the similar line of reasoning, though in a more subtle way. Non-competition agreement could be viewed as an effort by the employers to contain the free-riding behavior by its competitors on the investments the employers specifically made to train former employees. Left unregulated, the free-riding problem may reduce the employers' willingness to hire and train employees and could in the long run decrease the frequency of exchanges in the labor market to economically non-optimal level. In this light, restraining former employees' freedom to be re-employed may be justifiable; however, it may not be reasonable if the non-competition period is unduly long that the employees are compelled to inefficiently defer the time for re-employments.

V. Concluding Remarks

In this paper, we explore the issue of how competition law could be more consistently applied to regulate unfair-competition practices. With the assistance of the envy-free hypothesis for "fairness", we investigate how "fairness", a term that has been understood to involve interpersonal comparison of value, could be conceptualized within the efficiency-based framework for competition law. We then illustrate the operation of the framework with the enforcement experience from the Taiwan Fair Trade Commission. As we have described earlier, both the right-realignment and transparency-maintaining mechanisms have been used by the TFTC. However, the right-alignment mechanism requires the TFTC to

[22] In its pertinent part, Article 22 of the TFTA provides that "No enterprise shall have any of the following acts with respect to the goods or services it supplies:
1. using in the same or similar manner in the same or similar category of merchandize, the personal name, business or corporate name, or trademark of another, or container, packaging, or appearance of another's goods, or any other symbol that represents such person's goods, commonly known to the public, so as to cause confusion with such person's goods; or selling, transporting, exporting, or importing goods bearing such representation; or
2. using in the same or similar manner in the same or similar category of services, the personal name, business or corporate name, or service mark of another, or any other symbol that represents such person's business or services, commonly known to the public, so as to cause confusion with the facilities or activities of the business or service of such person.

be able to verify with a certain degree of precision the parties whose wealth need to be transferred, those who are entitled to accept the transfers, and by what amounts will the transfers be sufficient to trigger the envy-reducing process. Those considerations frequently entail non-negligible enforcement and error costs that may or may not be offset by their expected benefits. Unless the competition enforcement agencies could in some ways acquire the data or information needed for such calculations, transparency-maintaining mechanism appears to be the more appropriate view towards the regulations of unfair-competition practices.