

Industrial Policy and Competition Policy: “Common Destiny” or “Strange Bedfellows”?

Written by Raymond Li

Introduction

While industrial policy consists of government measures applied to sectors or industries in order to advantage them,¹ competition policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop.² It is suggested that the two may be in tension although, as exemplified in mainland China, the former seems to be well within the latter. In this article, it first argues that a competition policy may contain objectives other than promotion of consumer welfare and industrial policy should be within competition policies; second, with reference to the China’s Competition Law – Anti Monopoly Law (“**AML**”) and the Ministry of Commerce (“**MOFCOM**”) decision on Coca-Cola/Huiyuan,³ it underscores the problems of industrial policy overwhelming the antitrust economics of competition policy in China, putting the legitimacy of formalization of competition policy at stake; lastly, it suggests that, as in line with overseas jurisdiction, the Chinese competition policy can be enhanced by reducing regulatory fragmentation and increasing the transparency.

Definitions and Scope

According to United Nations Conference on Trade and Development (“**UNCTAD**”), competition policy is argued to comprise two major instruments: the first is a competition law which contains rules to restrict anti-competitive market conduct, as well as an enforcement mechanism, such as an authority, targeting anti-competitive practices by private or public undertakings or enterprises; the second is competition advocacy, which can be used, in the interface with industrial policy, to promote less anti-competitive means of achieving other policies’ goals that significantly affect competition including, among others, consumer protection, standards, intellectual property rights, international trade, investment and licensing. It is thus understood that competition policy generally contains both core competition objectives and other public interest objectives which may be relevant to industrial policy that varies among jurisdictions over time.

Compared to competition policy, industrial policy is not a clearly defined term. Nevertheless, an industrial policy is a policy instrument operating at the level of product markets, factor markets, international trade or investment which target selected industries, directing resources in those industries

¹ UNCTAD 1998, “Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in order to Attain Greater Efficiency in International Trade and Development”, TD/B/COM.2/EM/10/Rev.1

² Ibid 5.

³ Peter J. Wang et al., *Antitrust Alert: Coca-Cola/Huiyuan Deal is First Acquisition Blocked by China Antitrust Review*, Jones Day Publications (Mar. 19, 2009).

to accord producers a “competitive advantage”.⁴ Such advantage conferred through industrial policy is for the purpose of overcoming market failures and promoting structural change – the transfer of resources from traditional activities to new goods and services using new technologies.⁵

Interaction between industrial and competition policies

Considering the non-competition objectives that may be contained in competition policy, the fact that interaction between competition and industrial policies may have both synergies and tensions are inevitable. In developing countries, competition law and policy help ensure domestic firms are not subject to anti-competitive practices from foreign or domestic firms. For example, if competition in input markets is distorted, production costs may increase, harming consumer welfare and the competitiveness of export product. An industrial policy with a goal to promote export competitiveness with effective competition law enforcement may address the matter. In addition, competition and industrial policies may be congruent to the extent that both bears the objectives of promoting of small and medium enterprises in our society.

On the other hand, certain industrial policies such as cartel activity, abuse of dominance and/or anti-competitive mergers are in conflict with competition law. In addition, privatization policies, sector regulation, for example, in the form of state subsidies, may render competition and industrial policies contradict each other as they may favour the creation or protection of large domestic firms as national champions. Consequently, the positive effects of competition may be obliterated as firms under favourable industrial policies expand in the market displacing lower-cost competitors and lessening the competition of the entire market in long term. It is suggested that the political impulses based on interest group captured in other parts of government as part of a broader competition policy should be limited to improve national competitiveness.⁶

Nevertheless, tensions between competition and industrial policies can be addressed by certain formal legitimization that works in tandem with the competition law to provide a special authorization mechanism. For example, agreements related to any joint ventures may be subject to authorization via such a mechanism. This not only can provide a clear mechanism for the enforcement authorities’ authorization while maintaining certain competition standards and objectives, more importantly, the formalization of decision-making mechanisms could constrain the enforcement authorities with their

⁴ Wade, R (1990). *Governing the Market*. Princeton: Princeton University Press.

⁵ UNCTAD 2009 “The Relationship between competition and industrial policies in promoting economic development”, TD/B/C.I/CLP/3.

⁶ Deborah Healey, *Australian Experience with Competition Law: The State as a Market Actor*, in Thomas K. Cheng, Ioannis Lianos & D. Daniel Sokol eds. *Competition and the State* (2014) 205.

uncontrolled discretion in their decisions without balancing various policy considerations in enforcement.⁷

Having said so, industrial policy should be complementary and within competition policy so long as industrial policies do not target certain sectors or firms. It is in line with the responses of several member states to the UNCTAD survey in which the industrial policies of most countries are to promote productivity, efficiency and competitiveness of economic activities.⁸ In this case, competition law and policy is an essential component of the overall industrial policy. However, it is emphasized that industrial policy should not be above the competition policy as the more openly sensitive an industrial policy is to a broader set of policy goals than the competition policy, the easier the competition law may yield to political pressures turning into a political instrument.⁹

Industrial Policy: A “problem” to China’s competition policy?

China’s competition policy in the form of its enactment of AML in 2007 is heavy laden with its industrial policy orientation as reflected in the background and provisions of AML, the enforcement structure and the merger decision of Coca-Cola/Huiyuan by MOFCOM whose approach is being criticized for economic patriotism or for having erroneously protected competitors instead of protecting competition.¹⁰

China’s competition policy is distinguished with its ‘common destiny’ shared with its industrial policy. First, the competition law in China is enacted as parts of a gradual evolution of domestic economic and regulatory policy, rather than as a result of pressure or conditionality from international development and funding bodies.¹¹ Second, despite taking leaf from the enforcement experiences of other established competition regimes, the AML does not only pursue the anti-competitive behaviour of private companies, it also carries the policy objective to address abuse of power by public administrations responsible for altering or eliminating competition¹² with a view to addressing the artificial internal market segmentation and preventing local governments from protecting locally based companies by placing unnecessary administrative burdens on external competition.

⁷ Angela Huyuc Zhang, Bureaucratic Politics and China’s Anti-Monopoly Law, 47 *Cornell International Law Journal* 707.

⁸ UNCTAD 2009 (n5) 15.

⁹ Eleanor M.Fox, Competition Policy: The Comparative Advantage of Developing Countries, 79 *Law & Contemporary Problems* 2016, 71-73.

¹⁰ Mario Mariniello, (2013) “The Dragon Awakes: Is Chinese Competition Policy a cause for concern?”, Bruegel Policy Contribution, Issue 2013/14, 8.

¹¹ Thomas J. Doleys, *Promoting Competition Policy Abroad: European Union Efforts in the Developing World*, 57 *Antitrust Bull.*, 2012, 337, 340.

¹² Fels, A. (2012) ‘China’s Antimonopoly Law 2008: An Overview’, *Review of Industrial Organization* 41(1-2): 7-30.

Industrial policy consideration is also evident in the language of AML provisions: for example, Article 1 of the AML “promotes the healthy development of the socialist market economy”.¹³ It is regarded as a non-competition related objective with an overriding effect as it will not be possible to maintain the socialist market economy and at the same time promote market competition through the AML.¹⁴ Another related policy concern is the regulation of state-owned enterprises (“SOEs”) which were important economic market players in the transitional socialist economy in China. Article 7 of the AML provides that the State shall protect SOEs that are critical to China’s national economy and security¹⁵. Further, administrative monopolies initiated by government agencies at various levels are to certain extent, even tolerated in Article 8 of the AML which states that administrative monopolies are not subject to the jurisdiction of the enforcement authorities.¹⁶ To the extent that the interpretation of ‘economic development’ and ‘national interest’ can be used to favour domestic industries, it is argued that the Chinese antitrust law is technically used to pursue industrial policy objectives instead.¹⁷

By the same token, the AML leaves large political discretion to its enforcement structure. For example, the Chinese State Council divides AML enforcement responsibilities among 3 existing ministries: (i) the MOFCOM leads merger review; (ii) the National Development and Reform Commission which has the responsibility for all price-related AML violations; and (iii) the State Administration of Industry and Commerce (SAIC) enforces all non-price related AML violations.¹⁸ Moreover, a second-tier Anti-Monopoly Commission which establishes general policy guidelines and coordinates the activities of the above 3 enforcement agencies with the composition of heads of a number of ministries and departments is also established.¹⁹ It means a merger review process may require direct intervention of other parts government besides MOFCOM which may wield significant influence by placing certain conditions with questions or concessions that have more political than competitive concerns.²⁰

As exemplified by Coca-Cola/Huiyuan, concerning Coca-Cola’s \$2.4 billion acquisition of Huiyuan, the leading fruit-juice producer in China in 2008 but was subsequently blocked by MOFCOM in 2009, it highlights how China’s competition policy with its non-competitive considerations, despite written in standard competition-law language, was used to control foreign multinational firms seeking to dominate or monopolize China’s market.²¹ According to MOFCOM’s substantive assessment, three

¹³ Article 1 of the AML.

¹⁴ Atleen Kaur, “Competition Law in the Lands of Tigers and Dragons, A Brief Update on India and China”, 87-SEP. *Mich. B. J* (2008), 34, 36.

¹⁵ Article 7 of the AML.

¹⁶ Article 8 of the AML.

¹⁷ It is noted that this does not mean that the EU and US do not implement industrial policy measures, just that their antitrust laws do not explicitly allow for protection of domestic industry, unless consumers share the benefits from it.

¹⁸ Article 10 of the AML.

¹⁹ Yane Svetiev and Lei Wang, Competition Law Enforcement in China: Between Technocracy and Industrial Policy, *Law and Contemporary Problems* 2016, Vol.79, 195.

²⁰ D Daniel Sokok, Merger Control Under China’s Anti-Monopoly Law, 10 *N.Y.U.J.L & Bus* 1(2013).

²¹ Thomas R. Howell, Alan Wm. Wolff, Rachel Howe, Diane Oh, “China’s New Anti-Monopoly Law: A Perspective from the United States”, 18 *Pac. Rim Law & Policy Journal* 53, 61 (2009). As such said, Cong Bin and He Yicheng, the members of the NPC Standing Committee, commented that the AML would be conducive to control the transnational

concerns were identified: (1) Coca-Cola's incentive to leverage its dominant position in the carbonated soft drink market to reinforce Huiyuan's position in the fruit juice market; (2) the unfair advantage that Coca-Cola's branding would have given to Huiyuan, making entry to the market allegedly more difficult; (3) the negative effect on the ability of small and medium-sized enterprises ability to compete in the juice market.

In the absence of guidelines on assessing concentrations at the time, MOFCOM's decision was intransparent without offering supporting substantive evidence or analysis. For example, it did not reveal the methodology used to define the relevant market, discuss the market shares of the parties or their competitors, or the degree of demand or supply substitutability.²² Given explicitly stated concerns of MOFCOM about the impact of other producers, innovation, workers' conditions, MOFCOM's decision was viewed as a competition policy coloured by both distributive and development sensitive policy considerations.²³

In summary, the view that competition policy is seen as a source of policy disruption in China²⁴ may erode the transparency and predictability of the output and process of defining the scope of rights under enlivening antitrust framework. With only the result - and not the manner - of balancing various policy considerations in enforcement being disclosed by the authority, it renders the public impression of the uncontrolled discretion the Chinese industrial policy is dispensed, by which the legitimacy in the formalization of competition policy risks being compromised.²⁵

Conclusion

Drawing on China's competition policy, it reveals much room is reserved for industrial policy consideration. In achieving a level playing field in global competition, first, China should consider reducing regulatory fragmentation by clearly defining the competences of the different institutional actors in charge of enforcement competition law.²⁶ In long term, a new, dedicated and independent competition authority should be established as in line with overseas jurisdictions. Secondly, by enhancing the transparency of the Chinese authorities' assessment of competition policy cases, greater predictability of the antitrust economics with outcomes less likely to be hijacked by overtly political

monopolies and crack down the various kinds of restrictive competition actions including abuse of market dominance, manipulating market price and product quality by transnational enterprises at the stage of the drafted AML. Cong Bin and He Yicheng, Speech Excerpts: Draft of the AML (Fayan Zhaideng Fanlongduan Fa Caoan), available at <http://www.law-lib.com/fzdt/newshtml/yjdt/20070830102634.htm>, 22nd Session of the 10th Standing Committee NPC, 27 June 2006.

²² Coca-Cola/Huiyuan: First Chinese Prohibition Decision Under New Merger Control Rules, Cleary Gottlieb (March. 23, 2009), <http://www.clearygottlieb.com/~media/cgsh/files/publication-pdfs/coca-cola-huiyuan-first-chinese-prohibition-decision-under-new-merger-control-rules.pdf>

²³ Yane Svetiev and Lei Wang (n20) 213.

²⁴ Ibid 220.

²⁵ Katharina Pistor, Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change, (2011) 11 *Global Jurist* 1, 2.

²⁶ Mario Mariniello (n10) 11.

concerns can be facilitated. After all, devising a mechanism for assessing mergers with an international dimension that would minimize the administrative burden on business is one of the most common-yet-important objectives of the competition policy shared worldwide.²⁷

²⁷ Whish, R., & Bailey, D. (2012) *Competition Law*, Oxford University Press.